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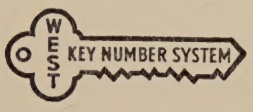
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CALIFORNIA REPORTER

COVERING CASES REPORTED IN

PACIFIC REPORTER
SECOND SERIES



15 P.2d – 16 P.2d

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OF THE
PACIFIC REPORTER
SECOND SERIES

ST. PAUL, MINN.
WEST PUBLISHING CO.
1941

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Pacific Reporter, Second Series, Vol. 15, Nos. 1–5; Vol. 16, Nos. 1, 2.

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Pacific Reporter, Second Series, Vol. 16, Nos. 3–5.

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CALIFORNIA REPORTER

IN VOLUME

15 PACIFIC REPORTER

SECOND SERIES

216 Cal. 527

Charles H. SWEATT, Petitioner, v. Robert DOMINGUEZ, City Clerk of the City of Los Angeles (a Municipal Corporation) and W. M. Kerr, Registrar of Voters of the County of Los Angeles, State of California, Respondents.

S. F. 14792.

Supreme Court of California.

Oct. 17, 1932.

In Bank.

Application for writ of mandate prayed to be directed to respondents as City Clerk of the City of Los Angeles and Registrar of Voters of Los Angeles County to compel them to omit proposed charter amendment from ballot. Writ denied.

Leslie R. Hewitt, of Los Angeles, for petitioner.

Erwin P. Werner, City Atty., Frederick Von Schrader, William H. Neal, and Robert J. Stahl, Asst. City Attys., all of Los Angeles, for respondents.

WASTE, C. J.

Petitioner has filed herein his application for a writ of mandate directed against the respondents city clerk of the city of Los Angeles and registrar of voters of the county of Los Angeles, to compel the respondents to omit from the form of the ballot to be used at a special election to be held in the city of Los Angeles on November 8, 1932, a proposition for the adoption of a proposed amendment to the charter of the city of Los Angeles, upon the ground that the date upon which said proposed amendment will be submitted to the electors of said city is the eighth day of November, 1932, and that the said date is less than forty days after the date upon which the advertisement of said proposed amendment was completed in the official paper of said city. Const., art. 11, § 8.

Upon the authority of Price v. Whitman, 8 Cal. 412; Iron Mountain Company v. Haight, 39 Cal. 540; Bank of Lemoore v. Fulgham, 151 Cal. 234, 237, 90 P. 936; Cosgriff v. Board of Election Commissioners, 151 Cal. 407, 409, 91 P. 98, the alternative writ is discharged, and the petition for a peremptory writ is denied.

We concur: LANGDON, J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

216 Cal. 580

McARTHUR v. JOHNSON.

L. A. 13154.

Supreme Court of California.

Oct. 25, 1932.

1. Evidence ⇐441(11).

In action on unconditional demand note, parol evidence of contemporaneous agreement to pay note only out of defendant's share of commissions earned jointly by parties in sale of realty *held* inadmissible, no invalidity, illegality, fraud, accident, or mistake being alleged (Code Civ. Proc. § 1856; Civ. Code, §§ 1625, 3097).

Such parol evidence was inadmissible, since it was in direct contradiction of express terms of note, because it tended to establish that note was not payable on demand, but only out of particular fund.

2. Evidence ⇐420(7).

Statute providing that delivery of negotiable instrument may be shown to have been "conditional," *held* to refer to parol conditions defeating passage of beneficial interest in instrument, not conditions restricting source of payment (Civ. Code, § 3097).

That this is proper construction of statute appears from reading of whole material part of clause involved, which provides that, as between immediate parties, and as regards remote party other than holder in due course, delivery may be shown to have been conditional, or for special purpose only, "and not for the purpose of transferring the property in the instrument."

[Ed. Note.—For other definitions of "Conditional Delivery," see Words and Phrases.]

In Bank.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by C. W. McArthur against F. O. Johnson, wherein defendant filed a counterclaim and cross-complaint. From the judgment rendered and from the denial by operation of law of plaintiff's motion for a new trial, plaintiff appeals.

In part affirmed, and in part reversed and remanded for a new trial in accordance with opinion.

For prior opinion, see 13 P.(2d) 762.

S. P. Williams and C. L. Brown, both of El Centro, for appellant.

Harry W. Horton, of El Centro, for respondent.

PRESTON, J.

Upon re-examination of this cause, we desire to adopt as a part of the opinion of this court herein, practically the entire opinion written by Mr. Justice pro tem. Harden of the District Court of Appeal, Fourth Appellate District, hereinafter set forth as follows, to wit:

"Plaintiff sued upon a promissory note made by defendant and payable on demand to the order of plaintiff in the sum of $2,000. The note was free from uncertainty or ambiguity. The defense interposed was that said note had been made for the accommodation of plaintiff and without consideration to defendant. No issues of invalidity, illegality, fraud, accident, or mistake were tendered. Defendant also filed a pleading denominated 'a counterclaim and cross-complaint,' alleging several causes of action against plaintiff for money. Parol evidence was received which tended to establish that it was agreed by the parties thereto, at the time of the making and delivery thereof, that said note was to be paid only out of defendant's share of commissions earned jointly by defendant and plaintiff in the sale of real estate. No express findings were made upon the defense that defendant was an accommodation maker. Judgment was entered crediting defendant with the payment of $400 thereon and adjudging that said note was payable only out of defendant's share of said commissions. Defendant was also given judgment upon his counterclaim and cross-complaint for $1,118.49 and interest.

"Plaintiff appeals from the judgment and from the denial by operation of law of his motion for a new trial. The only point raised on the appeal is that said parol evidence was incompetent.

[1] "The note was an unconditional promise to pay money on demand. The parol evidence received was in direct contradiction of the express terms of said note. It tended to establish that said note was not payable on demand, but, on the contrary, was payable only out of a particular fund. Said evidence was not admissible. Section 1856, Code Civ. Proc., and section 1625, Civ. Code. Said sections lay down rules of substantive law. Harding v. Robinson, 175 Cal. 534, 540, 166 P. 808. Under conditions similar to those existing here, the principles of law involved have been applied to prevent the reception of parol evidence to contradict the terms of written instruments in a great variety of cases. In support of our holding we shall cite only a few decisions dealing with commercial paper. Brown v. Spofford, 95 U. S. 474, 24 L. Ed. 508; San Jose Sav. Bank v. Stone, 59 Cal. 183; Cashman v. Harrison, 90 Cal. 297, 27 P. 283; Leonard v. Miner, 120 Cal. 403, 52 P. 655; Wright v. Shoenhair, 100 Cal. App. 163, 280 P. 174. Our case falls squarely within the rules announced and applied in said cases."

[2] It is contended that section 3097 of the Civil Code sets up a different rule of law. So far as here material that section provides: "* * * the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. * * *" The court admitted parol evidence, and, on such evidence, found the agreement between the parties to have been as follows: "* * * Said note was delivered by the defendant to the plaintiff upon the understanding and condition that said note was to be paid wholly and solely from commissions that might thereafter become due to the plaintiff and the defendant in connection with their joint efforts in the sale of real property in Imperial County, California. * * *" We are of the view that this finding does not bring into operation the above-quoted provision of the statute. By the use of the phrase "and not for the purpose of transferring the property in the instrument" is clearly meant the right to set up by parol conditions that will defeat the passage of the beneficial interest in the instrument, but this does not include conditions which concede the transfer of the property in the instrument and merely restrict the source of payment. Repeated holdings of other courts may be found making similar application of a provision of the Uniform Negotiable Instruments Act, which is identical with our own statute. Uniform Laws Annotated, vol. 5, Negotiable Instruments Act, § 16, p. 97.

For example, the case of Smith v. Dotterweich, 200 N. Y. 299, 93 N. E. 985, 987, 33 L. R. A. (N. S.) 892, holds that, "when the oral testimony goes directly to the question whether there is a written contract or not, it is always competent; but when the effect of the oral testimony is to establish the existence of a written contract, which it is designed to contradict or change by parol, then

the spoken word must yield to the written compact."

Again, in the case of Storey v. Storey (C. C. A.) 214 F. 973, 974, it is said: "And probably nowhere is the basis of the error more clearly and simply stated than in Pym v. Campbell, 6 El. & Bl. 370: 'The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible.' * * *"

In the recent case of Murphy v. Craig (C. C. A.) 28 F.(2d) 963, 964, the court said: "That the maker of a promissory note for the payment of a sum certain, on a day certain, will not be heard to say that the note is payable out of a particular fund only, or that a collateral agreement authorizing the sale of collateral to satisfy the indebtedness secured by it is no agreement, and confers no authority at all is too firmly established to require extended discussion."

Again in 22 C. J. 1076, it is said: "Where an engagement is in general terms made payable in money it is by legal implication payable in lawful money of the country, and parol evidence cannot be admitted to show an agreement that it should be paid in any other medium or manner, or that payment should be made only out of some particular fund." The same authority, at page 1091, further states: "It is not permissible to show a parol agreement of the payee or holder of commercial paper not to enforce payment against the person or persons liable thereon; or a parol agreement that the payee or holder shall look to some other person or persons for payment, that he shall require payment only in a certain event or out of some particular fund, that he shall not require payment until a certain security has been exhausted, that he shall not call on one of the persons liable for payment until all remedies against the others have been exhausted, or that the obligation may be extinguished by part payment."

The above holdings are indorsed in the case of Steinfeld & Co. v. Tew, 35 Ariz. 147, 274 P. 1047, where, in construing a statute of that state, the court held, as stated in the syllabus, that "in action on notes, evidence showing that they were to be paid out of moneys realized by defendant from sale of mine held inadmissible, where agreement was made at time of making note or before, as varying terms of written instrument, since such transaction does not constitute 'conditional delivery,' under Civ. Code 1913, par. 4161." See, also, Whiteman v. Bishop (Tex. Civ. App.) 289 S. W. 730.

It follows that said error in the reception of parol evidence requires a reversal of the judgment and a new trial with respect to the issues tendered by plaintiff's complaint and the answer thereto. The findings and judgment with respect to the issues tendered by the counterclaim or cross-complaint, however, appear to be free from error and we see no reason for disturbing them. Therefore, that portion of the judgment which decrees as follows: "That the defendant is entitled to judgment against the plaintiff in the sum of $1,118.49, together with interest thereon at the rate of seven per cent. per annum from the date of this judgment and for defendant and cross-complainant's costs herein, in the sum of $———," is hereby affirmed; in all other respects the judgment is reversed, and the cause is remanded for a new trial with respect to the said issues tendered by the complaint and answer, appellant to have his costs on appeal, together with a stay of execution on the judgment resting upon the cross-complaint until the determination of all the other issues in the cause.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; TYLER, Justice pro tem.; LANGDON, J.; SEAWELL, J.

216 Cal. 531

PEOPLE v. KAWAMOTO.

Cr. No. 3519.

Supreme Court of California.

Oct. 18, 1932.

1. Homicide ⇐253(1).

Evidence sustained conviction for first degree murder by shooting and stabbing.

2. Homicide ⇐233.

Proof of motive is not indispensable to sustain conviction for first degree murder.

3. Criminal law ⇐1159(4).

Credibility of witnesses was, in first instance, for jury, and subsequently for trial judge on motion for new trial.

4. Homicide ⇐332(2, 4).

Evidence being sufficient to sustain conviction for first degree murder, it was not province of Supreme Court on appeal to weigh evidence, nor pass on credibility of witnesses.

5. Homicide ⇐165.

Evidence of illicit intimacy between accused and deceased would not mitigate gravity of offense nor reduce degree of homicide.

6. Criminal law ⇐1186(4).

Any error in sustaining objection to question propounded juror on voir dire respecting effect of evidence of illicit relationship be-

tween accused in murder case and deceased *held* not prejudicial (Const. art. 6, § 4½).

7. Criminal law ⇐1137(1).

Accused's failure to offer evidence respecting alleged illicit relationship with deceased *held* acquiescence in trial court's ruling, excluding questioning of jurors in respect thereof on voir dire.

In Bank.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Z. Kawamoto was convicted of murder in the first degree, and he appeals.

Affirmed.

Tom Okawara, of Fresno, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., Walter C. Haight, Dist. Atty., of Visalia, and Leslie A. Cleary, Deputy Dist. Atty., of Modesto, for the People.

WASTE, C. J.

In an information filed by the district attorney of the county of Tulare, the defendant was charged with having murdered one Tomo Mukai. At the conclusion of the trial, the jury brought in a verdict finding the defendant guilty of murder in the first degree. The verdict being without recommendation, the court below entered judgment imposing the death penalty. Defendant appeals from the judgment and from the order denying his motion for new trial.

[1] The evidence adduced by the prosecution tends to show that Tomo Mukai, the deceased, was living with her husband on a farm near Reedley, in Tulare county. At about 6:30 o'clock on the evening of August 7, 1931, the husband of deceased left for Fresno to deliver a truckload of melons. One M. Miyamoto, who had assisted with the picking of the melons, remained at the farm after the departure of the deceased's husband. When called as a witness by the people, Miyamoto testified in substance that the defendant came to the home of the deceased shortly after 9 o'clock on the evening in question; that, after engaging in conversation for a few minutes, the defendant and deceased left the house; that shortly thereafter two or three pistol shots were fired, whereupon the deceased called out, "Kill me, give me help"; that the witness ran out of the house just as the deceased ran in again pursued by the defendant; that from the outside of the house he [the witness] peeked through a window and saw the defendant standing before the deceased with a gun in one hand and a knife in the other hand; that he heard defendant say, "I kill you, and I will be punished; I am going to prison for ten years"; and that, as the witness crossed the road to summon the help of neighbors, he thought he heard two more shots.

A neighbor, called by the prosecution, testified that she heard two series of pistol shots on the night in question, and that Miyamoto, the witness just above referred to, came to her house seeking assistance. The autopsy surgeon testified that the body of the deceased contained several stab or knife wounds and a bullet wound, the latter, in his opinion, causing death. There is also evidence that the defendant had purchased a hunting knife two days prior to the homicide. The officers summoned to the scene of the crime testified that they found the defendant and the deceased lying on the floor, the former with a bullet wound in his head, and the latter apparently dead. In response to certain questions asked by one of these officers, the defendant, though in a weakened condition, stated that he had killed the deceased because "she fooled me * * * I think before she be my wife." At the hospital defendant informed the doctor in attendance that "she fooled me, I kill her." The officers found a gun in close proximity to the bodies, and removed a hunting knife, having blood on its blade, from the defendant's person.

The defendant, in addition to calling one witness to testify to his reputation for peace and quiet, took the stand in his own behalf, and narrated a story tending to indicate that Miyamoto, the state's principal witness, was in fact the perpetrator of this heinous crime. He testified, in substance, that as he approached the deceased's home on the evening in question the lights were extinguished; that he entered, and, upon receiving no response to his salutation, turned on the lights; that he found the deceased in a bedroom, and that Miyamoto, the state's witness, subsequently emerged from another room; that defendant inquired as to the reason for Miyamoto's presence in the house; that an altercation with Miyamoto ensued; that the deceased prevailed upon defendant to leave the house, escorting him to his automobile; that, while defendant and the deceased were outside the house, they heard shots; that upon returning to the house they found Miyamoto in the kitchen with a revolver in his hand; that Miyamoto, addressing the defendant, said: "I have this gun here; I want to fix you;" that defendant thereupon took out his hunting knife in order to defend himself; that there was a struggle between the two men, with the deceased sandwiched in; that shots were fired, and the deceased and defendant crumpled to the floor. He did not remember seeing any officers in the house after the struggle, nor could he recall making any statement or confession to them.

Upon this appeal the defendant urges that the verdict is not supported by the evidence. He contends that the record is destitute of

evidence tending to show a motive for the crime, and that the story narrated by Miyamoto, the state's principal witness, is unbelievable and should be rejected.

[2] In our opinion the above excerpts from the evidence are amply sufficient to disclose a motive for the commission of the crime of which the defendant stands convicted. However, proof of motive is not indispensably necessary. As stated in People v. Tom Woo, 181 Cal. 315, 328, 184 P. 389, 394, "the presence or absence of motive is essentially a question of fact, and, like any other fact, is not necessary to be proved, if the crime can otherwise be established by sufficient competent evidence. So * * * the absence of proof of motive is a fact to be reckoned on the side of innocence; but, if the proof of guilt is nevertheless sufficient to overthrow the presumption of innocence, the appellants must stand convicted, notwithstanding no motive has been shown." See, also, People v. Northcott, 209 Cal. 639, 643, 289 P. 634, 70 A. L. R. 806; People v. Kelley, 208 Cal. 387, 281 P. 609.

[3] We cannot follow the defendant's suggestion and dismiss from consideration Miyamoto's testimony as to the manner of the perpetration of the homicide. True, his story is in sharp conflict with that related by the defendant while on the stand, but "the credibility of the witnesses was, in the first instance, a matter solely for the jury to determine; and finally, upon the hearing of the defendant's motion for a new trial, it was the right and duty of the trial judge, in weighing the sufficiency of the evidence upon which the verdict was had, to consider the credibility of the witnesses. The trial judge's determination of the question of such credibility is conclusive upon us." People v. Martin, 19 Cal. App. 295, 299, 125 P. 919, 920; People v. Tom Woo, supra, 181 Cal. page 326, 184 P. 389; People v. Ward, 14 Cal. App. 143, 144, 111 P. 265.

[4] There is an abundance of substantial evidence to justify the verdict in the instant case. All conflicts in the evidence have been resolved against the defendant by the jury in the first instance and by the trial court upon its denial of the motion for a new trial. The evidence being sufficient to support the verdict, it is not our province to weigh the same, nor to pass upon the credibility of the witnesses. People v. Tom Woo, supra; People v. Ward, supra.

[5-7] During the voir dire examination of one of the jurors, the trial court sustained an objection to a question propounded by the defendant having to do with the possible effect, if any, upon the juror of evidence tending to show the existence of an illicit relationship between the defendant and the deceased in her lifetime. At no time during the trial of the cause did the defendant offer any evidence of such illicit relationship. He now complains that the ruling of the court below on the voir dire examination of the juror constituted prejudicial error, and that such ruling precluded and dissuaded him from offering evidence along this line during the trial. Assuming the evidence to have been admissible, a point we need not decide, its rejection could not have prejudiced the defendant's cause. Evidence of intimacy between the defendant and deceased would not have served to mitigate the gravity of the crime, nor reduce the degree thereof. Regardless of the relationship existing between the defendant and his victim, the homicide perpetrated under the circumstances disclosed by the prosecution and accepted by the jury constituted murder in the first degree. Therefore, the error in the ruling, if any, could not have been prejudicial, and, under section 4½ of article 6 of the Constitution, would not require a reversal. Moreover, we are inclined to the opinion that defendant's complete failure to offer any evidence as to such relationship, assuming the same to be admissible, was, in effect, an acquiescence in the trial court's ruling made, not upon the offer of evidence, but upon the voir dire examination of the jurors. In the absence of at least an offer of such proof, defendant should not now be heard to complain that he was foreclosed from introducing the evidence.

We have read the entire transcript of the evidence, and find nothing approximating prejudicial error in the trial court's rulings governing the admission and rejection of evidence. Defendant's second and final contention is, therefore, also devoid of merit.

From what has been said, it necessarily follows that the judgment and order appealed from must be, and each is, hereby affirmed.

We concur: PRESTON, J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; TYLER, Justice pro tem.

216 Cal. 546

POWERS v. BOARD OF PUBLIC WORKS et al., and five other cases.

S. F. 14618.

Supreme Court of California.

Oct. 21, 1932.

1. Municipal corporations ⇐218(2).

If position exists in practice with reasonable degree of continuity and permanency, court may treat position as "permanent" within civil service provisions of charter, although board of public works may occasionally lay off incumbent.

[Ed. Note.—For other definitions of "Permanency; Permanent," see Words and Phrases.]

2. Municipal corporations ⇐218(6).

Position of painter *held* not abolished by each resolution of board of public works laying off incumbent temporarily, where, over series of years, position was filled most of time (San Francisco Charter, art. 6, c. 1, § 3).

3. Mandamus ⇐76.

In mandamus proceedings for reinstatement of painters, that budget was insufficient to include plaintiffs' positions *held* not controlling, where plaintiffs were actually employed and paid with fair degree of continuity and permanency (San Francisco Charter, art. 3, c. 1, § 3).

4. Trial ⇐105(1).

Incompetent evidence admitted without objection is sufficient to support finding.

5. Evidence ⇐215(3).

In mandamus to reinstate painters, letter from board of public works to city attorney, stating that plaintiffs' position was identical with that of plaintiff in another mandamus proceeding, *held* admission court was entitled to consider.

Such letter, which was in evidence, was an admission by board of public works which trial court was entitled to consider in connection with finding in other mandamus case that plaintiff in other case was laid off for lack of funds and not for lack of work, as bearing on question whether, in present mandamus action, plaintiffs were likewise laid off for lack of funds, rather than for lack of work.

6. Mandamus ⇐76.

In mandamus proceeding to reinstate painters, reason for layoff *held* not material, issue being whether layoff was in fact temporary or permanent.

Reason for layoff was not of controlling effect, real question being not why plaintiffs were laid off—whether for lack of funds, lack of work or some other reason deemed by board of public works at time to be sufficient—but rather whether layoff was in fact temporary or permanent in character, of such a nature as to amount to termination or abolition of positions held by plaintiffs. If, in fact, positions were continued in existence with only temporary interruptions, reason for interruptions was of no particular importance.

7. Mandamus ⇐168(4).

In mandamus proceeding to reinstate painters, finding that positions claimed were maintained by board of public works as permanent positions, not abolished, *held* supported, though approximately seven months elapsed between layoff and resumption of employment with other painters.

8. Mandamus ⇐168(4).

In mandamus proceeding to reinstate painters, that board of public works did not notify civil service commission, as required by charter, that positions were abolished warranted inference that board did not consider positions abolished (San Francisco Charter, art. 13, § 13).

9. Mandamus ⇐76.

Painters in San Francisco department of public works, having served over six months continuously, *held* entitled to mandamus compelling reinstatement where positions were maintained as permanent.

In Bank.

Appeals from Superior Court, City and County of San Francisco; Stanley Murray, Judge.

Actions for mandamus, consolidated for trial, by Edward B. Powers, by William E. Edrich, by Jay D. Bidwell, by Fred E. Ewald, by Harry Smith and by J. J. Bradley against the Board of Public Works and others. From judgment in favor of plaintiffs, defendants appeal.

Affirmed.

For prior opinion, see 8 P.(2d) 496.

See, also, 114 Cal. App. 119, 299 P. 573.

John J. O'Toole, City Atty., and Thomas P. Slevin, Asst. City Atty., both of San Francisco, for appellant Board of Public Works.

Wm. A. Kelly, of San Francisco, for appellant Civil Service Commission.

Joseph T. Curley and Marvin C. Hix, both of San Francisco, for respondents.

E. R. Hoerchner and Theodore Johnson, both of San Francisco, amici curiæ.

PER CURIAM.

A hearing was granted in these cases, after decision by the District Court of Appeal, First Appellate District, Division 1, in order

to give further consideration to the contentions of appellants that respondents herein were not permanent employees and that their respective positions had been abolished by resolutions of the board of public works.

After reading the transcript we are convinced that neither of these contentions can be sustained.

The evidence clearly shows that each of the respondents, by reason of six months' continuous work as painter, had acquired the status of a permanent employee within the meaning of the city charter, and within the rule enunciated by this court in Rodgers v. Board of Public Works, 208 Cal. 291, 281 P. 64. As such permanent employees they are entitled, in proper order, to be employed as painters whenever there is painting work to be done and money is available, for such work, and can be removed from the civil service list only for cause or by the abolishment of their positions.

The contention that the resolutions of the board of public works laying off these men amounted to an abolishment of their positions is not in accord with the facts as disclosed by the record. The record clearly shows that respondents were laid off solely because of lack of funds, and not because the work they were doing was completed or their jobs abolished. As soon as money became available other men were immediately put to work by the board of public works as painters. A fair reading of the transcript indicates that the only reason these respondents were not put back to work was because the appellants believed that under the one-year "holdover" rule respondents had not acquired a permanent status. The one-year "holdover" rule was held invalid in the Rodgers Case, supra, in which it was held that six months' service is sufficient to give an employee a permanent status. The testimony leaves no room for doubt but that the board of public works at no time intended to abolish these positions, but simply intended temporarily to "lay off" these men because of lack of funds.

After careful consideration we are convinced that the opinion prepared by Mr. Justice Dooling, pro tem., and concurred in by Mr. Presiding Justice Knight and Mr. Justice Cashin, properly and adequately disposes of all the questions presented on these appeals.

We therefore adopt the opinion of the District Court of Appeal as the opinion of this court. Said opinion is as follows:

These six cases were consolidated for trial and are here presented together upon appeal for the reason, as stated by counsel for appellants, that the facts in each case are very similar and the law applicable to them is identical. Basically the cases involve practically the same situation passed upon by the Supreme Court in Rodgers v. Board of Public Works, 208 Cal. 291, 281 P. 64, and since many of the charter provisions and rules of the civil service commission of the city and county of San Francisco pertinent to this case are set out in the opinion in the Rodgers Case, it will suffice to refer to that opinion without restating them herein. Since it is conceded that the facts in each of the cases are very similar, and no attempt to differentiate them has been made in the briefs, it will likewise suffice to set out the facts in the case of respondent Powers as typical of all.

Powers, together with the other respondents, obtained a place upon the civil service eligible list of painters in the city and county of San Francisco on March 13, 1923. Such list, by virtue of a rule of the civil service commission adopted relative thereto, was made to automatically expire at the expiration of four years thereafter, i. e., on March 12, 1927. Powers served as a painter under the board of public works from March 23, 1923, to July 28, 1923; from September 17, 1923, to January 16, 1924, and from December 2, 1925, to September 27, 1926. Each time that he commenced work, his appointment was evidenced by a resolution of the board of public works "appointing" him as a painter, and each time that he ceased work a like resolution of the board of public works was adopted reciting that he was "laid off" or, in one instance, his services "discontinued." The list upon which Powers' name appeared having automatically expired on March 12, 1927, he was thereafter refused permanent employment as a painter under the board of public works and commenced this action for a writ of mandate to compel his employment and the payment to him of compensation for periods during which another painter was employed in a position to which he claimed to be entitled. From a judgment in his favor, this appeal is taken.

The trial court found in this case, as in the Rodgers Case, that Powers had been appointed to a permanent position as painter under the board of public works, and had served in such position for the periods hereinabove set out; that he was laid off from such position because of lack of funds, and not because the work on which he was engaged had been completed; that his said position was not abolished and that he is entitled to be reinstated to the permanent position of painter and to compensation for certain periods when such position was occupied by another.

It is plain from this recital that, unless these cases can in some manner be differentiated from the Rodgers Case, the judgments herein must be affirmed on the authority of that decision. Recognizing this fact, counsel for appellants urge various grounds upon which they claim the finding, that respondents' positions as painters were not abolished and have been maintained by

the board of public works as permanent positions, is not supported by the evidence.

[1, 2] Section 3, chapter I, article VI, of the San Francisco Charter, as it existed at all times covered by these actions, provided that "The Board [of Public Works] may employ such clerks, superintendents, inspectors, engineers, surveyors, deputies, architects and workmen as shall be necessary to a proper discharge of their duties." It was by virtue of this authority to employ "workmen" that respondents herein were employed as painters. From this, appellants argue that since the civil service provisions of the charter do not guarantee permanency of employment, but only permanency of tenure in a particular position so long as the particular position is maintained, and since the position of painter does not exist by virtue of any charter provision or ordinance creating such position, the position of painter to which Powers was appointed was created by the resolution of the board of public works appointing him, and was abolished by the resolution of the same board laying him off. This was substantially the view taken by this court in the Rodgers Case as a reading of our opinion will show (274 P. 1034), but the views which we therein expressed were overruled by the Supreme Court and a contrary holding is implicit in the opinion of the Supreme Court in the same case, for the reason that the position of granite cutter therein considered likewise exists solely by virtue of the above-quoted provision of the San Francisco Charter. We are of the opinion that the law should look to the practical situation actually existing rather than to any purely theoretical considerations, and that, if the position of painter, or granite cutter, actually exists in practice with a reasonable degree of continuity and permanency, the courts are justified in treating the position as a permanent one within the meaning of the civil service provisions of the charter although the services in the position may occasionally be intermitted by resolutions of the board of public works "laying off" the incumbent of the position. To put the contention of appellants to a concrete test, Would it be reasonable to consider the position of painter abolished by each resolution laying off the occupant thereof if over a series of years the position was actually filled fifty weeks out of every fifty-two? The law looks to substance rather than to form and should have regard to the circumstances as they actually exist to determine whether in fact the position is permanent or not.

[3] Appellants likewise call attention to section 3, chapter I, article III, of the Charter, requiring the supervisors in making the annual budget to itemize the salaries, wages, or rates of compensation of the employees of various departments, including the board of public works, and to the fact that in the years in question the number of painters provided for in the budgets for the board of public works was not great enough to include the positions claimed by these respondents. But again we must look to the facts as they actually existed, and, if painters were actually employed and paid with a fair degree of continuity and permanency in addition to those specifically provided for in the budget, that fact should control.

[4, 5] Appellants attack the finding that respondents were laid off for lack of funds and not for lack of work as being supported only by testimony of hearsay statements made by certain foremen and the superintendent of painters. Much, though not all, of this evidence was admitted without objection, and, as to that so admitted, it is the settled rule that incompetent evidence admitted without objection is sufficient to support a finding. Parsons v. Easton, 184 Cal. 764, 195 P. 419; Lucy v. Davis, 163 Cal. 611, 615, 126 P. 490; Yule v. Miller, 80 Cal. App. 609, 252 P. 733; Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 461, 466, 168 P. 1037. There was likewise in evidence a letter from the board of public works to the city attorney asking to be advised as to the status of these respondents, in which it was stated that "their position is identical with that of James Rodgers." This was an admission by appellant board of public works which the trial court was entitled to consider in connection with the finding in the Rodgers Case that Rodgers was laid off for lack of funds and not for lack of work.

[6] However, we do not consider the reason for the layoff as being of controlling effect. The real question is not why respondents were laid off—whether for lack of funds, lack of work, or some other reason deemed by the board of public works at the time to be sufficient—but rather whether the layoff was in fact temporary or permanent in character, of such a nature as to amount to a termination or abolition of the positions held by respondents or not. If in fact the positions were continued in existence with only a temporary interruption, the reason for the interruption would seem to be of no particular importance.

[7, 8] Finally, appellants contend that the evidence of the times during which painters were actually employed in places claimed by respondents after their last layoffs is not sufficient to support the finding that the positions were maintained as permanent positions by the board of public works. In this behalf the record shows that, commencing in July, 1927, men were put to work in positions claimed by respondents under temporary certifications of the civil service commission; that commencing in February, 1928, four painters have been steadily employed in positions claimed by respondents, and since July 19, 1928, six additional painters have been steadily employed in like positions. There is a gap here be-

tween the layoffs and resumption of employment of approximately seven months and fairly continuous employment of painters thereafter. In the Rodgers Case, as shown by the opinion of the Supreme Court, Rodgers was employed as granite cutter practically continuously from July 29, 1925, to May 15, 1926, when he was laid off; he resumed employment March 1, 1927, and between then and September 30, 1927, when he was again laid off, he worked only nineteen and a fraction days; thereafter no work was done in a position claimed by him until January 25, 1928, which was almost four months after his layoff. We can find no such substantial difference in the facts of these cases and the Rodgers Case as would justify us in holding that the trial judge abused his discretion in holding that the positions claimed by respondents herein were maintained by the board of public works as permanent positions. It should be remarked, too, that section 13, article XIII, of the San Francisco Charter, requires notice to be given to the civil service commission by the appointing power of all positions that are abolished. No notice was ever given to the civil service commission that any of the positions of painter here involved had been abolished. From this fact the trial court was entitled to draw the inference that the board of public works did not consider the positions abolished.

[9] In these cases, as in the Rodgers Case, respondents having served more than six months continuously in positions which the trial court found have been maintained as permanent positions, they were entitled to the relief afforded them by the judgments appealed from.

The judgments appealed from are affirmed.

ERNST et ux. v. SEARLE et al. *

S. F. 14397.

Supreme Court of California.

Oct. 24, 1932.

Rehearing Granted Nov. 21, 1932.

1. Brokers ⇐94.

Grantor's delivery of deed to real estate agent to effect exchange of property did not confer authority on agent to deliver deed to grantee in pursuance of sale agreement so as to enable grantee to acquire title to premises though agent absconded with purchase money (Civ. Code, §§ 2317, 2318, 2334).

Such delivery to agent did not confer authority on agent to deliver deed to grantee, because agent had no actual authority, since he was instructed to effect an exchange of the property and not a sale, and his authority was subject to such condition, and because the agent had no ostensible authority to deliver deed, since there was no representation of such authority by the grantors, except in so far as mere intrustment of deed constituted representation. "Ostensible authority" rests on estoppel, and its elements are representation by the principal, justifiable reliance thereon by the third party, and change of position or injury resulting from such reliance.

[Ed. Note.—For other definitions of "Ostensible Authority," see Words and Phrases.]

2. Brokers ⇐96.

Grantee relying solely on real estate agent's representations regarding his authority to sell, when entering purchase contract, *held* not justified in paying purchase price to agent on his subsequent possession of deed, so as to avoid loss from agent's embezzlement. (Civ. Code, §§ 2317, 2318, 2334).

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Julius Ernst and another against C. R. Searle and others. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Stoney, Rouleau, Stoney & Palmer, T. E. Palmer, and Royal E. Handlos, all of San Francisco, for appellants.

Brobeck, Phleger & Harrison, Maurice E. Harrison and S. R. Pfund, all of San Francisco, for respondents.

PER CURIAM.

This is an action to quiet title. Plaintiffs, husband and wife, reside in Los Angeles. The property involved herein is located in San Francisco. In February, 1929, defendant Searle, a real estate agent in Los Angeles, suggested to them that they exchange their San Francisco property for certain property in Los Angeles. Plaintiffs agreed, and on February 28, 1929, they executed a writing authorizing Searle to negotiate the exchange. Searle went to San Francisco, talked with A. J. Conway, another real estate broker, and thereafter interested defendant Hilbar Properties Company in the purchase of plaintiffs' property. An agreement of sale was drawn up on March 1, 1929, by the terms of which said defendant was to assume a $10,000 mortgage on the property and pay the sum of $5,500 in cash. An escrow was opened with defendant Title Insurance & Guaranty Company in San Francisco. Searle

then returned to Los Angeles, and fraudulently represented to plaintiffs that Hilbar Properties Company was the owner of the Los Angeles property which they wanted to obtain; that he had arranged the exchange; and that it was necessary that he have a deed to complete the transaction. A deed executed by Mrs. Ernst to A. J. Conway as grantee was first given to him, and rejected by the Title Company because of the absence of the husband's signature. Thereupon, on March 5, 1929, plaintiffs executed a deed to Hilbar Properties Company, which Searle took to San Francisco and deposited with the Title Company. The deed was recorded, the purchase price was paid into escrow, and, pursuant to instructions from Searle, the Title Company paid the commissions, and on March 9 sent him the balance of the money, $3,727.07, in the form of a certified check made out to him as payee. Searle cashed the check and disappeared. Mrs. Ernst expected to hear from him about April 8, and, upon his failure to call, she investigated the ownership of the Los Angeles property, and discovered that the defendant Hilbar Properties Company had no interest therein, and that the authorized exchange had not been carried out. Shortly thereafter, on April 24, 1929, this action was commenced to quiet title to the San Francisco property. Judgment was rendered in favor of plaintiffs, and defendant Hilbar Properties Company appealed.

[1] The evidence showed, and the trial court found, that neither plaintiffs nor said defendant made any investigation of the circumstances surrounding the transaction, prior to its completion. The court further found, and the finding is fully supported by the evidence, that "the plaintiffs Anna Ernst and Julius Ernst never intended, nor did either of them ever intend, that the said document be delivered or that the same should be effective as a deed, unless and until the exchange of properties * * * should be consummated." The decision was based upon the conclusion that the deed executed by plaintiffs was never validly delivered to the grantee. With this conclusion we agree.

The question, of course, is whether Searle had authority, as agent for plaintiffs, to deliver the deed. Such authority must have been either actual or ostensible. He had no actual authority, since he was instructed to effect an exchange and not a sale of the property, and his authority to deliver the deed was subject to this condition. The evidence shows that plaintiffs did not intend the instrument to be delivered except as part of the exchange.

It is just as clear that Searle had no ostensible authority to deliver the deed. "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Cal. Civ. Code, § 2317. An agent also has such authority as is given by statute (Cal. Civ. Code, § 2304 et seq.), unless deprived thereof by his principal; "and has even then such authority ostensibly, except as to persons who have actual or constructive notice of the restriction upon his authority" (Cal. Civ. Code, § 2318). Ostensible authority rests upon the doctrine of estoppel, and its essential elements are representation by the principal, justifiable reliance thereon by the third party, and change of position or injury resulting from such reliance. Cal. Civ. Code, § 2334; Wiley B. Allen Co. v. Wood, 32 Cal. App. 76, 162 P. 121; Harris v. San Diego Flume Co., 87 Cal. 526, 25 P. 758. In the instant case, there is no representation or holding out by the plaintiffs to defendant that Searle had authority to deliver a deed of their property in pursuance of an agreement to sell it. There was no representation made by plaintiffs at all, save in so far as the mere intrustment of the deed constitutes a representation. But, as pointed out by counsel for plaintiffs, the deed might have been handed to Searle for any one of several purposes: to use the property as security for a loan, to exchange it for other property, to sell it, or to place the deed in escrow. In other words, Searle might have been an agent to secure a loan, to effect an exchange, to negotiate a sale, or he might have been a mere messenger to deposit the deed in accordance with the instructions from his principal. It necessarily follows that the equivocal act of intrustment does not amount to a representation of any specific authority on the part of the agent, and certainly not to the broad power contended to exist in the instant case. The only representation which can be said to have been made by plaintiffs as a result of their giving the deed to Searle was that he was their agent or messenger; but it remained for defendant, as in the ordinary case, to inquire into the extent of his authority. Such inquiry would have necessitated the production of the writing which embodied the terms of Searle's employment (and which, by virtue of our statutes, was necessary for any dealing with the real property in question), and an inspection of that writing would have disclosed the limited power which he had.

These principles are applied to a situation very similar to that presented by the instant case in MacDonald v. Cool, 134 Cal. 502, 66 P. 727. There Mrs. Cool, the owner of property, made a deed in favor of MacDonald and handed it to the agent, Turner. Turner's instructions, evidenced by a receipt which he gave his principal upon taking the deed, were to deliver it as security for a loan to be obtained for Mrs. Cool. Turner instead delivered the deed to the grantee to secure his

own indebtedness. The court said (page 504 of 134 Cal., 66 P. 727, 728):

"It is contended by the appellant that Mrs. Cool made Turner her agent, and is bound by his acts within the scope of his agency, although his conduct was contrary to some undisclosed intention on the part of the principal. It is also contended that there was an undefined ostensible agency created by merely intrusting the deed to Turner.

"The agency, if such there was, is defined in the receipt, and, if MacDonald was dealing with Turner as the agent of Mrs. Cool, he should have ascertained the extent of the agency. I see no ground whatever for holding that there was an ostensible agency for any specific purpose."

The same view was expressed in Keele v. Clouser, 92 Cal. App. 526, 268 P. 682, where the principal gave the deed to the agent for deposit in escrow, and the agent instead delivered it directly to the grantee. The court said (page 532 of 92 Cal. App., 268 P. 682, 684): "The plaintiff's testimony showed that her broker had no authority to make such delivery. His authority extended only to a deposit of the deed with the bank, there to remain in escrow, and hence if he gave possession of it to the defendants his act was not binding upon the plaintiff and did not constitute a delivery of the deed. * * * A broker employed to find a purchaser for real property has no authority to make a contract or a conveyance in behalf of his principal, unless special power is conferred upon him for that purpose (4 Cal. Jur. 564, 565), and hence can have no authority to take one of the essential steps toward a conveyance, such as the delivery of the deed. The delivery here cannot be held good under the doctrine of ostensible agency. The broker was a special agent (Civ. Code, § 2297), and it was therefore incumbent on the defendants to inquire as to the extent of his authority (1 Cal. Jur. 715, 744). The delivery of a deed to an agent for the limited purpose of putting it in escrow does not confer on the agent ostensible authority to convert it into a conveyance by delivering it to the grantee, unless there is some further conduct on the grantor's part reasonably indicating to the grantee that the agent has such authority. MacDonald v. Cool, 134 Cal. 502, 66 P. 727."

[2] There is another fact which is fatal to defendant's claim. Said defendant did not rely upon Searle's possession of the deed in making the contract to sell. This contract was made March 1, solely on the faith of Searle's own representations as to his powers, and without any investigation thereof. It was on March 5 that Searle obtained the deed. It is apparent, therefore, that the possession of the deed is being used as a justification for payment of the purchase price to the agent. There is neither authority nor principle to support such an extraordinary theory. Even if the agent were shown to have had express authority to negotiate a sale, this would not give him implied or ostensible authority to collect the purchase price. Schnier v. Percival, 83 Cal. App. 470, 256 P. 1109; Hicks v. Wilson, 197 Cal. 269, 240 P. 289; Gold v. Phelan, 58 Cal. App. 471, 208 P. 1001. Hence, even if defendant's first position, contrary to the facts and to the law, were nevertheless conceded, it would simply mean that said defendant would have been justified in paying the money to plaintiffs. If this had been done, the loss resulting from the embezzlement by Searle would never have occurred. That loss, irrespective of plaintiffs' prior acts, was directly caused by defendant itself, in paying the purchase price to the agent instead of to the principal.

Some suggestion is made in later briefs of defendant that it dealt with Searle as a principal, and not as an agent. While this is at variance with its earlier position, the matter is immaterial, for the facts no more warranted a belief that Searle was a principal than that he was an agent with unlimited powers. Since the deed was executed by another person, it was incumbent upon defendant to inquire into the authority of the party who held it to deliver it.

The judgment is affirmed.

216 Cal. 560

ROSENFELD v. MILLER.

L. A. 13819.

Supreme Court of California.

Oct. 24, 1932.

1. Appeal and error ⇐477.

Appellate court has no jurisdiction to grant writ of supersedeas except in aid of its appellate jurisdiction (Const. art. 6).

2. Appeal and error ⇐484.

Purpose of writ of supersedeas is to preserve rights of litigant until there is final determination of his appeal.

3. Appeal and error ⇐477.

Writ of supersedeas may issue in exercise of appellate court's jurisdiction to stay proceedings on judgment without statutory provision therefor.

4. Appeal and error ⇐479(1).

Writ of supersedeas may issue when necessary to preserve rights of litigant where sureties on undertaking to stay execution fail to qualify.

5. Appeal and error ⇐479(1).

Appellate court would issue writ of supersedeas providing appellant filed undertaking within 10 days where he had been unable to file undertaking within time required because of surety's failure to qualify.

In Bank.

Action by A. M. Rosenfeld against Robert Miller, in which plaintiff recovered a judgment and defendant appeals and applies for a writ of supersedeas.

Writ of supersedeas granted conditionally.

Willcox & Judson, of Los Angeles, for appellant.

Loucks & Phister, of San Pedro, Harry J. Miller, of Los Angeles, and M. Phister, of San Pedro, for respondent.

CURTIS, J.

[1] In this action plaintiff recovered a personal judgment against the defendant in the sum of $16,928. Defendant in due time appealed from said judgment and on June 25, 1932, and within the time provided by law, filed an undertaking executed by two sureties staying the execution of said judgment. Plaintiff excepted to the sufficiency of said sureties, and, on the day fixed for the justification of said sureties, one of said sureties failed to qualify in the amount required, and the court ruled the undertaking insufficient. Said hearing was had and said ruling was made on Saturday, the 16th day of July, and the time allowed by law for the justification of new sureties on said bond expired on Monday, July 18th. Defendant endeavored to procure new sureties within the time allowed, but due to the shortness of said time he was unable to do so. On July 20th the plaintiff caused execution to be issued and placed in the hands of the sheriff, and the latter levied upon and took possession of the factory, machinery, equipment, and stock in trade used by the defendant in the carrying on of his business of manufacturing and selling curled hair in the city of Los Angeles, which said business defendant had carried on and conducted in said city for the past forty-seven years. It is further shown that said sheriff under said writ of execution has advertised said property for sale and will sell the same unless prevented by order of this court and that a sale of said business by said sheriff will destroy said business and the good will thereof to the irreparable damage of the defendant. Thereupon defendant made application to this court for a writ of supersedeas staying the execution of said judgment pending the appeal of said action. The writ was granted on the ex parte application of the defendant. A petition for a rehearing was filed by the plaintiff mainly on the ground that the appeal of said action was to the District Court of Appeal and not to this court, and, therefore, this court had no jurisdiction of the action and its order granting said writ was void. This point we determined was well taken. We think the law is clear that an appellate court has no jurisdiction to grant a writ of supersedeas except in the aid of its appellate jurisdiction. This is undoubtedly the effect and intent of article 6 of the Constitution. Hyatt v. Allen, 54 Cal. 353; Older v. Superior Court, 157 Cal. 770, 773, 109 P. 478. We granted said petition for a rehearing, and thereafter said appeal was transferred to this court, and the matter is now before us upon its merits.

[2-5] The purpose of the writ of supersedeas is to preserve the rights of a litigant until there is a final determination of his appeal. Halsted v. First Savings Bank, 173 Cal. 605, 160 P. 1075; Southern Pacific Co. v. Superior Court, 167 Cal. 250, 139 P. 69. It may issue in the exercise of an appellate court's jurisdiction to stay proceedings upon a judgment or order appealed from although no statutory provision is made for such stay. 23 Cal. Jur. 984. It may also issue when it appears necessary to preserve the rights of a litigant, where the sureties on an undertaking to stay execution fail to qualify. Segarini v. Bargagliotti, 193 Cal. 538, 226 P. 2. In that case, which was in some particulars like the present one, the court said: "The sureties failed to appear and justify on that date because of a serious illness in the family of one of them, whereupon appellant applied to this court for a writ of supersedeas. Under the rule stated in Nonpareil Mfg. Co. v. McCartney, 143 Cal. 1, 76 P. 653, the appellant is not entitled to this writ as a matter of right, but we may properly, in the exercise of a sound discretion, grant him the writ upon such terms as will be just and will adequately protect the rights of the respondent. We conclude that, under the circumstances, the writ should be so granted in order to preserve the status quo until the final determination of the action."

In the present action the failure of one of the defendant's sureties to justify appears to have been due to the fact that the property of this surety was in the joint name of himself and wife, and that his joint interest therein was not of sufficient value to enable him to qualify as a surety on said undertaking. At the time he signed said undertaking the record shows that he represented that he was the sole owner of said property and defendant so understood that he was the owner thereof in severalty. Had he been the sole owner of said property, he would have been accepted as a surety on said undertaking, but the court on finding that he only owned a joint interest therein with his wife refused to approve the undertaking as presented with said surety as one of the bondsmen thereof.

We think it sufficiently appears that defendant at the time he secured said surety as one of his bondsmen was of the belief that said surety was the sole owner of said property, and he only ascertained to the contrary at the hearing when said surety attempted to justify. Due to the amount of the undertaking required, it was not possible for the defendant to secure another surety within the brief time remaining for the filing of said bond, and for that reason no further undertaking was presented or filed by defendant.

The only counter showing made by the plaintiff is that since the rendition of said judgment the defendant has made several conveyances of his property, and the suggestion is offered that these conveyances were made for the purpose of defeating the execution of said judgment. Conceding that the defendant has conveyed certain of his property since the rendition of said judgment, the execution of a proper and adequate undertaking on appeal would fully protect plaintiff in all of his rights and render his judgment collectible when the appeal is finally determined. We, therefore, are of the opinion that the writ should be granted.

It is hereby ordered that a writ of supersedeas is granted as prayed for, provided the defendant within ten days from the filing of this order in the office of the clerk of this court, files herein a good and sufficient undertaking on appeal staying the execution of said judgment, as required by law, in the sum of $34,000; said undertaking to be approved by the presiding judge of the Superior Court of the state of California in and for the county of Los Angeles.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; LANGDON, J.; TYLER, Justice pro tem.; SEAWELL, J.

216 Cal. 512

YOUNG et al. v. SUPERIOR COURT IN AND FOR KERN COUNTY et al.

L. A. 13888.

Supreme Court of California.

Oct. 11, 1932.

1. Eminent domain ⇐167(1).

Contemplated acquisition for street improvement within and without city to be part of state highway system and financed by federal, state, and county bonds and assessments on property specially benefited *held* not "municipal affair," within Constitution permitting cities to remove themselves from operation of general laws as to municipal affairs; hence general law was applicable as to property within city (St. 1925, p. 849; Const. art. 11, § 8).

[Ed. Note.—For other definitions of "Municipal Affairs," see Words and Phrases.]

2. Eminent domain ⇐9.

City's resolution consenting to county's jurisdiction to condemn property within city for street improvement to be part of state highway system *held* not unlawful delegation of power (St. 1925, p. 849).

3. Statutes ⇐110½(1).

Title to act re-enacting provision of Constitution *held* not required to authorize incorporation of such provision in act (St. 1925, p. 876, § 28; Const. art. 1, § 14).

In Bank.

Application by John W. Young and another for a writ of prohibition to restrain Hon. Sidney L. Strother, Judge of the Superior Court in and for Kern County, from taking further proceedings in a certain action in condemnation.

Writ denied.

Paul W. Schenck and A. G. Fickeisen, both of Los Angeles, for petitioners.

Robert H. Dunlap, of Los Angeles, for respondents.

Thomas S. Bunn and Robert H. Dunlap and George R. Larwill, Sp. Counsel, all of Los Angeles, for Kern County.

Gibson, Dunn & Crutcher and Woodward M. Taylor, all of Los Angeles, amici curiæ for Bank of America, etc.

Hugh K. McKevitt, of San Francisco, amici curiæ for Department of Public Works and California Highway Commission.

SHENK, J.

This is an application for a writ of prohibition to restrain the respondent superior court and judge thereof from taking further proceedings in an action in condemnation pending before said court entitled County of Kern, Plaintiff, v. Marie T. Ackerman et al., Defendants (No. 25454). This petition was originally filed on July 9, 1932, in the District Court of Appeal, Fourth Appellate District. An alternative writ and a petition for rehearing were denied by that court, without opinion. A petition for hearing in this court was granted and an alternative writ was issued returnable on December 6, 1932, at Los Angeles. The respondents applied for an advancement of the cause to the September Los Angeles calendar. The respondents duly noticed a motion to dismiss the application on the ground that the same presented issues which had become moot. In the meantime the petitioners on September 22d filed in this

court a petition for a writ of review to annul certain action theretofore taken by the respondents in ordering immediate possession by the condemnor in the eminent domain proceedings. On September 26th, at the Los Angeles session of the court, the motion to advance the prohibition matter was granted. The motion to dismiss that proceeding was denied. The writ of review was ordered returnable in five days. The return has been filed and that proceeding will be disposed of by separate order.

The proceeding of which the action in condemnation is a part was and is taken under the Acquisition and Improvement Act of 1925. Stats. 1925, p. 849. The proceeding contemplates the acquisition of property for and the improvement of what is called Golden State avenue. The land sought to be condemned lies wholly within the county of Kern and partly within and partly without the city of Bakersfield. The part without the city is in unincorporated territory and is 1.45 miles in length. The improvement is to form a portion of a state highway laid and established as such by the state highway commission on May 28, 1931. Pursuant to the plan of the state highway commission, the department of public works has prepared plans and specifications for the construction of the highway which runs into and through the city of Bakersfield and over the lands sought to be condemned. The proposed work will constitute a link in one of the major highways of the state. The Golden State highway is referred to as a co-operative highway project toward which the state has allocated in excess of $1,000,000. The county of Kern has set apart from its general funds the sum of $117,000 for the purpose of the acquisition of these particular lands, and an additional sum of $10,000 has been or is to be expended by the county for engineering and other costs of the proceeding. As a portion of the contemplated improvement, a bridge is to be constructed across the Kern river, and the department of public works has advertised for bids for such bridge construction. The Golden State highway through Bakersfield, including the construction of said bridge, is a portion of the federal-aid system of highways within this state, and the appropriation therefor by an emergency measure of the last Congress is available provided the work is completed before June 30, 1933.

On August 4, 1931, the board of supervisors of Kern county adopted a resolution of intention declaring that the public interest, convenience, and necessity required and that it was the intention of said board to order the acquisitions specifically enumerated in the resolution and incorporated in the complaint in condemnation, and that said proceedings would be under and in accordance with the Acquisition and Improvement Act of 1925. An assessment district called "Acquisition and Improvement District No. 3" was laid out and established to pay the costs of the acquisitions not provided for by the federal, state, and county appropriations. Protests were filed on behalf of the owners of 5.67 per cent. of the area of the district. Hearings were had by the board of supervisors as provided for by the act. The protests were overruled, and on August 31, 1931, the board adopted a final resolution ordering said acquisitions. Prior thereto the city council of the city of Bakersfield, by resolution, consented to the acquisition of land within the city. It was determined to issue bonds on the property within the district sufficient to pay the balance of the amount required by the court to be deposited in the condemnation proceeding so that an order of immediate possession could be made.

Thereafter, on December 21, 1931, the action in condemnation was filed in the respondent court wherein 186 parcels of land and interests therein are sought to be condemned. The parcel owners, more than 250 in number, were made parties defendant. The petitioners herein are the owners of one of said parcels situated within said district and within the city of Bakersfield. A demurrer to the complaint filed by them was overruled. They failed to answer, and their defaults were entered. Thereafter the respondent court, on June 6, 1932, entered an order permitting the plaintiff in said action to take immediate possession of the property upon depositing in court a sum of money reasonably adequate to secure to the owners of the property sought to be condemned, compensation for the property taken, and damages incident thereto. The court determined that the sum of $234,946 would be adequate for such purposes, and specifically set forth in the order the amount estimated to be adequate for each parcel of land and interest therein. As above stated, the county of Kern advanced from its general funds the sum of $117,000 as approximately one-half of the required deposit. The balance of $117,946 was raised by the issue and sale of bonds to be paid by special assessments on the lands in the district. Upon the deposit in court, an order was made on July 20, 1932, entitling the county of Kern to take immediate possession of the property for the purposes specified in the complaint in condemnation.

On January 14, 1932, the petitioners herein filed in the District Court of Appeal of the Fourth Appellate District an application for a writ of prohibition directed against the respondent court, alleging the same matters set forth in the present petition except that it was alleged that the application for immediate possession would be made upon making the required deposit in court and praying that the respondent court be restrained from mak-

ing the contemplated order. On the day of its filing, the petition was denied without opinion. No petition for rehearing was filed, and the order of denial became final within sixty days. The same contentions were advanced in said petition as in the present proceeding, and it was on this state of the record that the respondents moved for a dismissal of the present proceeding on the ground that the matter had become moot. There was much force in the claim of the respondents that the petitioners are foreclosed from again litigating the same questions. However, the motion was denied in order that the court might give consideration to the claims of the petitioners on the merits.

There is no contention that the provisions of the Acquisition and Improvement Act of 1925 were not strictly complied with. But it is urged that the acquisition of the property for the opening of said street is a "municipal affair" in so far as such acquisition applies to property located within the city of Bakersfield.

[1] On the 5th day of May, 1914, a board of freeholders was elected in the city of Bakersfield to prepare and propose a charter for said city pursuant to section 8 of article 11 of the Constitution. At a special election held on November 7, 1914, the proposed charter was adopted by the electors of the city, and on January 23, 1915, the charter was approved by the Legislature. It is insisted that by the charter provisions, and particularly section 12 of article 3, the city accepted the offer contained in section 8 of article 11 of the Constitution as amended at the general election held on November 3, 1914, permitting cities to remove themselves from the operation of general laws as to municipal affairs by incorporating in their charters a general provision to that effect. The contention presents an interesting question, inasmuch as the charter was ratified by the electors of the city four days after the constitutional provision became a part of the organic law. But, in any view of the case now presented, the contemplated acquisition and improvement cannot be deemed a matter of purely municipal concern. As above outlined, the improvement is to be a part of the state highway system designed and constructed in part under the supervision of the department of public works of the state. It is located both within and without the city of Bakersfield. It is to be financed from federal, state, and county funds with the remainder from special assessment on the property within and without the city specially benefited. As such, it is of more than local concern, the general law is controlling, and the county of Kern, having instituted the proceeding, is the mandatory of the state to carry it forward to completion. Allied Amusement Company v. Byram, 201 Cal. 316, 256 P. 1097; County of Los Angeles v. Hunt, 198 Cal. 753, 247 P. 897; Stege v. City of Richmond, 194 Cal. 305, 228 P. 461; Gadd v. McGuire, 69 Cal. App. 347, 231 P. 754.

[2] There is no merit in the contention that the consent to the jurisdiction of the county as evidenced by the resolution of the city council of the city of Bakersfield is an unlawful delegation of power by the city to the county. See Gadd v. McGuire, supra.

[3] It is further insisted that the title of the act of 1925 is insufficient to authorize the incorporation in the act of the power to take immediate possession upon order of court. But this power is not derived from the statute. It is in the Constitution. Section 14, art. 1. Section 28 of the act merely repeats the constitutional provision, and no mention of it was necessary in the title.

No other points require discussion. The peremptory writ is denied, and the alternative writ is discharged.

We concur: WASTE, C. J.; TYLER, Justice pro tem.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

216 Cal. 784

John W. YOUNG and Margaret J. Young, Petitioners, v. SUPERIOR COURT of the State of California, IN AND FOR the COUNTY of KERN, and Honorable S. L. Strother, Judge thereof, Respondents.

S. F. 14778.

Supreme Court of California.

Oct. 11, 1932.

In Bank.

Application for writ of review to annul an order of the Superior Court of Kern County, Sidney L. Strother, Judge, authorizing plaintiff in a condemnation proceeding to take immediate possession of property.

Order affirmed.

A. G. Fickeisen and Paul W. Schenck, both of Los Angeles, for petitioners.

Robert H. Dunlap, of Los Angeles, for respondents.

Thomas S. Bunn and Robert H. Dunlap, and George R. Larwill, Sp. Counsel, all of Los Angeles, for Kern County.

Gibson, Dunn & Crutcher and Woodward M. Taylor, all of Los Angeles, amici curiæ for Bank of America.

PER CURIAM.

Review to annul the order of the respondent court authorizing the plaintiff in an ac-

tion in condemnation pending in said court entitled County of Kern, Plaintiff, v. Marie T. Ackerman et al., Defendants (No. 25454), to take immediate possession of the property sought to be condemned after deposit in court as provided in section 14 of article 1 of the Constitution and section 28 of the Acquisition and Improvement Act of 1925 (Stats. 1925, pp. 849, 876). The facts and the contentions of the petitioners are the same as those involved in John W. Young et al. v. Superior Court et al. (Cal. Sup.) 15 P.(2d) 163, this day decided. On the authority of that case, the order sought to be annulled is affirmed.

127 Cal.App. 9

PEOPLE v. CIMAR.*

Cr. 1227.

District Court of Appeal, Third District, California.

Oct. 15, 1932.

Rehearing Denied Oct. 29, 1932.

Hearing Denied by Supreme Court Nov. 14, 1932.

1. Prostitution ⇐4.

Evidence *held* sufficient to support conviction for "pandering" (Deering's Gen. Laws 1931, Act 1906).

"Pandering" is synonym of term "pimping," and consists of unlawfully procuring female to engage in gratifying lust of other individuals.

[Ed. Note.—For other definitions of "Pander" and "Pimping," see Words and Phrases.]

2. Prostitution ⇐1.

In prosecution for pandering, it was unnecessary to prove that woman became inmate of house of prostitution against her will (Deering's Gen. Laws 1931, Act 1906).

3. Prostitution ⇐1.

If defendant's conduct assisted, induced, persuaded, or encouraged female to become inmate of house of prostitution, crime of pandering was sufficiently established (Deering's Gen. Laws 1931, Act 1906).

4. Prostitution ⇐4.

In prosecution for pandering, letter from defendant to employee of house of prostitution *held* competent to show profit from her earnings furnished motive for pandering (Deering's Gen. Laws 1931, Act 1906).

5. Prostitution ⇐4.

In prosecution for pandering, letter from defendant to house of prostitution inmate *held* competent to show defendant worked with her to persuade another to remain in house of prostitution (Deering's Gen. Laws 1931, Act 1906).

6. Prostitution ⇐1.

Procuring a female to become an inmate of house of prostitution, with or without her consent is violation of statute, even though not accomplished by threats, violence, or fraud (Deering's Gen. Laws 1931, Act 1906).

"Procurer" is one who exploits virtue of female by soliciting trade for lewd and lascivious woman to gratify lust of other persons; an agent who promotes prostitution.

[Ed. Note.—For other definitions of "Procurer," see Words and Phrases.]

7. Prostitution ⇐3.

Information charging defendant with willfully and unlawfully procuring female to become inmate of bawdyhouse sufficiently charged pandering (Deering's Gen. Laws 1931, Act 1906).

Appeal from Superior Court, Yuba County; J. O. Moncur, Judge.

Lorenzo Cimar was convicted of pandering, and he appeals.

Affirmed.

Ralph D. Paonessa, Alexander L. Oster and Paonessa & Oster, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant was convicted of pandering in violation of the statutes of 1911, p. 9, 1 Deering's General Laws of 1931, page 819, Act 1906. The information charges that he did "wilfully and unlawfully and feloniously procure for a female person * * * a place as an inmate of a house of prostitution."

The appellant contends the verdict is not supported by the evidence for the reason that the female in question was not procured to become an inmate of a house of prostitution against her will, but, upon the contrary, that she voluntarily entered and remained in the house. It is also asserted the court erred in the admission of testimony and in instructing the jury regarding the law of the case.

[1-3] The judgment of conviction is amply supported by the evidence in this case. It is unnecessary to recite the testimony in proof of that assertion. The defendant was acquainted with the landlady and with another inmate of a notorious house of prostitution at Marysville, called the Hollywood Rooming House. He met a seventeen year old girl by the name of Lina Limbardo, who was em-

*Hearing denied 16 P.(2d) 139.

ployed in a Sacramento restaurant. After seducing her, he took her to Marysville and placed her in this house of prostitution, where she remained for more than a month promiscuously engaging in prostitution. She became an associate and partner of one of the inmates of the bawdyhouse. They divided their net receipts from the business. The record leaves no doubt that Lina Limbardo was induced by the defendant to become an inmate of this house of ill fame for the purpose of engaging in the practice of prostitution. It appears that he procured $50 from her earnings on a pretense of obtaining a loan of this money. These acts constitute unlawful and felonious pandering contrary to the first provision of the statute above mentioned, which declares that: "Any person who shall procure a female inmate for a house of prostitution * * * shall be guilty of a felony, to wit: pandering." This statute recites facts constituting several groups of acts incident to the practice of prostitution and to the maintenance of a house of ill fame, which are prohibited as unlawful pandering.

Pandering is a synonym of the vulgar term "pimping," and consists of unlawfully procuring a female to engage in gratifying the lust of other individuals, as distinguished from fornication, rape, or seduction. 3 Bouvier's Law Dictionary, p. 2592; 46 C. J. 1172; 74 A. L. R. 312, note. The circumstances constituting pandering ordinarily depend upon the language of the statute under which an accused person is charged. According to the provisions of that portion of the statute under which this defendant was charged with pandering, it was unnecessary to prove that the female was procured by him by means of force or fraud to become an inmate of the house of prostitution. It was not even necessary to prove that she became an inmate of the house against her will. If, by means of his entreaty or persuasion, she was induced to become an inmate of the house of ill fame, the requirements of the statute are fulfilled. It may be conceded the crime of pandering is not accomplished unless the accused person procures the female to become an inmate of the house for the purpose of engaging in prostitution. It may be admitted that the term "inmate," as it is used in the statute, implies that the female shall abide in the house of ill fame for the purpose of engaging in prostitution. The female who is involved in the present case did engage in promiscuous illicit intercourse in the house of prostitution for a period of a month, after which time she was apprehended, and the defendant was charged with this crime. If the conduct of the defendant assisted, induced, persuaded, or encouraged the female to become an inmate of the house of ill fame for the purpose of practicing prostitution, the crime of pandering is sufficiently established. The testimony is ample to support each of these necessary elements. The record contains a conflict of evidence, but the motive for the conduct of the defendant, the character of the house, and the purpose for which the female became an inmate thereof, were all matters for the determination of the jury. The loathsome practice of pandering should be discouraged by every legitimate means known to the law.

[4] Error is assigned by the appellant in the admission in evidence of three letters. It is asserted they were incompetent, prejudicial, and not identified as the handwriting of the defendant. The defendant was known by the name of Mori. Lina Limbardo, who is involved in this criminal proceeding, was employed in the Hollywood house of prostitution under the assumed name of Jakie Baldwin. The first challenged letter, which was received in evidence over the objection of the defendant, was addressed to Jakie Baldwin, and was identified by her as the handwriting of the defendant. It was written to her by the defendant in response to a request for the return of $50 of her money which he claimed to have borrowed. It is competent evidence tending to show that his profiting from her earnings furnished a motive for him to have procured her to become an inmate of the house of prostitution. It tended to show that he was sharing in the receipts of her illicit practice. He claimed that he merely left her in that rooming house temporarily at his own expense. She testified that he returned after she had been there a week, and that, "He asked me if I was ready to go home, and I said 'yes,' and he didn't like that very well. He got sore and didn't say anything but went in the other room and talked to Bobby (her associate) and she came in there and explained how nice he was and everything, and persuaded me to stay there." There was no error in the introduction in evidence of this letter.

[5] The second letter complained of was written by the defendant to Bobbie Meyers, an inmate of the Hollywood house of prostitution. This is the woman with whom he negotiated to persuade Jakie Baldwin to remain in the house of ill fame. The letter was signed L. Mori. It was positively identified as his handwriting. He admitted that his real name was Squiccimori. He was known by the nickname of Mori. This letter was competent as an admission of the defendant's friendly relationship with Bobbie Meyers to corroborate the theory that he worked with her to persuade Jakie Baldwin to remain in the house of prostitution as an inmate thereof.

The last letter which was received in evidenced was signed by Squiccimori, and acknowledged by him to be in his handwriting. The defendant became a witness at the trial in his own behalf. He failed to deny that

these letters were written by him. They were all competent to prove that the defendant deliberately planned to procure Jakie Baldwin to become an inmate of the house of ill fame. They tend to show the motive with which he left her at that house.

[6, 7] Finally the appellant contends the court erred in instructing the jury that in order to constitute the crime of pandering it was only necessary to prove that the defendant had procured Lina Limbardo to become an inmate of the bawdyhouse for the purpose of prostitution. That upon the contrary it was unnecessary to prove that such procuring was accomplished by means of promises, threats, violence, or fraud. In support of this assertion, the appellant relies on the case of People v. Burns, 75 Cal. App. 84, 241 P. 935.[1] That case does hold that it is necessary to allege and prove that the female is induced to become an inmate of a house of prostitution by means of promises, threats, violence, or some device or scheme exercised by the accused person. We are of the opinion the learned author of that decision misconstrues the language of the statute with relation to the first offense of pandering which is defined therein. The first offense which is prohibited by statute seems to have been entirely overlooked by the court in deciding the Burns' Case. No petition for hearing was presented to the Supreme Court in that case. The statute reads: "Any person who shall procure a female inmate for a house of prostitution, * * * shall be guilty of a felony, to wit: pandering." The term "procure," as it is used in the statute with relation to the crime of pandering, has a very definite and well-understood meaning. A procurer is one who exploits the virtue of a female by soliciting trade for a lewd and lascivious woman to gratify the lust of other persons. A procurer is an agent who promotes prostitution. 50 C. J. 628; 6 Words and Phrases, Third Series, 190; People v. Roderigas, 49 Cal. 9. The result of soliciting patronage as the agent of a depraved woman is equally harmful to society, whether the procurer carries on his loathsome trade with or without her consent. In enacting the statute against pandering, the Legislature evidently intended to discourage the nefarious business of replenishing houses of prostitution with inmates. It is unnecessary for the statute to specify the various terms and conditions which may be deemed to constitute the act of procuring. The statute clearly declares that any one who procures a female inmate for a house of prostitution is guilty of pandering. The effect of the statute would be greatly restricted if it were construed to apply only to such acts of procuring as were accomplished by means of coercion, violence, threats, persuasion, or fraud. Under the provisions of this statute, if a man accedes to the importunities of a wanton woman and finds her a place as an inmate of a bawdyhouse, where she practices prostitution, as her agent in this forbidden enterprise, he is just as guilty of pandering as though he had induced her to become an inmate of the house by means of threats, violence, or fraud. The crime of procuring a female for a house of prostitution is clearly made separate and distinct from the other statutory offense of inducing a female to enter such a house by means of "promises, threats, violence or by any device or scheme." The statute distinguishes these different offenses by separating them with the disjunctive preposition "or." The statute reads: "Any person who shall procure a female inmate for a house of prostitution, or who, by promises, threats * * * shall be guilty of a felony, to wit: pandering." We are therefore of the opinion the statute makes it a crime for one to procure a female to become an inmate of a house of prostitution, with or without her consent, and regardless of whether it is accomplished by means of threats, violence, or fraud. The challenged instruction is therefore not erroneous.

It will be observed the defendant was not charged in this case with inducing a female to become an inmate of a house of prostitution by means of threats, violence, or fraud. He was merely charged with wilfully and unlawfully procuring her to become an inmate of a bawdyhouse. We are of the opinion this language states a good cause of action under the first provision of the statute. There was neither a demurrer to the information nor motion to quash the pleading. If there is any defect in pleading, proceedings, or instructions, they are cured by the provisions of article 6, section 4½ of the Constitution, for there appears to have been no miscarriage of justice in this case.

The order and the judgment are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

[1] Anything in the opinion in the case of People v. Burns, 75 Cal. App. 84, 241 P. 935, contrary to the decision herein is hereby expressly disapproved.

126 Cal.App. 685

CUNNINGHAM v. COX.

Civ. 8476.

District Court of Appeal, First District, Division 2, California.

Oct. 10, 1932.

1. Automobiles ⇐244(49).

Evidence supported implied finding that boy pedestrian struck by automobile at night was guilty of contributory negligence.

2. Automobiles ⇐168(2).

No road is deemed to be within business or residence district for purposes of vehicle act, unless it appears that there is required density of structures and that district is signposted (St. 1923, p. 517, § 28½, as added by St. 1929, p. 510, § 7; St. 1923, p. 555, § 116, as amended by St. 1927, p. 1438, § 33).

3. Appeal and error ⇐1067.

Failure to instruct what constituted residence district *held* not prejudicial, under evidence showing place of automobile accident was not residential district (St. 1923, p. 517, § 28½, as added by St. 1929, p. 510, § 7; St. 1923, p. 555, § 116, as amended by St. 1927, p. 1438, § 33).

4. Trial ⇐296(3).

Instruction did not instruct that motorist had right to drive 40 miles per hour after dark on wrong side of highway when considered with another instruction (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30).

In action for death of motorist, court instructed jury that maximum speed limit at time and place of accident was 40 miles per hour if place of accident was not within business or residence district, but this instruction was qualified by instruction embodying provisions of St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30.

5. Trial ⇐255(1).

One desiring special instruction should propose such instruction.

6. Trial ⇐260(1).

Refusing instruction covered by instruction given *held* not error.

7. Automobiles ⇐246(38).

In action for death of boy struck by automobile, requested instruction did not sufficiently present last clear chance doctrine, and was therefore properly refused.

Requested instruction was, in substance, that when each of parties contend that the other was responsible for accident, issue must be determined against party who is shown to have had better opportunity or to have been in better situation to avert or prevent accident, and this means party who is in better position to foresee, anticipate, or know that accident might occur.

8. Appeal and error ⇐1067.

Where automobile accident occurred outside residence district, rulings and failure to instruct, if leading jury to believe district was residence district, *held* not prejudicial to plaintiff (St. 1923, p. 517, § 28½, as added by St. 1929, p. 510, § 7; St. 1923, p. 555, § 116, as amended by St. 1927, p. 1438, § 33).

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Charles N. Cunningham against Joseph E. Cox. From a judgment for defendant, plaintiff appeals.

Affirmed.

Avery J. Howe, of Palo Alto, for appellant.

Frank V. Campbell and L. H. Schellbach, both of San Jose, for respondent.

SPENCE, J.

Plaintiff sought to recover damages for the death of his minor son, Charles N. Cunningham, Jr., alleging that said death was caused by the negligence of the defendant in operating his automobile. Defendant denied any negligence on his part, and pleaded contributory negligence on the part of the deceased boy. The cause was tried with a jury, and a verdict was rendered in favor of the defendant. From the judgment entered upon the verdict, plaintiff appeals.

[1] The accident occurred at approximately 7:20 on the night of January 29, 1931, on the Saratoga-San Jose road. This road runs in a general westerly direction through an orchard section of Santa Clara county from San Jose to Saratoga. A short distance westerly from the scene of the accident said road is intersected by the Saratoga-Mountain View road. There is an interurban car track in the center of the road situated in the middle of a strip of asphalt surfacing about nine feet in width. The balance of the improved portion of the road consists of two concrete strips, each about ten feet in width, located on either side of and immediately adjoining the asphalt strip. Both the defendant and the deceased boy lived in the vicinity of the scene of the accident. On the night in question the defendant, accompanied by his wife, was returning from Saratoga and was driving his Ford sedan automobile along said road in an easterly direction. He intended to stop at the Oldham residence on the north side of the highway, and, as the night was dark, he drove his car over the car track and onto the north side of the highway some little distance before reaching his intended

destination. The deceased, a boy of fourteen years, and another younger boy named Robert La Fontain, were proceeding on foot in a westerly direction along the highway from the residence of the deceased boy towards Saratoga. There is comparatively little conflict in the testimony regarding the manner in which the accident happened. The defendant's testimony, corroborated by that of his wife, was that he was driving slowly at a speed of not over twenty miles per hour; that his lights were lit, and, although he was looking ahead in the direction in which he was proceeding, he saw nothing on the highway until just before the collision; that the small boy (Robert La Fontain) ran "right close in front of the machine" from defendant's right side "like that (indicating) and just as he got across the other boy (the deceased) seemed to run right into the lights and the car hit him there." The only eyewitness testifying on behalf of plaintiff was Robert La Fontain. He was but thirteen years of age at the time of the accident, and his testimony was indefinite and uncertain in several particulars. He admitted, however, that the car had its lights lit and that it was not going fast. He further admitted that he and the deceased were joking and chasing each other along the highway. The deceased was running near the car track and ahead of the witness. At the time of the accident they were not merely jogging along, but the boy testified, "We were going kind of fast" and "I was trying to catch up to him again." With respect to defendant's automobile, he stated, "A car came in view and I jumped off the road and I guess Newton (the deceased) did not see it." This witness estimated that the car was twelve feet from him when he first saw it. The deceased was struck by the right front portion of the car, and after the accident the front of the car was spattered with orange juice and orange pulp which was not there before the accident. The evidence clearly indicated that deceased was carrying some oranges when struck, but the manner in which he obtained them was not entirely clear. Neither the deceased's father nor his companion knew of the deceased carrying any oranges from his home. There were ripe oranges on the trees along the sides of the road near the point of collision. The La Fontain boy did not testify positively, but stated that he did not think the deceased stopped to get any oranges, and that he did not think that the deceased had any oranges in his hand at the time the accident occurred. The uncertainty of the boy's testimony in this connection, together with the undisputed facts in evidence, made quite plausible the theory of respondent's counsel which was that the deceased had been engaged in the boyish prank of gathering some of the neighbors' oranges at the side of the road and had run headlong into the path of the automobile in his flight.

Appellant first contends that the verdict is not sustained by the evidence, but there is no merit in this contention. Even if negligence on the part of respondent be conceded, the foregoing statement shows that there was ample evidence to support an implied finding that the deceased was guilty of negligence proximately contributing to the accident.

In arguing the above contention and other contentions found in the brief, appellant lays great stress upon the nature of the district in which the accident occurred. He endeavored to prove upon the trial that this was a "residence district" within the meaning of the California Vehicle Act, and the facts were quite thoroughly developed and were undisputed. In our opinion these undisputed facts clearly show that the district was not "a residence district" within the meaning of the act. We may say parenthetically that several photographs of the road in the vicinity of the scene of the accident were introduced in evidence. These photographs show long stretches of the road bordered by large shade trees and orchards, but in none of these photographs can we locate a house of any description. Any houses located in the vicinity were no doubt situated in the orchards some distance back from the road. The distance of the setback appears to be immaterial under the act, but we mention it only to indicate that the district had none of the appearances of what is commonly termed "a residence district."

Section 28½ of the California Vehicle Act (as added by St. 1929, p. 510, § 7) very specifically defines "a residence district" as follows: "(b) A 'resident district' for the purpose of this act shall mean the territory contiguous to a public highway, not comprising a business district as herein defined, when the property fronting on one side of said highway for a distance of at least a quarter of a mile is occupied by thirteen or more separate dwelling houses or business structures, or where the property fronting on both sides collectively of said highway for at least a quarter of a mile is occupied by sixteen or more separate dwelling houses or business structures. (c) Every public highway shall be conclusively presumed to be outside of a business or residential district unless its existence within a business or residential district shall be established by clear and competent evidence as to the nature of the district, and unless signposted when and as required by this act." The required signposting is specified elsewhere in the act, and the signs must be "conspicuously placed on every such highway at the boundary lines of such residence district." California Vehicle

Act, § 116 (as amended by St. 1927, p. 1438, § 33).

[2] It is therefore clear that no road is deemed to be within a "business or residence district" for the purposes of the act unless it appears first, that there is within the district the required density of structures, and, second, that the district is signposted "at the boundary lines" thereof; and if the uncontradicted testimony affirmatively shows either an insufficient density of structures within the alleged district or a failure to post signs at the "boundary lines" of the alleged district, then the district is outside of a "business or residence district" for the purposes of the act. Appellant relies upon the fact that the board of supervisors had passed an ordinance in 1920 declaring the territory "along the line of the San Jose and Saratoga road running from the junction of said road with the Saratoga and Mountain View road, easterly along said San Jose and Saratoga road for a distance of 1500 feet" to be closely built-up territory within the meaning of section 1 of the California Vehicle Act, St. 1915, p. 397 (the forerunner of the present act), and also ordering signs to be posted at the "boundary lines" of said district; and the further fact that a twenty-mile sign was posted near the easterly boundary line of the district on the north side of the highway which might be viewed by traffic going westerly towards Saratoga. The accident happened at a point to the west of this sign and between it and the junction of the Saratoga and Mountain View road. Appellant himself testified that there were but eight houses including those on both sides of the road within the next quarter of a mile going westerly towards Saratoga from this sign, and that there was "no other 20 mile sign on that road at any place." In other words there was no sign at the westerly boundary line of the alleged district, which sign might have been viewed by traffic going easterly from Saratoga and in the direction which respondent was driving. It therefore affirmatively appears that there was neither sufficient density of structures nor sufficient signposting to make the district in question a "residence district" within the meaning of the act, and under these circumstances appellant could not rely upon any resolution which the board of supervisors may have adopted with relation to said territory. Upon the record before us it would have been entirely proper to have instructed the jury that the scene of the accident was not within a "business or residence district."

[3-5] The trial court neither instructed the jury, as requested by respondent, that the scene of the accident was not within a "residence district," nor did it instruct the jury as to what constituted a "residence district" within the meaning of the act, but in our opinion its failure to do so was not prejudicial to appellant. Subdivision (a) of section 113 of the Vehicle Act (as amended by St. 1927, p. 1436, § 30) relating to speed was read to the jury, and they were also instructed that the maximum speed limit at the time and place of accident was "40 miles per hour if the place of the accident was not within a business or residence district." Appellant objects to the last-mentioned instruction on the ground that the maximum limit was 20 miles per hour "if the defendant was driving in a residence district." From what has been said above, it is apparent that this objection is without merit. Furthermore there was no evidence to show that appellant was driving in excess of 20 miles per hour. Appellant makes the further objection that the jury was thereby instructed that respondent "had a right to drive 40 miles per hour after dark on the wrong side of the highway." No such meaning could reasonably be derived from the above-mentioned instructions when read together, as the maximum speed instruction was qualified by the instruction embodying the provisions of subdivision (a) of section 113 of the California Vehicle Act. If appellant desired that the jury be specifically instructed to that effect, he should have proposed an instruction for that purpose.

Appellant further claims that the trial court erred in refusing his proposed instruction reading: "It is lawful for a pedestrian to walk upon any portion of a highway when within a residence or business section or district." The trial court did read to the jury section 150½ of the California Vehicle Act (as added by St. 1929, p. 546, § 66) providing: "It shall be unlawful for any pedestrian to walk along and upon any highway outside of a business or residence district otherwise than close to his left-hand edge of the highway." We find no error of which appellant may complain, for the evidence affirmatively showed that the accident occurred outside of a "business or residence district."

[6] Appellant makes the further contention that the trial court erred in refusing to give his purported instruction reading: "If you shall find that the defendant was driving on the left or wrong side of the street or highway, then I instruct you that he is guilty of negligence as a matter of law." It is a sufficient answer to point out that the court fully covered the subject-matter of this instruction by reading section 122 of the Vehicle Act (as amended by St. 1929, p. 540, § 50) and also instructing the jury that "The violation of law constitutes negligence per se."

[7] Appellant proposed the following instruction, which was refused: "When each of the parties, as they do here, contend that the other was responsible for the accident, this issue is to be determined against the

party who is shown to have had the better opportunity or to have been in the better situation to avert or prevent the accident, and this means the party who is in a better position to foresee, anticipate or know that the accident might occur." Appellant states that this instruction "attempted to embody the last clear chance rule." We must confess that we did not recognize it. It is conceded that it "does not clearly state the law," but appellant contends that "it does sufficiently put in issue the last clear chance doctrine." We cannot agree with appellant, and in our opinion the instruction was properly refused even if it be assumed that there was evidence which might have warranted the giving of a properly framed instruction embodying the last clear chance doctrine.

[8] Appellant further contends that the jury was confused by the conflicting instructions of the trial court relating to what constituted a "residence district." The instructions referred to were in reality rulings of the trial court during the taking of evidence on this subject. The jury may have been confused by these various rulings, but, as we have indicated above, we cannot conceive of any prejudice resulting to appellant's cause. The accident happened outside of a "residence district," and if, by reason of these rulings and the failure of the trial court to definitely instruct on this subject, the jurors were confused or were led to believe the district was a "residence district," appellant could not have been adversely affected thereby.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

127 Cal.App. 45

PEOPLE v. FERNANDES et al.

Cr. 1226.

District Court of Appeal, Third District, California.

Oct. 17, 1932.

1. Kidnapping ⇨4.

Count of indictment charging kidnapping by unlawfully carrying away certain person from one county to another *held* sufficient (Pen. Code, § 207).

2. Criminal law ⇨339.

Admission of testimony concerning similarity of handwriting on hotel register with that of defendant *held* not error, where evidence showed defendant's presence at hotel.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

B. Fernandes, P. Dorian, and others were convicted of simple assault and of the crime of kidnapping, and they appeal.

Affirmed.

Frank C. Hale, of Merced, and D. P. Eicke, of Stockton, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER, delivered the opinion of the court.

The defendants were convicted of simple assault and also of the crime of kidnapping one Tiofolo Papito and carrying him from the county of Merced into the county of San Joaquin. From the judgment of conviction and the court's denial of their motion for a new trial, the defendants appeal.

Upon this appeal no point is made as to the sufficiency of the testimony supporting the count charging assault, but reliance is based upon an alleged defect in the fifth count of the information filed against the defendants, charging the crime of kidnapping, in that it does not charge that the defendants intended or had any design to take the said Tiofolo Papito out of the state of California.

[1] So far as material here the count charging kidnapping is in the following words: "The said B. Fernandes, P. Dorian, C. Rondez and F. Rondez on or about the 8th day of May, nineteen hundred and thirty-two, at and in the said county of Merced, and State of California, and prior to the filing of this Information, did then and there unlawfully, wilfully, feloniously and forcibly, and without any lawful warrant or authority, steal, take, seize, kidnap and carry away one Tiofolo Papito, in the said County of Merced, and did then and there, from the said County of Merced, aforesaid, unlawfully, wilfully, feloniously and forcibly carry away and transport the said Tiofolo Papito into another county, to-wit, the County of San Joaquin, State of California, without having established a claim to the said Tiofolo Papito according to the laws of the United States, or the State of California."

In making the contention that the information is insufficient to charge the offense of kidnapping, appellants rely upon section 207 of the Penal Code, and the case of Ex parte Keil, 85 Cal. 309, 24 P. 742. The language of section 207, supra, shows clearly that the Legislature intended to describe several offenses or several different acts which would constitute the offense of kidnapping, to wit, the forcible taking of a person from one county to another; also, from this state to another state, without having established authority, as provided by law. So far as ap-

plicable here the section reads: "Every person who forcibly steals, takes, or arrests any person in this state, and carries him into another country, state, or county, or into another part of the same county, or who forcibly takes or arrests any person, with a design to take him out of this state, without having established a claim, according to the laws of the United States, or of this state [etc.], is guilty of kidnapping." The language is plain and direct that every person who forcibly steals, takes (etc.), any person in the state and carries him into another country, state, or county, or into another part of the same county, without authority so to do, is guilty of kidnapping. There does not need to be any intent or design to carry the person kidnapped out of the state. If taken from one county to another the crime is complete.

In Ex parte Keil, supra, the court had before it a case of kidnapping, in which it was stated that there was no evidence that the petitioner took or intended to take Bush and Kemp into any other country, state, or county, and then added, "Petitioner was not guilty of kidnapping therefore, unless he had the 'design to take them out of this state'" (within the meaning of the section to which we have referred). In the instant case the charge is, and the proof establishes the charge, that the defendants forcibly and wilfully took the person of Tiofolo Papito from the county of Merced to the county of San Joaquin.

In the case of People v. Fick, 89 Cal. 144, 26 P. 759, the defendant was charged with taking a Chinese woman from San Joaquin county and conveying her to the county of Placer. Nothing appears in the opinion indicating that there was any intent or design to carry the Chinese out of the state. Conviction of kidnapping was upheld.

In People v. Sheasbey, 82 Cal. App. 459, 255 P. 836, 838, the court, in passing upon the question of intent or design, used the following language: "Where the intent, state of mind, or belief of the defendant is an element of the crime, he is permitted to give his direct testimony on that fact. [Citing a number of cases.] But no state of mind or belief is a part of the crime of kidnapping nor constitutes by itself a defense to the charge and, where no circumstances are proven which would constitute a lawful excuse, no intent is necessary, except the intention of doing the acts denounced by the statute. The purpose or motive of the taking and carrying away has been held to be immaterial in prosecutions for kidnapping." Citing People v. Fick, 89 Cal. 144, 26 P. 759; People v. Bruno, 49 Cal. App. 372, 193 P. 511.

The word "or" as found in section 207, supra, refers to alternatives, that is, to different acts which, if committed, constitute the offense, not that all of the acts must be taken together, but each particular act is sufficient; that is, the carrying, taking forcibly, feloniously, etc., of a person from one county to another, constitutes the offense; or from one place to another, with the design to take the person out of the state.

The word "or" is thus defined in 46 C. J. p. 1124: "The monosyllable 'or' is a disjunctive particle that marks an alternative generally corresponding to 'either,' as 'either this or that.'" Other definitions are given, but these are sufficient. Thus, if the defendants did either, or one or the other, of the specified acts denounced by the statute, the crime is complete so far as the charging of the crime in the information is concerned.

No question is presented for our consideration as to the sufficiency of the evidence to sustain the verdict of the jury. It is contended, however, that the court erred in permitting a witness to testify as to the handwriting of one of the defendants found upon a hotel register in the city of Stockton. The testimony shows that the defendants took the person of Tiofolo Papito from a place called "Cortez" in Merced county, to the city of Stockton, and kept him over night at a hotel or lodging house known as the "Mariposa Hotel." The name of one of the defendants, Dorian, appeared upon the ledger, showing that the defendants had been at that hotel on the 8th of May, 1932.

The testimony objected to is that given by a police officer in the city of Stockton by the name of Harbert, who testified that he had compared the signature, admitted to be the genuine signature of the defendant Dorian, with that appearing upon the register of the Hotel Mariposa. The record shows that the witness in his official capacity had, as a part of his duties, the comparing of signatures. The witness, however, had never seen the defendant write, nor does it appear that the witness was testifying as an expert. Over the objection of the defendant this witness was allowed to testify as follows: "I would say, according to the amount of experience that I had had, that this was written by the same man." That is, that the signature admitted to be the genuine handwriting of the defendant Dorian was written by the same person who signed the hotel register.

[2] While the foundation laid for the introduction of the testimony of this witness was not very full, and was not made as complete as it should have been, the fact is shown by the testimony that all of the defendants were at the hotel mentioned at the time in question; that they had with them the person of Tiofolo Papito, and even though it be true that the defendant Dorian stayed at another hotel called the "Palace," in the city of Stockton, the defendants suffered no prejudice whatever by reason of the admission of the testimony just referred to. The testimony shows that the person of Tiofolo Papito was

beaten up by the defendants; that they all acted in concert; forced Papito, by exhibiting guns, to get into the automobile and accompany defendants to the city of Stockton.

The sufficiency of the testimony to sustain the verdict not being challenged, save as to the question of intent or design, and the testimony showing clearly that no authority was exhibited or warrant exhibited authorizing the defendants to take the person of Tiofolo Papito out of the county of Merced and transport him to the county of San Joaquin, and the only grounds for reversal being the ones we have considered, it satisfactorily appears that the appeal is without any substantial merit, and that the conviction should be allowed to stand.

The judgment and order of the trial court are affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

126 Cal.App. 607

WILSON et al. v. COOPER et al.

Civ. 8411.

District Court of Appeal, First District, Division 2, California.

Oct. 5, 1932.

Rehearing Denied Nov. 4, 1932.

Hearing Denied by Supreme Court Dec. 1, 1932.

1. Reformation of Instruments ⇐21.

Relations between stepmother and half-brother to stepdaughters and half-sisters *held* not fiduciary, as respected right to reformation of instrument.

2. Reformation of Instruments ⇐36(3).

Complaint in action to reform instruments *held* not to show that confidential relation existed between persons executing instruments and persons benefitted thereby.

Complaint merely alleged that plaintiffs as stepdaughters and half-sisters, had resided in family for some years, and that trust and confidence existed, but showed, however, that they had not seen either stepmother or half-brother for a number of years, until death of father, at which time instruments were executed at instance of half-brother, whereby sisters conveyed interest in estate.

3. Reformation of Instruments ⇐32.

Delay of more than 30 years in attempting to secure reformation of instruments, whereby heirs conveyed interest in estate, *held* to constitute laches (Code Civ. Proc. § 338, subd. 4; § 343).

Appeal from Superior Court, Monterey County; H. C. Lucas, Judge.

Action by Rosanna Cooper Wilson and another against Martha M. Cooper, known also as Martha Cooper Hughes, and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

John G. Jury, of San Francisco, and Cora B. Harding, of Berkeley, for appellants.

Hudson & Martin and George Allan Smith, all of Monterey (Wyckoff, Gardner & Parker, of Watsonville, of counsel), for respondents.

KING, Justice pro tem.

The action is in equity to reform instruments alleged to have been procured by defendants through fraud and mistake. The complaint was demurred to generally, and upon the ground that the action is barred by the provisions of section 338, subdivision 4, and by section 343, Code of Civil Procedure. The demurrer was sustained and, plaintiffs having failed to amend, their default was entered and judgment rendered for defendants. From this judgment the appeal is taken.

The complaint alleges in substance: That plaintiff Rosanna Cooper Wilson, born December 7, 1859, and plaintiff Delfina E. Cooper, born February 7, 1862 (the latter being now represented by Rosanna C. Wilson as executrix), are children of J. B. H. Cooper, being the issue of his marriage with Iduveguez Soto Cooper, his first wife, now deceased. That J. B. H. Cooper married defendant Martha M. Cooper March 12, 1871, and that the issue of this marriage was J. B. R. Cooper, Abelardo E. Cooper, Alfred H. G. Cooper and Alice F. Dillon (née Cooper). That J. B. H. Cooper died June 21, 1899, leaving as his heirs at law his widow Martha M. Cooper and the six children. That upon the marriage of their father to Martha M. Cooper the plaintiffs were taken into the home of their father and stepmother and lived there until the marriage of plaintiff Rosanna (about 1880), from which time until 1886, plaintiffs lived on a ranch of their father in Monterey county, "not far from the family home in Castroville in said county." In 1886 plaintiffs moved to Fresno, where they have lived ever since 1886. That during all the time, from 1886 to the time of their father's death (1899), he kept in touch with plaintiffs by occasional correspondence. That shortly after the death of J. B. H. Cooper said Martha M. Cooper and her son J. B. R. Cooper conspired to cheat and defraud plaintiffs out of their rightful inheritance and share in the estate of their father, and to procure the entire estate for themselves and the other children of Martha M. Cooper. That "pursuant to and in furtherance of said conspiracy and fraudulent scheme" said J. B. R. Cooper visited plaintiffs on July 8, 1899, and "falsely and fraudulently and positively represented" that their father had made deeds to all his real property; that he left no cash and no

will, and that the will which he had theretofore made had been revoked, and that only the personal property remained to be administered; that his mother and himself proposed to make a liberal settlement with plaintiffs for their interests as heirs in the personal property left by deceased and to give them more than their share; that he then presented to them for signing four instruments, one of which was executed by plaintiff Rosanna Wilson and her husband, another by Delfina E. Cooper (the other two being immaterial). These instruments in consideration of $10 conveyed to J. B. R. Cooper "All real property in the State of California of which J. B. H. Cooper, deceased, was ever at any time seized or possessed." The instruments were acknowledged and were recorded July 10, 1899. Thereupon he paid them $2,500 each in cash and a note for $2,000 each signed by J. B. R. Cooper and Martha M. Cooper.

It is further alleged that upon this visit to Fresno, J. B. R. Cooper after greeting plaintiffs with kisses of affection and joining with them in mutual expressions of a common sorrow in the loss of their father, and with a design to take advantage of the affection held by the plaintiffs for Martha M. Cooper and J. B. R. Cooper and the remaining children of the family, and to profit by the trust and confidence reposed in him and the said Martha M. Cooper, he made the representations above stated. He asked plaintiffs to trust him and his mother and promised that he would look after all their interests, and that he and his mother would, as administrators of decedent's estate, take charge of everything pertaining to plaintiffs' rights and interests better than they or any other person could do, reminding the plaintiffs of the fact (which plaintiffs both knew) that he was acquainted with the law, and that he knew the situation and was in a position to protect plaintiffs' rights and interests in all respects, and he promised to attend to all papers and matters for them in the course of the administration of said estate; and further stated to them that the employment of any attorney by them would be a useless and unnecessary expense, and besides that it would lead to undesirable publicity; that he and Martha M. Cooper at all times concealed the fact that J. B. H. Cooper had, in fact, made a will, and concealed the fact that decedent had appointed said J. B. R. Cooper and said Martha M. Cooper executors thereof, positively representing all such matters to the contrary; and said J. B. R. and Martha M. Cooper also concealed the fact that he and said Martha M. Cooper had during the time of such negotiations, that is between June 24, 1899, and July 15, 1899, either filed said will in the court at San Francisco or had the filing thereof then in contemplation; and at all times J. B. R. and Martha M. concealed the fact that any will had ever been filed by them, whereas, plaintiffs later learned that a will of decedent was filed by them in San Francisco in June or July, 1899, the exact date whereof and the exact character of which will are unknown to plaintiffs because of the false and fraudulent representations aforesaid, and also because of the destruction of all public records of said estate in the San Francisco fire of April, 1906; that plaintiffs were never advised or notified of the filing of any will of decedent or of any proceedings in probate; plaintiffs believing that the estate left by decedent was small, and believing also in the assurances of said J. B. R. that plaintiffs were to receive their fair share therein upon such settlement, and that all notices, matters, and papers of every character would be looked after and attended to by said J. B. R. for plaintiffs, according to the representations, promises, and assurances aforesaid.

It is further alleged that in order to induce the plaintiffs to execute the instruments before mentioned and in furtherance of said fraudulent scheme and purpose, J. B. R. represented to plaintiffs that the instruments were intended to convey all the right, title, and interest of plaintiffs in the real property which their father had formerly owned and which he had conveyed to Martha M. and her children, and were, in effect, a mere release or quitclaim to such real property and were sufficient to effect the settlement of all rights of plaintiffs to such personal property left by deceased; that relying upon said false, fraudulent, and deceitful representations, and believing them and each of them to be true, and not knowing the true facts, because thereof and also because of said fraudulent concealments by said J. B. R. and said Martha M. Cooper, the plaintiffs and George A. Wilson, husband of plaintiff Rosanna, executed and delivered said instruments.

It is also alleged that $9,000 paid upon said settlement was not an unconscionable or inequitable consideration for plaintiffs' shares of the personal property left by decedent, and plaintiffs do not complain of such settlement. It is, however, alleged upon information and belief, that the real property of which decedent died seized and possessed was at the time of his death of the reasonable value of between $400,000 and $500,000; that said sum of $9,000 was understood by plaintiffs and intended to be consideration for said personal property interests of plaintiffs in the estate of deceased, and said sums were never intended to be received nor were the same received as consideration for the interests of plaintiffs as heirs at law of deceased in the real property left by him. That in fact, by reason of the mistake of plaintiffs, induced by and through the false and fraudulent representations and concealments hereinbefore alleged, and which mistake defendants J. B. R. and Martha M. Cooper knew and/or suspected, said instruments did not truly express, nor does either

truly express the intention of the respective parties thereto; that neither of said instruments was intended to convey any interest of plaintiffs or either of them in or to any of the real property of said deceased, and to which plaintiffs, or either of them, would be entitled by right of succession as heirs at law of said deceased.

It is then alleged that the reasonable value of the rightful share of plaintiffs in the personal property of the estate of deceased constituted full and adequate consideration for the sums paid plaintiffs; and that therefore said instruments, so far as they purport to convey any interest in the real property left by decedent, are, and each is, supported by no consideration whatsoever, and wholly inadequate, unconscionable, and void.

Then follows an allegation that the real property in question was included in a decree of distribution of the estate of decedent; and an allegation on information and belief that to procure said decree the defendant Martha M. Cooper falsely testified before the superior court in San Francisco that she, the widow, and her four children were the only children of deceased and his only descendants, and that said Martha M. and her four children were all in court at the time of making said decree, and all of her children knew of and abetted the giving of this false testimony, "and each and all of them took under said decree with full knowledge of plaintiffs' said rights and interests as heirs of said decedent, and with full knowledge of the false and fraudulent testimony given in said cause and of the fraud and wrong thereby consummated against plaintiffs." It is then alleged that the distributees under said decree of distribution took the undivided interest of each of the plaintiffs to said real property in trust for the plaintiffs; and that they now hold the same in trust for plaintiffs, and that a like trust is impressed on the rents, issues, and profits thereof.

Then follows an allegation that said real estate has increased in value to between $650,000 and $750,000.

And in respect to the trusts and confidences reposed by plaintiffs in Martha M. and J. B. R. Cooper, and to the discovery by plaintiffs of the false and fraudulent character of the representations and concealments charged, it is alleged: That plaintiffs were treated by their father and his wife Martha M. with the same kindness and parental affection as were the other children of the family; that J. B. R., born in 1872, lived in the same family with plaintiffs and the other children and grew up with them, and plaintiffs, by reason of said family relations with Martha M. and J. B. R., acquired a sincere affection for them and reposed trust and confidence in them; that during the six years while plaintiffs lived "not far from the family home in Castroville" the same trust, confidence, and affection continued; and it also continued thereafter up to, on, or about September 18, 1928, "when plaintiffs received the first intimation of the fraud and deceit practiced upon plaintiffs by said Martha M. and J. B. R. Cooper." Briefly, the allegations regarding this first intimation are: That visiting their stepmother September, 1928, they made a casual inquiry concerning the will which decedent had read to plaintiffs in 1878 in presence of Martha M. and in which plaintiffs and the other children of deceased were treated approximately alike. That on said inquiry Martha M. became greatly excited and angry and told them they had better go. Plaintiffs then surmised for the first time that there was fraud, deceit, and treachery in the whole transaction, and together they proceeded as diligently as they could to uncover the truth in respect thereto. They searched the records, finding the San Francisco records destroyed, as before alleged, and found that decedent had died seized and possessed of the real property which is the object of the action. They also discovered that the representations and statements made by J. B. R. and the concealments made by him and Martha M. Cooper made and carried out while acting as executors of said estate and under the trusts and confidences reposed by plaintiffs in them for many years were wholly false and fraudulent. And plaintiffs learned from a friend to whom they telephoned that he had read the will which was probated in San Francisco and that said will made no mention of plaintiffs, "thus further revealing to plaintiffs the false and fraudulent character of the representations and concealments and acts of said Martha M." and J. B. R. Cooper aforesaid. They further allege that neither Martha M. nor J. B. R. Cooper ever revealed to plaintiffs that decedent left a will or left any real property, but kept said facts covered and concealed at all times and by their positive, false, and fraudulent representations to the contrary, and by their said concealments, so fraudulently guarded from plaintiffs, and because defendants thereby induced the belief that the estate left by decedent was small, and caused plaintiffs to refrain from making any independent inquiries, plaintiffs were placed in a position where they could not discover said fraud earlier without entertaining suspicions and a mistrust of defendants unwarranted in view of the representations and assurances made by them while acting under and in apparent pursuance of the trusts and confidences aforesaid.

Then follows an allegation that the various defendants have or claim some interest in the real property described which interest is alleged to be subordinate and subject to that of plaintiffs as to one-ninth each.

The prayer is that plaintiffs be adjudged entitled to one-ninth interest each in the real

property described; that the two instruments mentioned in the complaint be reformed and corrected; that all claims of the defendants be decreed subordinate to the interests of plaintiffs; and that defendants be required to account for rents, etc.

It will be noted that: (1) All the false representations and statements charged are alleged to have been made by J. B. R. Cooper. (2) The concealments are charged to both J. B. R. and Martha M. Cooper. (3) It is alleged in the latter part of the complaint that the representations and concealments were made by these two defendants "while acting as executors of said estate." This is evidently an error, at any rate as to the representations made by J. B. R. Cooper, for the representations were made July 8, 1899, while the allegation as to the admission of the will to probate is that "between on or about June 24th and July 15th, 1899," J. B. R. and Martha M. Cooper either filed said will in the superior court "or had the filing thereof then in contemplation"—so that there is no allegation that he was then an executor. (4) That J. B. R. Cooper was about eight years old when the plaintiffs ceased living with the family and about fourteen at the time plaintiffs moved to Fresno, and there is no allegation that plaintiffs ever saw him from this time until July, 1899, when as a young man, aged 27, he made the representations complained of. (5) That the complaint does not aver that plaintiffs ever saw Martha M. Cooper from 1886, when they moved to Fresno, until 1928, when plaintiffs asked a casual question about a will that had been read to them fifty years before. (5) That J. B. H. Cooper, father of plaintiffs, died testate in 1899, and his will was probated in San Francisco, and a decree of distribution was made distributing his estate to his widow and her children—but nowhere is there an allegation as to the terms of this will. (6) That at the time the representations complained of were made by J. B. R. Cooper, the plaintiffs were respectively aged 39 and 37 years and at this time, being also the date of the execution of the instruments of conveyance, the husband of one plaintiff at least knew of the transaction, because he signed the paper with his wife. No allegation is made that plaintiffs did not read the papers which they respectively signed, nor that either were in any way of defective mentality.

While the complaint alleges many "concealments" by Martha M. Cooper from the appellants, no statement of any act by her is alleged tending to show a concealment. On the contrary, the first conversation which appellants allege with her after their father's death occurred in 1928, which is 29 years after his death and just at the time appellants first had their suspicions aroused.

Appellants' claim is that under the circumstances alleged the defendants became and are involuntary trustees of the interests of the appellants in the property described. It is argued that J. B. R. Cooper "besides being executor of the estate voluntarily assumed a relation of personal confidence by agreeing to look after the interests of the plaintiffs in the estate, and hence he was a trustee for the plaintiffs as well as an agent for them." However, the complaint does not show that he was an executor at the time of making the representations, and does show that the plaintiffs at that time parted with their interests, and the promise to look after their interests was idle.

[1, 2] This case rests entirely upon the theory that J. B. R. Cooper and Martha M. Cooper occupied with the plaintiffs and appellants a confidential relation. In Roberts v. Parsons, a Kentucky case reported in 195 Ky. 274, 242 S. W. 594, at page 596, is a discussion of "Fiducial Relation" as distinguished from "Confidential Relation," in which the court says: "Former being more correctly applicable to legal relationships between the parties, such as guardian and ward, administrator and heirs, trustee and cestui que trust, principal and agent, and other similar ones, while the latter might include them and also every other relationship wherein confidence is rightfully reposed and is exercised, among which," etc. California cases refer to the former class as a "fiduciary relation." No allegation in the complaint brings the relation between J. B. R. Cooper and/or Martha M. Cooper on the one hand and appellants on the other within the relation defined as fiduciary. In this case is a stepmother and a half-brother, not administrator and heirs, for they were not appointed when the deeds were executed; not co-owners, for it is not alleged the decedent left appellants any interest in the property by his will (in fact, whatever reference is made to the contents of the will is to the effect that appellants were not mentioned in it); then the relation was not fiduciary. Was it confidential? As to Martha M. Cooper no allegation is made of any representation, nor was any concealment made, if at all, until after the deeds in question were executed. As to J. B. R. Cooper, the complaint shows no communication between him and the appellants from the time he was fourteen years old until the very date of the deeds. They allege that appellants "lived in the same family" with him, "acquired sincere affection" for him, and "reposed trust and confidence" in him during the time from his birth in 1872 till the marriage of plaintiff Rosanna in 1880. That during the period from Rosanna's marriage till 1886, while plaintiffs lived on a ranch "not far from the family home in Castroville * * * the same trust and confidence and affection continued"; that after plaintiffs removed to Fresno in 1886, and until September 18, 1928, "The said trust and confidence and affection existed and continu-

ed." This allegation is made though the only occasion on which appellants saw or met J. B. R. Cooper, so far as the complaint discloses, was on July 8, 1899, when he visited them in Fresno, "greeted appellants with kisses of affection," joined with them in mutual expressions of a common sorrow in the loss of their father, and then made the fraudulent representations complained of and obtained the documents which are the basis of this action. These allegations do not seem to the court to show that a confidential relation existed, and without such a showing the complaint is insufficient and the demurrer was properly sustained.

[3] Respondents further urge that laches is shown which also justifies the sustaining of the demurrer, and in this we agree.

Objection is made by appellants to the terms of the decree of distribution made by the court in the probate proceeding; but in the view of the case, as we see it, a consideration of this point is unnecessary.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

126 Cal.App. 729

FEENEY v. CLAPP et al.

Civ. 8374.

District Court of Appeal, First District, Division 1, California.

Oct. 11, 1932.

Rehearing Denied Nov. 10, 1932.

Hearing Denied by Supreme Court Dec. 8, 1932.

1. Appeal and error ⇐1008(1).

In suit for rent against defendants as partners, whether nominal lessee signed for partners *held* for trial court.

2. Principal and agent ⇐136(3).

Where landlord is justified in believing he is dealing with nominal lessee's principals in renting property, principals also are liable, though not signing lease.

3. Principal and agent ⇐136(3).

In suit against partners for rent under lease signed only in name of partners' agent, recovery could be had against agent.

4. Frauds, statute of ⇐144.

Party relying on statute of frauds to defeat contract may, by conduct raising equity independent of contract, be estopped to make that defense (Civ. Code § 1624).

5. Frauds, statute of ⇐144.

In suit for rent under lease within statute of frauds, defendant taking possession and paying rent waived statute of frauds as defense (Civ. Code, § 1624).

Appeal from Superior Court, San Benito County; H. G. Jorgensen, Judge.

Action originally by Margaret Feeney, since deceased, for whom Thomas S. Feeney, as administrator of her estate, was substituted, against W. O. Clapp and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

James Snell, of Hollester, for appellants.

Wyckoff, Gardner & Parker, of Watsonville, for respondent.

PER CURIAM.

The above action was brought by Margaret Feeney, since deceased, to recover installments of rent under a lease alleged to have been entered into by defendants on October 12, 1924. The answers admitted the execution of the lease by defendant Clapp, but denied its execution by or on behalf of defendants Woodruff, who were copartners doing business under the name of F. H. Woodruff & Sons.

Mrs. Feeney was the owner of a ranch in San Benito county known as the Feeney place, which contained about 116 acres. Defendants Woodruff were engaged in the business of growing and marketing seeds, and had their principal place of business in Milford, Conn. They contracted with landowners in California for the growing of seeds, and occasionally leased lands themselves for that purpose. Defendant Clapp from the year 1920 to the date of trial was the representative of the firm in California, where the Woodruffs occasionally visited in connection with the business. On December 29, 1923, Mrs. Feeney leased the land, defendant Clapp being named in the lease as lessee, for the term of one year from November 1, 1923, the lessee having the option to extend the term for an additional three years. While the testimony is conflicting, it sufficiently appears that the rent under this lease was paid by defendants Woodruff, who furnished seed for planting the land; that all the crops grown thereon were delivered to the latter, and no accounting therefor was made to Clapp; further, that one of the partners made statements to the effect that the firm was the real party in interest under this lease. Clapp admitted that in August, 1924, the Woodruffs advanced to him the sum of $10,000, for which he gave no evidence of indebtedness, and that the amount was never repaid. It was also shown that in 1923 there was deposited in Clapp's bank account the sum of $40,000, and in 1924 the sum of $29,500, the proceeds of checks drawn upon Connecticut banks with which the Woodruffs did business.

The lease made no provision for the furnishing of water for irrigation, and in the

spring of 1924 the crops on the land were suffering from lack of moisture. It was shown that the firm was so advised by Clapp, and W. H. Woodruff, one of its members, thereupon came to California. According to the testimony, the latter consulted with Mrs. Feeney and her sons with regard to the sinking of a well upon the property. In these conversations Woodruff mentioned the fact that the lease contained an option for an additional term of three years, stating that they would not exercise the same, unless assured of sufficient water for irrigation purposes. After considerable negotiation, Mrs. Feeney agreed to pay a sum not to exceed $1,000 toward the cost of sinking a well if the Woodruffs would exercise their option, whereupon W. H. Woodruff agreed that this should be done. Mrs. Feeney's agent then proposed that a written agreement to that effect be prepared in which the firm members should appear as parties. Woodruff stated that, if the agent insisted, the partners would take the lease in their own names, but suggested that, inasmuch as Clapp appeared as lessee in the original lease, the agreement be made in his name. After further discussion Woodruff stated: "Well, if I am here we will execute the lease in our name; if not I will see that written authorization will be left with Clapp." A few days later Woodruff and the agent mentioned met again on the land. Woodruff stated that he expected to leave shortly for the East, and, in reply to the suggestion that he would be unable in that case to execute the new lease as had been agreed, said, "No, but I have left written authorization with Mr. Clapp." It appears, and the court found, that no such authorization was executed. It was further found—and the evidence supports the finding—that Mrs. Feeney expended the sum mentioned and executed the new lease in reliance upon the representation and in the belief that Clapp was acting for the firm. The work proceeded on the well, but Woodruff left California before the new agreement was drawn. In October, 1924, Mrs. Feeney's agent prepared a new lease for the term of three years from November 1, 1924, and this also contained Clapp's name as lessee. The new lease was executed by the latter and Mrs. Feeney, who in the meantime had advanced about $900 toward the cost of the well in the form of credits on the rent which had become due. The rent was made payable in installments in November and September of each year after the date of the lease, and the installments were paid until November, 1926, when default was made. There was evidence that the rent paid thereunder was by checks drawn upon the bank account of the firm, or from funds furnished by it and deposited to Clapp's account; also that the crops were shipped to the firm, which made no accounting therefor to Clapp, nor did the latter receive anything in the way of a price therefor. The court found that the rent was payable by defendant Clapp and defendants Woodruff, doing business as aforesaid, and entered judgment against the three for the amount.

Defendants have appealed therefrom, and contend that the court's findings that Clapp was the agent for the firm, that Woodruff agreed that the lease should be executed in Clapp's name or negotiated to that end, and that the firm is estopped to deny its liability under the lease, are unsupported; also that the court erred in admitting certain evidence over objection. Defendants further claim that the court erroneously found Clapp to have been a member of the firm; but this can be disposed of at the outset by stating that the findings bear no such construction.

[1] In addition to the above, it was testified that Woodruff stated that the crops growing in the spring of 1924 belonged to the firm, and that the firm had leased the ranch, "and had a chance for a three-year lease on the place." The record discloses some conflict respecting the ownership of the bank deposits mentioned, but it was sufficiently shown that a portion thereof was firm property, and, in addition, Clapp's testimony in this regard was impeached by evidence which indicated that his memory was faulty. Other circumstances appear tending to show that, contrary to defendant's contention, Clapp was not operating on his own responsibility, but that the firm members were the real parties in interest.

Without further discussing the voluminous testimony in the case, it appears to us that the findings complained of are sufficiently supported. It is true the testimony is sharply conflicting, and inferences in support of defendants' contentions might fairly be drawn therefrom, but these questions were for the trial court, and under such circumstances its conclusions either way are conclusive on appeal. Aronson & Co. v. Pearson, 199 Cal. 295, 249 P. 191; Wing v. Kishi, 92 Cal. App. 495, 268 P. 483.

[2, 3] It is clear from the evidence that Mrs. Feeney did not extend credit exclusively to Clapp, notwithstanding that the lease was made in his name, and that she justifiably acted upon the belief that she was also dealing with his principals. Where such is the case, the rule is well settled that the principal is liable (Geary St., etc., R. R. Co. v. Rolph, 189 Cal. 59, 207 P. 539; Rubin v. Platt Music Co., 92 Cal. App. 203, 268 P. 396; Milonas v. Sarantitis, 109 Cal. App. 343, 292 P. 978. See, also, Pacific, etc., Homes, Inc., v. Seeber, 205 Cal. 690, 272 P. 579, where Ferguson v. McBean, 91 Cal. 63, 27 P. 518, 14 L. R. A. 65, cited by defendants, is criticized); and where, as here, the agent intentionally made himself a party to the contract, recov-

ery can be had against him as well (Marshall v. Bernheim, 64 Cal. App. 283, 221 P. 401).

[4, 5] The firm members claim that the contract alleged was within the statute of frauds (Civ. Code, § 1624), and consequently that they were not bound, but it is plaintiff's position that they were estopped to assert the statute. On this question the finding was that defendants Woodruff immediately after the execution of the lease entered into possession, paid the rent, and received the crops and other benefits thereunder; and this finding is also supported. Although a contract may be within the statute of frauds, yet if the conduct of the party relying thereon has been such as to raise an equity outside of and independent of the contract, he may be estopped to make that defense (12 Cal. Jur. Statute of Frauds, § 102, p. 934, and cases cited; Borel v. Rollins, 30 Cal. 408), and under facts similar to those of the present case the principal was held to be estopped to aver the invalidity of the lease (Heffernan v. Davis, 24 Cal. App. 295, 140 P. 716; Chain v. Ehrman, 92 Cal. App. 334, 268 P. 438; Laack v. Dimmick, 95 Cal. App. 456, 273 P. 50).

Defendants complain of rulings upon objections to questions asked of defendant Clapp on cross-examination, and to testimony of admissions and conduct by them at different times during the period over which these transactions extended. We have examined the record, and are satisfied that no prejudicial error was committed.

There is likewise no merit in the claim that the record contains no evidence of ostensible authority in defendant Clapp. On the contrary, the conclusions of the trial court in this respect are amply supported.

After an examination of the evidence, we are satisfied that the findings are fully sustained, and that no error has been shown which would justify a reversal of the judgment.

The judgment is affirmed.

126 Cal.App. 739

PEOPLE v. STANDLEY.

Cr. 2195.

District Court of Appeal, Second District, Division 1, California.

Oct. 11, 1932.

Rehearing Denied Oct. 25, 1932.

Hearing Denied by Supreme Court Nov. 10, 1932.

1. Forgery ⇐44(½).

Evidence *held* to sustain finding that accused feloniously filed, registered, and recorded forged deed which, if genuine, might lawfully be registered or recorded (Pen. Code, § 115; St. 1915, p. 1932 et seq.).

2. Forgery ⇐14.

Actual effect of forged deed on record title of land registered under Torrens Title Law *held* immaterial in prosecution for forgery; gist of offense being offering forged deed for record (Pen. Code, § 115; St. 1915, p. 1932 et seq.).

3. Criminal law ⇐576(5).

Accused, who failed to object to any continuances during trial before court, and was not prejudiced thereby, could not complain that he was not granted a speedy trial.

4. Statutes ⇐105(1).

Constitutional provision that act shall embrace but one subject, which shall be expressed in title, must be liberally construed (Const. art. 4, § 24).

5. Statutes ⇐109.

Reasonably intelligent reference to subject to which act is addressed is sufficient without abstract or catalogue of contents of act (Const. art. 4, § 24).

6. Statutes ⇐118(1).

Title of statute penalizing forgery, stealing, mutilating, and falsifying judicial and public records and documents *held* sufficient compliance with constitution regarding titles of acts (Pen. Code, § 115; Const. art. 4, § 24).

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Fred W. Standley was convicted of offering false and forged deed for filing, registration, and recording, and he appeals.

Affirmed.

James V. Brewer, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

TAPPAAN, Justice pro tem.

The information upon which appellant was tried contained ten counts. The trial was had before the court sitting without a jury, and appellant was found not guilty upon nine counts and guilty upon one count—count VII. From the judgment entered against him upon count VII, and from the order denying his motion for a new trial, appellant takes this appeal.

The count of the information upon which appellant was found guilty charged that appellant "did willfully, unlawfully, feloniously and knowingly procure and offer to be filed, registered and recorded, a false and forged

instrument, to-wit: a certain purported deed which by its terms purported to convey from E. L. Stevenson, grantor, to S. Judson Manning, grantee, certain real property, to-wit: Lot 83, Tract 8921, which said deed was recorded on February 27, 1930, in Book 9732, page 290, official records of Los Angeles county, said purported deed being an instrument which, if genuine, might be filed, registered or recorded under the laws of the state of California."

The crime thus charged is the felony defined by section 115 of the Penal Code, this section being one of the sections contained in chapter 4 of the Penal Code, entitled "Forging, Stealing, Mutilating, and Falsifying Judicial and Public Records and Documents." The trial, which culminated in appellant's conviction, occupied the trial court for many days, and the record presented upon this appeal contains well over two thousand pages of transcript. There is contained in the record much that is not germane to this inquiry, but it was necessary for this court to examine the entire record, as presented, by reason of the fact that the testimony of a majority of the witnesses, while presented primarily as to a particular count, also was of a general nature, and applied to all of the counts involved in the information. In summarizing the evidence, no attempt will be made here to quote the actual language employed by the several witnesses. Where it is deemed necessary to make direct quotations, they will be indicated in the usual manner.

It appears from the record that the appellant, who is described by his counsel as a lawyer who had never been disbarred, had been for many years engaged in that particular branch of the real estate business known as a "Trader." It would also appear that a "Trader," as used here, is one engaged in dealing in and with so-called "equities" and trust deeds. Appellant maintained offices in a number of buildings in the city of Los Angeles, and in 1922 or 1923 moved into certain offices in the Western Mutual Life Building. Appellant was an occupant of these same offices up to the time of his arrest. It is appellant's contention that, at all times while he was an occupant of these offices, he was associated therein with E. L. Stevenson, S. Judson Manning, and Elmer C. Manning. The evidence discloses that business was transacted in these offices under a number of different names and styles. From the names that appeared upon the door of the offices and from the names upon the office stationery made use of by the typists employed there, it appears that beside appellant's name, the names of Manning Bros., Stevenson Realty Company, California State Realty Association, and S. Judson Manning were made use of in the transaction of the business carried on there. Appellant testified that he was employed by some of the above-named associations as office manager. The suite of offices consisted of three connected offices, one of which was used as a reception room and in which there was an office safe. In this reception room the typist received telephone calls and "buzzed" the other offices. As to the method of conducting the reception room, the testimony of the two typists, who were in charge thereof for a period of about five years just prior to appellant's arrest, is of interest. These witnesses, one of whom was employed at the time of appellant's arrest, and the other about a year previous, and for a period of some three or four years, were both hostile to the prosecution by whom they were called. In fact, one of them only appeared after an extended search had been made for her, and after a bench warrant had been issued requiring her attendance in court. Their testimony, in so far as it is material here, was very similar as to facts and circumstances. They both occupied, during the period of their employment, the reception room and operated the telephone. The doors from the reception room which connected it with the other offices in the suite were at all times kept locked; that appellant had access to all of the offices and the safe in the reception room, dictated letters which were by them written upon stationery having printed thereon the names hereinbefore enumerated as occupants of the offices; that this stationery was given them by appellant and the letters when written were delivered to him; that during the time of their respective employment in the offices, they had never seen any person of the name of either E. L. Stevenson or S. Judson Manning; that during said time, no one was identified to either of them as E. L. Stevenson or S. Judson Manning; that letters were received at the office addressed in these names and were left in a place accessible to appellant. It appeared from the testimony of other witnesses that, when persons called and asked to see the persons just named, the interview was had with a person identified by the witness as the appellant. A witness testified that a person representing himself as E. L. Stevenson rented from her a house and gave a check signed E. L. Stevenson. This witness identified appellant as that person. A radio salesman identified appellant as Lane Stevenson, who purchased a radio delivered to this same house. The rent check and radio contract were in evidence in the case and were made use of by the experts examined. A witness testified that he and one Louis Wade Stevenson had had desk room in the offices occupied, at different times, by appellant, and that this Stevenson had had difficulty with appellant over his (Stevenson's) name at one time. This Stevenson died in 1927, some years before the events here involved took place. Evidence was introduced that E. L. Stevenson

had been a party defendant in some twelve suits filed in the superior court and had been served personally in but one of these actions. It is a somewhat significant fact in this connection that Stevenson was served with process by S. Judson Manning, and that the notary before whom the affidavit was acknowledged was appellant. Appellant testified that Stevenson and Manning made use of the office at night, and in support of this contention, offered the testimony of a witness, Miss MacLean, who stated that she was at the office at night on a number of occasions and saw E. L. Stevenson there. The relationship of this witness to appellant is not fixed with certainty by the record. One witness described her as an "auditor." Some of her jewelry was found in the office safe. A divorced wife of appellant also testified that, over a long period of time and up to within a few months of the trial, she was in the office of appellant and wrote letters for him in the evenings, but that she had never at any time seen E. L. Stevenson there or elsewhere. A number of witnesses besides Miss MacLean and appellant testified to the existence of E. L. Stevenson in the flesh. In most instances they were introduced by appellant, although in some few cases they claimed to have met him years before trial and to have had business dealings with him. It is to be noted that these witnesses, when requested to describe his personal appearance, gave a rather colorless and noncommittal description. One of appellant's witnesses was an exception to this, and described Stevenson as having a face "if seen once would never be forgotten; his eyes were slant; oriental; a Japanese face." In view of this somewhat startling divergence in the opinion of the witnesses as to the personal appearance of E. L. Stevenson, and that fact, taken in conjunction with the fact that in most of the instances "Stevenson" was introduced by appellant to the witnesses, might lead to the conclusion that more than one person may have co-operated with appellant as "E. L. Stevenson" as the exigencies of the several instances requiring his presence in person demanded.

A large part of the record is taken up with the testimony of two handwriting experts; one a witness for the prosecution, the other for appellant. The prosecution's expert testified that appellant wrote the grantor's name —"E. L. Stevenson," upon the deed which is the basis of the charge upon which appellant was convicted, while appellant's expert testified that appellant did not write the name thereon. One interesting sidelight upon this testimony was the production, by appellant at his office during the time of the trial, of a person who wrote the name "E. L. Stevenson" before appellant's expert. This name, so written, appellant's expert declared to have been written by the same person who wrote the same name to the deed in question. The expert for the prosecution testified that it was not written by the same person. It should be noted that, although an E. L. Stevenson was produced at the trial by the prosecution, who testified that he had not written the signature to the deed in question and did not know appellant and had not authorized the use of his name, that the E. L. Stevenson, whom appellant contends signed the questioned deed, did not appear at the trial, although appellant saw him, he says, during the course of the trial. Appellant explains this nonappearance of Stevenson as due to the fact that he was named as a defendant in the information with appellant. The record shows that during the trial the charge as against Stevenson was dismissed by the people. In view of the fact that appellant contends in his brief filed in this appeal that "E. L. Stevenson" might have been appellant's lawfully used nom de plume, the prosecution seemed justified in refusing the demand of appellant's counsel that E. L. Stevenson be granted immunity. There was much evidence introduced at the trial which was of a general nature and related to the condition and conduct of the offices occupied by appellant; that checks and records were found in the office and safe in the names of Stevenson and appellant; that there were found in the offices a great number of papers affecting title to real property; that in the same was a blank instrument signed with Stevenson's name; that witnesses called upon appellant at the offices to secure the release of their property from clouds upon their titles caused by recorded instruments. The deed in question, and upon which the charge against appellant is based, was found in appellant's office, and was an instrument which, under our laws, could be recorded and in fact was recorded. A check in amount sufficient to cover the recording of the deed in question and another instrument recorded at the same time and signed by appellant, was also found in the same offices; that appellant had access to all the three offices in the suite and at times used them all; that E. L. Stevenson had no record title to the lands described in the questioned deed. The above statement of facts is somewhat lengthy, but seems justified when considered in comparison with the so-called "Narrative" filed by appellant, which contains 514 pages.

[1] The evidence presented at the trial, as will be seen from the foregoing summary, is conflicting as to matters of fact, but from the record as a whole it cannot fairly be said that there is not substantial and convincing evidence to support the findings of the trial court. The evidence is not of such a character as would justify this court in reversing the judgment.

Appellant's first contention is that the evidence is insufficient to support the verdict

rendered by the court, and is predicated upon the fact that the land described in the deed in question had been registered under the so-called "Torrens Title Law" (St. 1915, p. 1932 et seq.), and that the mere recording of the deed as shown by the evidence would not affect the title; and that, as there was no evidence that the deed was registered, the people's case must fail. As a corollary appellant argues that as the deed was not, or could not be registered under the Land Title Law, that no one could be defrauded, which defrauding appellant asserts is a necessary element of the crime charged against him.

[2] The sufficiency of the information was not questioned by demurrer or at any stage of the trial by appellant, and in charging the offense in the information, the language of section 115 of the Penal Code is substantially employed. The theory of the prosecution was that the deed purporting to be signed "E. L. Stevenson" was in fact signed by appellant. The crime with which appellant was charged, as defined in the section of the Penal Code hereinbefore referred to, consists in the offering for recordation of an instrument, which is either false or forged, when such instrument is one which, when genuine, is capable of recordation under law. The legislative intention in the enactment of the section is clearly one to protect the integrity of our system of recordation of instruments and the vice interdicted is the placing of false or fictitious instruments of record which might have the effect to cloud the record. Under the section the actual effect of the false or fictitious instrument upon the record title is immaterial to the crime charged. The court found upon evidence of a substantial nature that the name signed to the deed in question, E. L. Stevenson, was forged and placed there unlawfully by appellant, and that this deed described a specific parcel of real property and was acknowledged before appellant as notary, so that apparently it was capable of being recorded under our laws (Civ. Code §§ 1161, 1169, 1170, 1181, 1185, 1193, 1213), and was in fact offered for record by appellant and duly recorded as a deed. The gist of the offense charged is the offering for record of a false or forged deed. There is evidence in the record to support this finding, whether Stevenson be fact or fiction. Although it is true that under other sections of our Penal Code defining forgery, there are included as necessary elements of the crime charged thereunder, allegations that the instrument was executed with the *intent to defraud* and was in fact *fictitious*. In the case of People v. Chretien, 137 Cal. 450, 70 P. 305, 307, the court, in passing upon the sufficiency of an information filed under section 470 of the Penal Code, said (pages 453, 454 of 137 Cal., 70 P. 305): "We now hold that the forgery of any fictitious instrument mentioned in section 470 and not mentioned or included in section 476, falls within the former section. We further hold that the information brought under section 470 is sufficient without alleging that the deed was fictitious. It is only where the information is laid under section 476 that the fictitious character of the instrument must be alleged. As we held in People v. Eppinger, 105 Cal. 36, 38 P. 538, where the instrument is fictitious, and the crime is punishable under section 476, the defendant is entitled to know by the information that it is brought under that section, and not under section 470. And this must be so, for section 470 includes, in terms, the same instruments (as well as many others not therein contained) found in section 476. But it does not follow, nor do we think it true, where the information is laid under section 470, that the fictitious character of the instrument must be alleged if it be an instrument not included in section 476. It is forgery in either case, whether the instrument is fictitious or not; and it is, therefore, immaterial whether the signature is that of a person not in existence or of an existing person, provided the instrument is not mentioned in section 476 or some other section specifically dealing with the offense." The analogy existing between the above-cited case and the instant case, as to the proper interpretation to be placed upon the Penal Code sections involving the term "forgery," is clear.

The section under which appellant is charged, section 115 of the Penal Code, does not require that the act must be done with the intent to defraud another, nor is there any provision therein requiring that any one be defrauded thereby. In this it differs from many other sections of the same Code relating to forgery.

In the case of People v. O'Brien, 96 Cal. 171, 31 P. 45, where the defendant was tried and convicted under section 114 of the Penal Code, making it unlawful for a person not an officer to mutilate or destroy any public record, it was held that, when an act in general terms is made indictable, a criminal intent need not be shown, unless from the language or effect of the law a purpose to require the existence of such intent can be discovered

In People v. Dillon, 199 Cal. 1, 7, 248 P. 230, 232, the case of People v. O'Brien, supra, is quoted, and it is said: "It is sufficient that he intentionally committed the forbidden act. * * * Section 20, Penal Code, is too clear to require juridical support. It provides: 'In every crime or public offense there must exist a union, or joint operation of *act* and *intent*, or criminal negligence.' (Italics supplied.) The only construction that may be placed upon the above-quoted section is that there must be an intent to do the for-

bidden thing or commit the interdicted act. It furnishes no basis for the claim that there must exist in the mind of the transgressor a specific purpose or intent to violate law. If it were so, innumerable statutes would be rendered ineffectual."

The cases of People v. Webber, 44 Cal. App. 120, 186 P. 406, and People v. Baender, 68 Cal. App. 49, 228 P. 536, both presented facts somewhat similar to the instant case, and both involved conviction under the provisions of section 115 of the Penal Code. These cases are conclusive authority in support of the conviction in the case at bar.

[3] From an examination of the record here, it appears that there is no merit in appellant's contention that he was not granted a *"Speedy Trial."* Appellant was placed on trial within the time provided by law, and all continuances had during the course of the trial were with appellant's consent, either express or implied. The record fails to show that, at any stage of the proceeding, appellant made any objection to continuances. Appellant was tried by the court, having in open court waived his right to a jury trial, and further, appellant had waived his right to be placed upon trial within the 60 days provided by law. Appellant now for the first time objects that, during the course of the trial, there were a number of continuances, and that, by reason of these continuances, he was deprived of his right to a *"Speedy Trial."* The record here fails to disclose that in any case where the trial was so postponed, appellant objected to the postponement, or that appellant was prejudiced in his defense by the action of the court in so continuing the trial.

[4-6] Appellant attacks the constitutionality of the section of the Penal Code under which he was convicted. It would appear that his contention that the section is unconstitutional is based upon article 4, section 24, of the Constitution, which provides as follows: "Every act shall embrace but one subject, which subject shall be expressed in its title." This section must be liberally construed, and all that is required to be contained in the title in order to meet the constitutional requirement is a reasonably intelligent reference to the subject to which the legislation of the act is addressed, and it is not necessary that it should embrace an abstract or catalogue its contents. In re Weymann, 92 Cal. App. 646, 268 P. 971. The section attacked by appellant, in our judgment, is constitutional, and does not violate appellant's rights saved him under our Constitution.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; YORK, J.

ALLAN-MacMASTER CO. v. EXTERSTEIN et al.

Civ. 4565.

District Court of Appeal, Third District, California.

Oct. 11, 1932.

Rehearing Denied Nov. 10, 1932.

Hearing Denied by Supreme Court Dec. 8, 1932.

1. Executors and administrators ⇐437(7).

Action to have certain stock restored to estate of decedent commenced within one month from time claim was allowed against estate was not barred.

2. Wills ⇐433.

Will of deceased husband classifying certain stock as property of wife *held* properly excluded in action to have stock restored to estate.

3. Pleading ⇐237(8).

Allowance of amendment to conform to proof in no way changing original cause of action nor prejudicing defendants *held* not error.

Appeal from Superior Court, Los Angeles County; Raglan Tuttle, Judge.

Action by the Allan-MacMaster Company against Pearl V. Exterstein and another. Judgment for plaintiff, and defendant named appeals.

Affirmed.

Walters & Mauk, of Los Angeles, for appellant.

C. A. Ballreich and Walter S. Coen, both of Los Angeles, for respondent.

PARKER, Justice pro tem, delivered the opinion of the court.

This action was prosecuted by plaintiff against appellant in her proper person and also as the executrix of the last will and testament of H. J. Exterstein, deceased. The purpose of the action was to have restored to the estate of said decedent certain assets out of which to pay debts of the estate. Judgment was for plaintiff and this appeal follows:

The grounds upon which appellant urges a reversal include the sufficiency of the evidence.

The property sought to be restored to decedent's estate consists entirely of the shares of stock of certain corporations. The trial court found that the said stock was placed in the name of decedent's wife, appellant herein, at a time when decedent was insolvent and deeply indebted, with numerous unsatisfied judgments standing against him and that no consideration was paid by the wife. Further it was expressly found that the entire scheme of transfer was for the purpose

of and with the intent to defraud creditors, existent and subsequent.

The appeal is presented in a more or less general argument with random references and disputatious conclusions on the case as a whole. The conclusions made lack definiteness, and are, as respondent claims, in the nature of an argument to a trial court or jury.

We have, however, gone carefully through the record and the transcript and find sufficient to sustain the trial court's holding. It was said in Federal Construction Co. v. Brady (Cal. App.) 10 P.(2d) 130, 131: "We might take the case before us, and step by step analyze each fact presented and each argument made, and we would end exactly where we began. We would still have a situation where a trial judge, with the additional advantage of having observed the witnesses, determined the disputed fact with substantial evidence to support his finding."

So here, we find abundant evidence supporting each finding of the court below and a detailed statement of each fact, and an analysis of its probative effect would seem to serve no useful purpose.

Appellant complains that the court erred in its rulings on the admission and rejection of testimony. Error is predicated upon the admission into evidence of certain declarations made by the husband prior to, or contemporaneous with, the transfer of the stock to the wife.

The point made is that these declarations, made without the presence of the wife, are not competent evidence against her. To some extent this might be true. Technically, those statements would not be evidence against the wife, but would be evidence showing the nature of the transfer and the circumstances surrounding the same. However, without further attempt at analysis we may note that litigation affecting the same property has been before the courts on other occasions. The case of Chapman v. Associated Transit Terminal Corp. (Cal. App.) 10 P.(2d) 1023, takes up the same point of evidence and disposes thereof adversely to appellant. A reading of the case will dispose of many other of the points now urged.

On the question of the sufficiency of the evidence appellant argues that the admitted fact is that the husband did not directly sell or transfer the stock, but that, through his efforts and labor, the stock was due him and he directed the corporate officers to place the same in his wife's name. Therefore, argues appellant, there can be no fraudulent transfer or any transfer or sale affecting creditors of the husband inasmuch as the property sought to be reached by the creditors never was the property of the debtor. A mere statement of the point suffices its own destruction.

[1] Appellant further urges the statute of limitations in that the action was not commenced within the three-year period following the transfer. It is conceded that the action was commenced within one month from the time the claim of plaintiff was allowed against the estate of the decedent. This satisfies the statute. Forde v. Exempt Fire Company, 50 Cal. 299; Scholle v. Finnell, 166 Cal. 546, 137 P. 241.

[2] Appellant complains further of the trial court's ruling excluding the will of the husband from evidence, through which it was attempted to show that the decedent had classified the disputed property as separate property of the wife.

Obviously, the husband's ex parte declaration, through testament or otherwise, could not determine the character of the property.

[3] Appellant lastly urges error in the allowance of certain amendments to conform to the proof. The effect of these amendments in nowise changed the original cause of action, nor in anywise prejudiced defendants. Judgment affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

127 Cal.App. 79

MILLER & LUX, Incorporated (a Corporation), Plaintiff, Cross-Defendant and Respondent, v. W. W. STARKEY and Leona G. Starkey (his Wife), Defendants, Cross-Complainants and Appellants.

Civ. 1034.

District Court of Appeal, Fourth District, California.

Oct. 17, 1932.

Motion to dismiss appeal by defendants from a judgment of the Superior Court of Fresno County, H. Z. Austin, Judge.

William Weinstein, of Los Angeles, for appellants.

J. E. Woolley, of San Francisco (Vincent J. McGovern, of San Francisco, of counsel), for respondent.

BARNARD, P. J.

The respondent has moved to dismiss the appeal herein on the ground that no transcript had been filed within the time allowed.

It appears, by certificate of the county clerk, that notice of appeal was filed on June 2, 1932, that no proceedings have been begun

for the preparation or settlement of either a transcript or a bill of exceptions, that no such proceedings are pending, and that the time therefor has expired. The motion should be granted. People v. Berkeley Chiropractic College, 103 Cal. App. 139, 283 P. 981.

The appeal is dismissed.

We concur: MARKS, J.; JENNINGS, J.

BALAAM v. PACIFIC STATES SAVINGS & LOAN CO.*

Civ. 8538.

District Court of Appeal, First District, Division 1, California.

Sept. 30, 1932.

Rehearing Denied Oct. 29, 1932.

Hearing Granted by Supreme Court Nov. 28, 1932.

Municipal corporations ⊂=519(6).

Lien of assessment for street improvements, whether "represented" by bond or not, *held* superior throughout its life to assessment of later date (St. 1911, p. 744, § 23, as amended by St. 1921, p. 291; St. 1911, pp. 758, 760, §§ 59, 64, and pp. 758, 760, §§ 61, 66, as amended by St. 1923, pp. 277, 280, §§ 2, 5).

This is so since the various provisions of St. 1911, p. 744, § 23, as amended by St. 1921, p. 291; St. 1911, pp. 758, 760, §§ 59, 64, and pp. 758, 760, §§ 61, 66, as amended by St. 1923, pp. 277, 280, §§ 2, 5, all point to the conclusion that the lien arises at the time the assessment is recorded, and at that time only, and that the bond merely represents the assessment and creates no new lien or obligation; the word "represented," as used in such sections, providing that the assessment may be represented by a bond, meaning to stand as the representative of title to the indicated thing; to stand in the place of another; to act its part or exercise its right.

[Ed. Note.—For other definitions of "Represent." see Words and Phrases.]

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Le Roy Balaam against the Pacific States Savings & Loan Company, in which the defendant filed cross-complaint. From an adverse judgment, defendant appeals.

Affirmed.

Orrick, Palmer & Dahlquist, of San Francisco (Christopher M. Jenks, of San Francisco, of counsel), for appellant.

Jones, Balaam & Hardin, W. Reginald Jones, and John F. Balaam, all of Oakland, for respondent.

O'Melveny, Tuller & Myers and James L. Beebe, all of Los Angeles, amici curiæ, for Municipal Bond Co.

Arthur M. Ellis, of Los Angeles, amicus curiæ, for Frank C. Smith.

LAMBERSON, Justice pro tem.

Under date of October 3, 1925, the treasurer of the city of Oakland issued bond No. 6 of street improvement bond series 638, of which bond plaintiff and respondent later became the owner and holder. On October 29, 1926, there was issued by the same official bond No. 25 of street improvement bond series 729. Defendant and appellant became the owner of the second bond. Both of the bonds were issued under and by virtue of the act of the Legislature known as the Improvement Act of 1911 (St. 1911, p. 730), and acts amendatory thereof, and covered the same parcel of real property. The action is one to foreclose the lien represented by plaintiff's bond, with a cross-complaint on the part of the defendant to foreclose the lien which gave rise to the issuance of the bond owned by it, and to have such lien declared prior and superior to the claims of the plaintiff. The appeal is from a decree declaring the lien of the assessment represented by plaintiff's bond to be prior and superior to the lien sought to be foreclosed by defendant.

The only question presented by the appeal is that of the priority of the respective liens. It is not questioned that, prior to the enactment in 1923 of certain amendments to the Improvement Act of 1911, the lien of an assessment last in time was prior in right. Woodill & Hulse Elec. Co. v. Young, 180 Cal. 667, 182 P. 422, 5 A. L. R. 1296, decided July 5, 1919.

In 1921, the Legislature adopted an act entitled "An act to amend section twenty-three of an act entitled 'An act to provide for work in and upon streets, avenues, lanes, alleys, courts, places and sidewalks, within municipalities, * * * and for establishing and changing the grades of such streets, * * * and providing for the issuance and payment of street improvement bonds to represent certain assessments for the cost thereof, and providing a method for the payment of such bonds,' approved April 7, 1911, as amended, relating to the relative priority of special assessment liens." Stats. 1921, c. 225, p. 291. As amended by such act, and so far as is pertinent here, section 23 of the Street Improvement Act reads as follows:

⊂=For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 28 P.2d 1053.

"Said warrant, diagram, and assessment * * * shall be recorded in the office of said superintendent of streets. When so recorded, the several amounts assessed shall be a lien upon the lands, lots, or portions of lots assessed, respectively, for the period of two years from the date of said recording, unless sooner discharged; such lien shall be subordinate to all special assessment liens previously imposed upon the same property, but it shall have priority over all special assessment liens which may thereafter be created against the said property; and from and after the date of said recording of any warrant, assessment, diagram, * * * all persons * * * shall be deemed to have notice of the contents * * * thereof." Section 23 was amended in 1923 (Stats. 1923, chap. 58, pp. 113, 115, § 2), but the foregoing quoted portion was not changed in substance.

Upon a review of the Improvement Act of 1911, we find that section 23 is the only section thereof which provides for the creation of the assessment lien and which fixes the date at which such lien attaches. It states the basis upon which an assessment is created and the origin of the assessment and the lien thereof is found therein no matter whether the assessment is payable in cash or in installments as provided by the terms of any bond issued under the provisions of the various sections of part 3 of the act, which is devoted entirely and solely to the issuance and foreclosure of bonds. Section 59 (St. 1911, p. 758), embraced within part 3, provides that the city council of any municipality shall have the power, in its discretion, to determine that serial bonds shall be issued to represent assessments of $25 or over for the cost of any work or improvement, and the determination of the council to issue bonds, according to section 61 (as amended by St. 1923, p. 277, § 2), shall be declared in the resolution of intention to do the work.

Section 66 (as amended by St. 1923, p. 280, § 5) provides that the assessment shall be a first lien upon the property affected thereby until the bond issued for the payment thereof, with accrued interest and penalties, shall be fully paid. Section 64 (St. 1911, p. 760) provides that, in case the amount of unpaid assessments shall be less than $25, then the same shall be collected in the manner provided in part 1 of the act. The assessment, therefore, may be composed of amounts payable in cash and amounts which may be paid in installments and be represented by a bond. The various provisions of the act all point to the conclusion that the lien arises at the time the assessment is recorded, and at that time only, and that the bond merely represents the assessment and creates no new lien or obligation.

In German Savings & Loan Society v. Ramish, 138 Cal. 120, 126, 69 P. 89, 92, 70 P. 1067, the court said: "The bond creates no new liability, and, in effect, provides for what by some would be regarded as more favorable payment, because in installments, and after a period of years." See Hellman v. Shoulters, 114 Cal. 136, 44 P. 915, 45 P. 1057, in which the court likened the issuance of street improvement bonds to a situation wherein delinquent assessments might be made payable in annual installments extending over a period of years. The word "represented," used in various sections of part 3, means to stand as the representative of title to the indicated thing (Francis v. United States, 188 U. S. 375, 23 S. Ct. 334, 47 L. Ed. 508); to stand in the place of another; to act its part or exercise its right (Plummer v. Brown, 64 Cal. 429, 1 P. 703). Thus the bond is evidence of the obligation created by the assessment, but is not in itself a lien. The record in the office of the superintendent of streets continues at all times to be the record upon which payments must be shown in order to discharge the lien of the assessment. Throughout the act, very definite emphasis is placed upon the assessment, and the only assessment which is fixed as a lien upon the property is that described in section 23 of the act. There is only one lien, and that is the lien created by the recordation of the assessment. In the case of Cohn v. Federal Construction Co., 171 Cal. 547, 153 P. 916, involving the construction of the Street Bond Act (St. 1893, p. 33, as amended), the court at page 550 of 171 Cal., 153 P. 916, 917, said: "The provision for bonds is for the benefit of the property owner, to enable him to pay in installments, instead of cash, on completion of the work. The proceedings for the letting of the contract, doing the work, and making the assessment are precisely the same where bonds are authorized as where they are not. To such proceedings the issuance of bonds has no relation and the term is of no importance. To enable the property owner to act intelligently in electing whether to pay cash or suffer bonds to issue for his assessment, he should know the term they are to run before he acts." The issuance of bonds has been uniformly treated as the extension of a period of credit. Cohn v. Thompson, 47 Cal. App. 135, 190 P. 381.

As a practical matter, there may be many assessments which will not be cash assessments because the amount of the assessment will be less than $25. In other instances, the property owner may elect that no bond shall be issued for the assessment upon his property. In each instance no bond could issue, and the priority of assessment liens would be governed without question by the provisions of section 23. If bonds should issue for other assessments, the result would be undesirable confusion which would tend

to increase the cost of the work to the property owner and render the bond less attractive as an investment because of the danger of later liens of a different class or rank taking precedence over the securities in which investment was contemplated.

The basis for the lien being found in section 23 of the act, and the Legislature having very definitely, by its amendment, expressed its intention that the lien prior in time shall be prior in right, we must conclude that the lien of an assessment created under the provisions of that section as amended, whether represented by a bond or not, is superior to an assessment of later date, and that the right of priority having once attached continues as a superior right throughout the life of the lien; that is, until the assessment has been fully discharged. The conclusion urged by appellant, that the bond constitutes a lien in itself, and that, in spite of the declaration of the Legislature as to the priority of the lien of the assessment, the bond last issued should be superior in right, is untenable, for the reason that the bond would enjoy a different priority than that granted to an assessment of the same rank and growing out of the same proceedings; and, if it should be granted that such priority would continue for a period of only two years, then we would have a condition so confused and uncertain that it would be intolerable. Proceedings in relation to street improvements involving both the stability of contracts and the security of the investing public should be definite and certain.

We are of the opinion that the judgment should be affirmed, and it is so ordered.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

127 Cal.App. 145

PEOPLE of the State of California, Plaintiff and Respondent, v. Frank REDMOND, Defendant and Appellant.

Cr. 1685.

District Court of Appeal, First District, Division 2, California.

Oct. 24, 1932.

Appeal by defendant from a judgment of the Superior Court of Alameda County, John J. Allen, Judge, of conviction of theft of an automobile and from an order denying motion for new trial. Affirmed.

Guy R. McCoy, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and S. L. Sefton, of San Francisco, for the People.

NOURSE, P. J.

Defendant was tried before the court sitting without a jury upon an information charging the theft of an automobile. He was found guilty as charged, and his motion for a new trial was denied.

The defendant was the owner of a Chevrolet sedan, 1927 model, which he drove into a certain parking station in the city of Oakland. He left his car and walked over to a Chevrolet coupé, 1926 model, and started to drive away in this car when arrested. The Chevrolet coupé was locked, and, in order to take possession, the defendant broke the outside lock on the door. His only defense to the charge was that he was subject to absent-mindedness resulting from a disease from which he was suffering. The trial of the case below and the burden of this appeal were both addressed to the simple issue of fact whether this excuse was a sufficient defense to the admitted evidence of the guilt of the defendant. No question of law is involved.

We have examined the entire record, and find no error.

The judgment and the order denying the new trial are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

126 Cal.App. 15

DIETLIN v. MISSOURI STATE LIFE INS. CO. (two cases).

Civ. 8371.

District Court of Appeal, First District, Division 2, California.

Oct. 15, 1932.

Hearing Denied by Supreme Court Nov. 14, 1932.

Appeals from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

On rehearing.

Rehearing denied.

For former opinion, see 14 P.(2d) 331.

Myrick & Deering and Scott, of San Francisco, for appellant.

Edmund J. Holl, of San Francisco, for respondent.

PER CURIAM.

Both appellant and respondent have filed petitions for rehearing herein. In our opinion, there is but one point raised in said petitions which requires comment. Appellant contends that in our construction of the life policies we have ignored the fact that the presumption of permanency provided for

therein relates only to "total disability, as defined above," and that the words "as defined above" preserve the definition of permanency; namely, "such as to prevent the insured then and at all times thereafter from engaging in any gainful occupation." The only definition found "above" is the one just quoted which defines "total and permanent disability." Neither "total disability" nor "permanent disability" is separately defined at any place in the policy, but this does not mean that the word "total" and the word "permanent" have not separate and distinct meanings. Appellant would have us construe the presumption clause to mean "total and permanent disability, as defined above" rather than "total disability, as defined above." If appellant's construction is the correct one, what purpose does the clause creating the presumption of permanency serve when the fact of permanency must be established before the presumption of permanency arises? As we read the policy, the "total disability, as defined above," is a disability "such as to prevent the insured * * * from engaging in any gainful occupation." The omitted words "then and at all times thereafter" constitute the definition of permanency. We cannot assume that the clause creating a presumption of permanency when "total disability, as defined above," had existed for not less than three months, was inserted in the policies to serve no purpose whatsoever.

The petitions for rehearing are, and each of them is, denied.

126 Cal.App. 32

THIBAUT v. KEY et al.

THOMASSON v. SAME.

Civ. 4650, 4651.

District Court of Appeal, Third District, California.

Oct. 15, 1932.

Hearing Denied by Supreme Court Nov. 14, 1932.

Appeals from Superior Court, Shasta County; Walter E. Herzinger, Judge.

On rehearing.

For former opinion, see 14 P.(2d) 138.

Albert F. Ross, Dist. Atty., Jesse W. Carter, and Glenn D. Newton, all of Redding, for appellants.

Chenoweth & Leininger, of Redding, for respondents.

PER CURIAM.

In the petition by appellants for rehearing, attention is called to the fact that the law limiting the number of teachers in elementary school districts to one for each thirty-five units or fraction of units of average daily attendance of pupils for the preceding year, as provided by section 4.770 of the School Code (St. 1931, p. 2514) was not in force and effect at the date of the employment of teachers for the said district for the year 1931–32.

Therefore the following words in the opinion are stricken out, namely: "The said school district has only nine pupils, and by reason thereof the trustees are authorized to employ only one teacher to teach the school of said district." And in lieu thereof the following is inserted: "Section 18 of article 11 of the Constitution prohibits a school district from incurring in any year a liability in excess of the income and revenue provided for such year; therefore only one teacher could be legally employed by the trustees of said district to teach the school for the year 1931–32."

Defendants claim that we have overlooked the case of Martin v. Fisher, 108 Cal. App. 34, 291 P. 276, which holds that, under the provisions of the said section of the Constitution, the district could incur no indebtedness in any year exceeding the income and revenue provided for that year, and that, the trustees having employed Mrs. Moore in May, 1931, another teacher could not be legally employed after that time. In other words, that, Mrs. Moore having been employed in May, 1931, and Miss Thomasson's employment having taken place prior to June 10, 1931, therefore the latter's employment was void. We have covered this matter in the opinion by holding that Miss Thomasson's contract was a continuing one, unless, before June 10, 1931, she was notified of her dismissal; that she was the legally employed teacher of said district when Mrs. Moore was employed, and continued to be such teacher upon the failure of the trustees to notify her of her dismissal prior to June 10, 1931.

The petition for rehearing is denied.

125 Cal.App. 729

SETH et al. v. LEW HING et al.

Civ. 7942.

District Court of Appeal, First District, Division 2, California.

Oct. 13, 1932.

Hearing Denied by Supreme Court Nov. 10, 1932.

1. Bills and notes ⇐92(1).

Consideration to one of several signers of joint and several note *held* sufficient (Civ. Code, § 3105).

2. Contracts ⇐53.

In absence of fraud, when "good and valid consideration" exists, law will not weigh quantum thereof (Civ. Code, § 1605).

A "good and valid consideration" exists when there is either a benefit to the promisor or detriment to the promisee.

[Ed. Note.—For other definitions of "Good Consideration" and "Valid Consideration," see Words and Phrases.]

3. Contracts ⇐53.

In determining question of consideration, law will not weigh quantum of promisee's detriment any more than it would quantum of promisor's benefit (Civ. Code § 1605).

4. Bills and notes ⇐92(1).

Where payee of note has suffered detriment, and maker has received benefit, note is not invalid for lack of consideration on ground that payee incidentally received some benefit (Civ. Code, §§ 1605, 3105, 3110).

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

On petition for rehearing.

Petition denied.

For prior opinion, see 14 P.(2d) 537.

Lillick, Olson & Graham, and Ira S. Lillick, all of San Francisco (Allan E. Charles, of San Francisco, of counsel), for appellants.

Russell P. Tyler, of San Francisco, for respondents.

PER CURIAM.

[1] In their petition for rehearing the respondents criticize our statement of facts and insist that we overlooked the evidence of the relations between the Oriental Bank and the directors of the Canton Bank. They state that the Oriental Bank controlled the other institution and that the directors of the latter were mere "dummies." The criticism is supported by incomplete and isolated quotations from the record with a disregard of the connecting links which demonstrate the true facts. The note in suit was a renewal of a note executed by the same parties in October, 1923. At that time there were eleven directors of the Canton Bank. There is no evidence in the record that any number of them were "dummies." There is evidence that one owned 107¼ shares, one 20 shares, one 30 shares, and another 19¼ shares. The stock was entered at $100 a share. One witness testified that he held 10 shares, but that they were owned by the Oriental Bank. He tried to create the impression that none of the other directors owned more than ten shares, but on cross-examination he explained that he was referring to the time when the Canton Bank failed in 1928 and not to the time when the note was executed in 1923. There is no dispute that the Oriental Bank owned and controlled the majority of the stock of the Canton Bank; but it must be borne in mind that this is a joint and several note and that all the signers united in a common defense, hence, a consideration to one of the signers is sufficient. Section 3105, Civ. Code; First National Bank of Scribner v. Golder, 89 Neb. 377, 131 N. W. 600-602.

On the issue of consideration we find the evidence uncontroverted that some of the respondents were substantial stockholders in the Canton Bank, some were depositors, some owed the bank large sums of money, others were stockholders and directors of the China Mail Steamship Company, and two—Chin Lain and Tong—were personally obligated to the bank in the sum of $72,000 on the indebtedness of the steamship company. Hence the loan from the Oriental Bank, which enabled the Canton Bank to keep its doors open and which cancelled the indebtedness of the steamship company, benefited these directors in various ways and in varying amounts—some as stockholders in the Canton Bank, some as officers receiving salaries as such, some as depositors, and some as individuals indebted to the bank for personal and company loans. To say that no one of them received any consideration for the loan is to disregard the plain common sense knowledge of such business transactions.

[2-4] It may be conceded that the Oriental Commercial Bank as holder of 51 per cent. of the stock of the Canton Bank, also received some consideration for the loan of its funds to the Canton Bank in return for the detriment which it suffered. But this concession does not compel the conclusion that the holders of the remaining 49 per cent. of the Canton stock did not receive any consideration for the loan. If a consideration passed to the Oriental Bank it must also have passed to those respondents who were stockholders at least. But this is not the ground upon which the issue should be decided. The rules of law which are determinative of this issue are based upon sound principles: In the absence

of fraud, when a good and valid consideration exists, the law will not weigh the quantum thereof (Whelan v. Swain, 132 Cal. 389, 391, 64 P. 560; Rusconi v. Calif. Fruit Exchange, 100 Cal. App. 750, 754, 281 P. 84); a good and valid consideration exists when there is either a benefit to the promisor or a detriment to the promisee (section 1605, Civ. Code); upon the principle of the Whelan Case the law will not weigh the quantum of the detriment suffered by the promisee any more than it would weigh the quantum of the benefit received by the promisor; where the payee of a promissory note has suffered a detriment and the maker has received a benefit it would be a contradiction of terms to say that there was no consideration for the note because the payee has incidentally received some benefit from the transaction. It is the consideration running to the maker which determines whether he is an accommodation party under the terms of section 3110 of the Civil Code. When, as here, the uncontradicted evidence demonstrates that the makers of the note received some consideration and that they were not accommodation parties within the meaning of the Code section their defenses fail as matter of law and this demands a reversal of the order appealed from.

The petition for rehearing is denied.

127 Cal.App. 94

PAXSON v. MARGULIS–STULMAN CO. et al.

Civ. 7476.

District Court of Appeal, Second District, Division 1, California.

Oct. 19, 1932.

1. Fraud ⇐31.

One fraudulently induced to execute contract may rescind it by offering to restore valuable things received or affirm and perform it and recover damages (Civ. Code, § 1691).

2. Vendor and purchaser ⇐116.

Purchaser not alleging or proving offer to restore valuable things received under contract cannot recover amount paid because of fraud (Civ. Code, § 1691).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Emily N. Paxson against the Margulis-Stulman Company, a corporation, and others. From a judgment against named defendant, it appeals.

Reversed.

Wheeler & Wackerbarth, Henry O. Wackerbarth, and Henry E. Carter, all of Los Angeles, for appellant.

Roland W. Schoettler, and E. Foster Brigham, both of Los Angeles, for respondent.

HOUSER, J.

From the record herein it appears that the defendant Margulis-Stulman Company, a corporation (hereinafter referred to as the defendant), was the owner of a certain lot which was valued by it at the sum of $7,950, and that plaintiff was the owner of two other lots on which she placed a value of $2,000. At the instance of the defendant, a written agreement was entered into between the parties by which, at the price of $7,950, the defendant agreed to sell to plaintiff, and plaintiff agreed to buy from the defendant, the lot owned by the defendant, and that in partial payment of said purchase price plaintiff would convey to the defendant, at an agreed valuation of $2,000, the said two lots owned by plaintiff. The agreement also provided for the payment in installments of the remainder of the purchase price of the lot owned by the defendant. Immediately preceding the date of the execution of such agreement, and as an inducing cause therefor, the defendant orally promised plaintiff that within six months thereafter next to ensue it would sell the lot which was the subject of the agreement at a profit of $500 to plaintiff, and that plaintiff would not be called upon to pay any of the installments as provided by said agreement. The contract of sale was duly recorded in the recorder's office of the county in which said property was located. At the expiration of said six months, the lot not having been resold, plaintiff demanded of the defendant that it immediately make such sale and otherwise comply with the terms of the oral understanding between the parties. Thereupon the defendant requested an additional short period of time therein, and assured plaintiff that, if she would accede to such request and make payment of the installments then due on the agreement, the defendant soon would make such sale. Relying upon such promise by the defendant, plaintiff paid an additional amount of $531.79 upon the purchase price of the lot. The defendant having failed to carry out its said oral agreement, plaintiff commenced an action against the defendant for "money received"; basing her right to the recovery of a judgment on the ground stated in her complaint "that all the promises and representations made by the defendants aforesaid were false and fraudulent at the time they were made and defendants knew that they were false and fraudulent but made them to deceive plaintiff, and she was deceived there-

by, and they never intended to fulfill any of their said agreements, and they never have sold said property, although they have been requested so to do. * * *" The amount for which the action was brought was the sum of $2,531.79, which was claimed to have been paid in cash on the purchase price of the lot agreed to be sold. From a judgment rendered against the defendant for the full amount sought by plaintiff, it appeals to this court.

[1] Without reference to qualifications thereof, in this state the general rule is established by statute and by numerous authorities that, where one has been induced by fraud practiced upon him to enter into any agreement, he has a right to enforce either of two affirmative remedies: Upon discovery of such fraud, he may rescind the contract by restoring, or offering to restore, to the other party everything of value which he has received from him under the contract, "upon condition that such party shall do likewise." Section 1691, Civ. Code. The alternative of the defrauded party in effect is that he affirm the contract, perform the conditions imposed upon him thereby, and thereupon become entitled to recover such damages from the other party as may have been suffered by reason of the fraud. 12 Cal. Jur. 781, and authorities there cited.

As is stated by respondent in her brief filed herein: "In the instant case, plaintiff elected to disaffirm the contract, and treat the same as rescinded, and sue to recover her money on the theory that no contract existed because of fraud, rather than affirm the fraudulent agreement and sue for damages for a breach thereof. * * *"

And again the statement occurs in respondent's brief: "This action was based solely upon fraud and deceit which was specifically pleaded. Upon discovery of the fraud, the plaintiff elected to void the contract, and treat the same as rescinded, and recover the money paid thereunder. * * *"

In the case of McGibbon v. Schmidt, 172 Cal. 70, 155 P. 460, 463, in discussing the effect of a former action between the same parties which related to an attempted recovery by an alleged defrauded vendee of real property of certain installments paid on the purchase price thereof, it is said: "The action to recover the purchase money was not based on fraud. It was in the form of an action for money had and received. It could not have been successfully maintained except by proof that the contract had been rescinded, or that defendant had been guilty of a breach thereof."

See, also, Hines v. Brode, 168 Cal. 507, 143 P. 729; Paolini v. Sulprizio, 201 Cal. 683, 258 P. 380; Orton v. Privett, 202 Cal. 754, 262 P. 713; 17 Cal. Jur. 614.

[2] Although plaintiff elected to stand on her remedy incident to rescission, and although as a result of the transaction had between the parties she was the recipient of a supposedly valuable contract of sale of the lot owned by the defendant, which contract had been recorded and which probably formed a "cloud" on the title of the said lot—neither among the allegations of her complaint in the action, nor contained within either the evidence offered or received on the trial thereof, does it appear that plaintiff ever completed a rescission of the contract by either a restoration of, or an offer to restore to the defendant, "everything of value" received by plaintiff "under the contract." It follows that plaintiff failed, both in her attempt to state a cause of action in her complaint, as well as in necessary proof of essential facts, and consequently that there can be no recovery upon the action as prosecuted.

It becomes unnecessary to notice other specifications of alleged error.

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

127 Cal.App. 28

THALER v. THALER.

Civ. 7484.

District Court of Appeal, Second District, Division 1, California.

Oct. 17, 1932.

1. Appeal and error ⇐1161.

Order will not be reversed merely because respondent consents thereto, but record must show some legal ground therefor.

2. Judgment ⇐160.

Order denying motion to vacate judgment and default will not be reversed where affidavit of merits fails to state facts showing alleged defense.

3. Judgment ⇐162(4).

Refusal to set aside judgment and default was not abuse of discretion, where counter affidavits showed that husband and wife had settled action to deprive wife's attorneys of contingent fee.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Lena Parsons Thaler against Julius J. Thaler. From order denying motion to

vacate judgment and default, defendant appeals.

Affirmed.

S. S. Hahn and W. O. Graf, both of Los Angeles, for appellant.

Phi. O. Clough, of Los Angeles, for respondent.

CONREY, P. J.

The complaint, as filed in this action, stated a cause of action against defendant for recovery of the sum of $8,929, with interest as stated. C. B. Conlin and S. Jack Cohen were plaintiff's attorneys of record. On the face of the record it appears that, after due service of summons and complaint, the default of the defendant for failure to appear was duly entered, and judgment was entered by the clerk on April 18, 1930. Four days later defendant gave notice of motion to vacate the judgment and default, and the subsequent execution and levy, on the ground that said proceedings were taken against the defendant through his mistake, inadvertence, surprise, and excusable neglect. Said motion was based on affidavits served and filed therewith. The motion was submitted upon the record, including said affidavits and certain counter affidavits made by Alys Ulberg, C. B. Conlin, and S. Jack Cohen. The motion was denied. Plaintiff appeals from the order.

Presumably Mr. Conlin and Mr. Cohen appeared, and, as attorneys for plaintiff, resisted the motion, although the plaintiff herself furnished to defendant one of the affidavits upon which the motion was based. There is no record of any substitution of other attorneys for the plaintiff. Nevertheless the notice of appeal was addressed to the plaintiff and to Phi. O. Clough, her attorney. Moreover, there has been filed in this court a "stipulation to reverse case" signed by Phi. O. Clough as attorney for plaintiff and respondent.

[1-3] The explanation of this extraordinary situation may perhaps be found in the fact that, as shown by some of the affidavits, the plaintiff's attorneys of record had succeeded in recovering the money by means of a levy made under the execution which they obtained, and that said attorneys were claiming a right to a part of said money in accordance with the terms of an agreement for a contingent fee, and that the parties to the action, who are husband and wife, have made some kind of settlement between themselves. However that may be, we are concerned only with the questions of law arising on the appeal. The mere fact that respondent is now willing to have the order reversed would not justify this court in rendering a judgment of reversal. A judgment or order will not be reversed unless the record shows some legal ground for reversal. In this case the order is sustained by the record for at least two reasons. There is not any sufficient affidavit of merits. The affidavit of Mr. Graf, one of the attorneys for appellant, stated that he believes the defendant has a good defense to the action, but it did not state or show that the facts of the case were known by him or had been stated to him. The "proposed verified answer," if any there was, is not in the record here. There was no error in the court's ruling. Andrews v. Jacoby, 39 Cal. App. 382, 178 P. 969. Moreover, if the court believed, as apparently it did believe, the facts stated in the counter affidavits, it is apparent that there was no abuse of discretion in denying the motion.

The order is affirmed.

We concur: HOUSER, J.; YORK, J.

127 Cal.App. 78

J. H. SMITH, Plaintiff and Appellant, v. J. L. TAECKER and Mary E. Taecker, Defendants and Respondents.

Civ. 1031.

District Court of Appeal, Fourth District, California.

Oct. 17, 1932.

Motion to dismiss appeal by plaintiff from a judgment of the Superior Court of Imperial County; A. C. Finney, Judge.

Griffin & Boone and Edward T. Taylor, all of Modesto, for appellant.

J. L. Taecker and Mary E. Taecker, in pro. per., for respondents.

BARNARD, P. J.

A motion to dismiss this appeal was made upon the ground of the failure of appellant to file his opening brief within the time prescribed. The transcript was filed in this court on July 22, 1932. Notice of motion to dismiss the appeal was filed on September 17, 1932, the time for hearing being set for October 11, 1932. On September 19, 1932, copies of the opening brief were sent by appellant to respondents, and on September 24, 1932, the original brief with a copy was sent to the county clerk with the request that the original be returned. On October 8, 1932, this original brief was returned to counsel by the county clerk, and on October 10, 1932, the same was filed in this court. Upon the authority of Tyner v. Axt, 111 Cal. App. 187, 295 P. 97; Toth v. Metropolitan Life Ins. Co., 113 Cal. App. 55, 297 P. 564; Snodgrass v. Hand (Cal. App.) 13 P.(2d) 769, and Robin-

son v. El Centro Grain Co. et al. (Cal. App.) 13 P.(2d) 965, the motion to dismiss is denied.

We concur: MARKS, J.; JENNINGS, J.

127 Cal.App. 91

FRUIT SUPPLY CO. v. TITLE GUARANTEE & TRUST CO.

Civ. 831.

District Court of Appeal, Fourth District, California.

Oct. 18, 1932.

1. Appeal and error ⇐338(1).

Notice of appeal not filed until 119 days after entry of judgment, *held* too late (Code Civ. Proc. § 939).

2. Appeal and error ⇐348(1).

Service of notice of entry of judgment is unnecessary to start time for appeal running (Code Civ. Proc. §§ 939, 953d).

Appeal from Superior Court, Tulare County.

Action by the Fruit Supply Company against Title Guarantee & Trust Company, executor of the estate of Maurice Flatow, also known as Max Flatow, also known as M. Flatow, deceased. From an adverse judgment, and from orders denying plaintiff's motion for a new trial, and denying plaintiff's motion to vacate the judgment, plaintiff appeals. On motion to dismiss the appeal.

Motion granted.

Sigmund S. Renco, of Los Angeles, for appellant.

Guy Knupp, of Los Angeles, for respondent.

JENNINGS, J.

Respondent moves to dismiss the appeal from the judgment herein and from the order denying appellant's motion for a new trial, also from the order denying appellant's motion to vacate the judgment. The motion to dismiss the appeal is made on the ground that appellant failed to file his notice of appeal and his notice to prepare transcript and to perfect the appeal within the time required by law.

[1] The certificate of the county clerk filed in support of respondent's motion shows that judgment was made and entered on April 11, 1932; that on April 22, 1932, appellant served and filed a notice of intention to move for a new trial; that on May 4, 1932, appellant served and filed a notice of motion to set aside the judgment; that said motion for a new trial and said motion to vacate the judgment were argued and submitted to the court on June 6, 1932; that on June 6, 1932, an order was made and entered denying said motions; that on August 8, 1932, appellant filed notice of appeal from the judgment and from the order denying the motion for a new trial and from the order denying the motion to vacate the judgment.

It is thus made to appear that the notice of appeal was not filed until 119 days after entry of the judgment, and that it was not filed within 60 days after entry of the orders from which an appeal is sought to be taken. The appeal was not, therefore, taken in time. Code Civ. Proc. § 939; Cook v. Cook, 208 Cal. 501, 282 P. 385; Lawson v. Guild (Cal. Sup.) 10 P.(2d) 459; Busing v. Moore, 116 Cal. App. 465, 2 P.(2d) 841.

[2] Appellant attempts to justify his delay by invoking the provisions of section 953d, Code of Civil Procedure, and insists that he was entitled to written notice of entry of judgment. The section cited does not apply to notices of appeal which must be filed within 60 days after entry of judgment or order from which an appeal is taken, and is not therefore of assistance to appellant. Cook v. Cook, supra; Lawson v. Guild, supra.

Respondent's motion to dismiss the appeal is therefore granted.

We concur: BARNARD, P. J.; MARKS, J.

126 Cal.App. 152

In re EDWARDS' ESTATE.

EDWARDS v. AGNEW et al.

Civ. 8120.

District Court of Appeal, Second District, Division 2, California.

Oct. 14, 1932.

Hearing Denied by Supreme Court Nov. 18, 1932.

Appeal and error ⇐832(4).

Rehearings will not be granted for purpose of considering points not included in original briefs.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

On petition for rehearing.

Rehearing denied.

For former opinion, see 14 P.(2d) 318.

Glensor, Clewe, Schofield & Van Dine, of San Francisco, for appellant.

Harry W. T. Ross, of Santa Barbara, for respondent Security-First Nat. Bank of Los Angeles.

Griffith & Thornburgh, of Santa Barbara, for respondents Miriam B. Edwards, Abby E. Randall, Dorothy Edwards, and Margaret Edwards Agnew.

PER CURIAM.

After a careful and due consideration of appellant's petition for rehearing, we find ourselves satisfied with our construction of the provisions of the will in question. We greatly regret, however, that a passage of our opinion, referred to and quoted from on page 8 of the petition for rehearing, appeared in the copy of the opinion furnished appellant. Its inadvertent inclusion was discovered almost immediately after filing and was stricken. It is apparent that it has not misled appellant.

The main argument for rehearing relates to the beneficence to Lolita King and has not heretofore been adverted to. The petition rather pointedly accuses us of overlooking the point. We have industriously reread all of the briefs, and the conclusion seems inevitable that the oversight was with appellant. Counsels' close vision was impaired, perhaps, by the great degree of confidence entertained by them in the point presented. Whether or not the new point would change the ruling we cannot, of course, say; and if it were not for the practice we would gladly again entertain the appeal and permit the filing of supplemental briefs. However, we feel that our course should be made to conform to the well-known doctrine expressed in Mann v. Brison (Cal. App.) 9 P.(2d) 257, and cases cited therein, that rehearings will not be granted for the purpose of considering points not included in the original briefs.

Rehearing denied.

126 Cal.App. 765

SPRING STREET REALTY CO. v. TRASK.

Civ. 8652.

District Court of Appeal, First District, Division 2, California.

Oct. 13, 1932.

Rehearing Denied Nov. 12, 1932.

Hearing Denied by Supreme Court Dec. 12, 1932.

1. Landlord and tenant ⇐152(11).

Lease authorizing lessee to make alterations not changing general character of building and sublet space therein authorized lessee to cut doors through walls to building on adjoining lot in order to give subtenants additional space.

The lease provided that lessor should be held harmless from mechanics' liens for alterations and improvements, contained no provision for forfeiture of lessee's estate because of alterations, required delivery of building and improvements to lessor in good condition and repair, except for reasonable wear and tear, at termination of lease, and gave lessee power to let and sublet.

2. Trial ⇐404(2).

Trial court's findings for plaintiff in language of lease in lessee's action for judgment declaring its right to make certain alterations in building *held* not conclusions, but findings of ultimate facts.

3. Landlord and tenant ⇐152(11).

That lessee's changes in building by cutting doors through walls to adjoining building would affect fire insurance rates did not establish change in general character of building within prohibition in lease.

4. Landlord and tenant ⇐152(11).

Lessee's right under lease to make alterations in building was law question for trial court.

5. Landlord and tenant ⇐152(11).

Physical changes lessee desired to make in building and manner of effecting them were fact questions for trial court in lessee's action for judgment declaring its right to make alterations.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by the Spring Street Realty Company against Victoria H. Trask. Judgment for plaintiff, and defendant appeals.

Affirmed.

Chapman & Chapman, of Los Angeles, for appellant.

Bauer, MacDonald, Schultheis & Pettit and Fred E. Pettit, Jr., all of Los Angeles, for respondent.

STURTEVANT, J.

From a judgment in favor of the plaintiff in an action brought to obtain declaratory relief the defendant has appealed.

In 1923 the defendant was the owner of a lot on the west side of South Spring street in Los Angeles. She entered into a ninety-nine year lease. The lease was assigned to the plaintiff. As lessee, the plaintiff erected a twelve-story steel frame class A building on the lot. The building is known as the California Bank building. In 1930 the plaintiff purchased the lot on the north and commenced to erect another building of the same type, but which is more modern and of a more perfect structure than the bank building.

The building was so constructed that in many respects it is a counterpart of the bank building. At least in part the levels of the floors and the location and size of the corridors coincide if the same are extended. Some of the plaintiff's tenants have demanded additional space. To meet those demands, it has become advisable for the plaintiff to cut doors through some of the walls so that the tenants making such demands can be given the additional space. The openings, if made, will be cut through the filler but not through nor into the supports of the structure of either building. The plaintiff claims the right to make the changes, and the defendant vigorously controverts that claim. In framing its pleading, the plaintiff inserted numerous allegations as to the facts, its intentions, and by reference pleaded the lease in hæc verba. The defendant filed an answer containing many denials and pleading many affirmative matters. The trial court made findings that are very full and complete and in general found the facts as alleged in the plaintiff's complaint.

[1] The defendant asserts that the lessee may not without the consent of the lessor make material changes or alterations in the building to suit its taste or convenience. The plaintiff replies that it does not claim to the contrary, but it asserts that by the express provisions of the lease it has the right to make the contemplated changes. Thereupon it quotes from article III, section (8), of the lease, the following covenants: "After the completion of the building, the Lessees, providing they shall not be delinquent or in default of any of the obligations imposed upon them by this lease, to be by them kept and performed, shall have the right to make, at their own cost and expense, any alterations or repairs or improvements to the same building, providing they do not in any way change the general character and construction of the building, or violate any of the provisions contained in the specifications therefor, or the requirements of sub-paragraphs a, b and c of paragraph 1 of Article III hereof." The plaintiff's position is strengthened by a consideration of other portions of the lease. There were inserted many passages to the effect that the defendant should be held harmless from mechanics' liens based on alterations and improvements to be made during the term of the lease. These passages show that both parties contemplated that substantial changes in the nature of alterations and improvements might be made during the term of the lease. The lease, also provides for the forfeiture of the estate of the lessee on the happening of certain contingencies. Such forfeitures are numerous; however, no such provision is inserted regarding alterations or improvements made by the lessee. The reversion clause is that at the termination of the lease "the building and improvements thereon shall be delivered to the lessor in good condition and repair, reasonable wear and tear and damages by the elements excepted." This clause also clearly contemplated that "improvements" might be added to the building after it was constructed. By the clear terms of the lease the plaintiff was to have the power to let and sublet. It contains no covenants to the contrary; therefore the lessee had those rights. 35 C. J. 977. In subletting, it might become necessary to insert partitions or to cut doors. The power to let and sublet was therefore to be taken into consideration in determining the plaintiff's rights in the instant case. Klein's Rapid Shoe Repair Co. v. Sheppardel Realty Co., 136 Misc. 332, 241 N. Y. S. 153, 155; Mayer v. Texas Tire & Rubber Co. (Tex. Civ. App.) 223 S. W. 874. In the light of all of these provisions, we think that the contention of the plaintiff is clearly correct.

[2] The trial court made its findings in favor of the plaintiff in the language of the lease. The defendant now asserts that those findings are conclusions. We think not. They were the ultimate facts. To prove those ultimate facts, the plaintiff introduced much evidence to which there was no legal objection.

It is asserted that connecting the two buildings by the opening of the passageways as authorized by the decree in this case would violate the prohibition against the making of any alteration, repairs, or improvements which may in any way change the general character and construction of the building. The bank building was constructed as an office building. The new building was also constructed as an office building. Nothing indicates that the character of the bank building has been changed. On this point the trial court found all of the facts against the defendant.

In her argument, the defendant continues by specifying nine different instances wherein, as she claims, the changes will violate the terms of the lease.

(1) She claims that the structure on the leased premises is the property of the lessor. The court found against her and in accordance with the clear recital contained in the lease.

(2) She claims it is not possible that the parties had in mind the connecting up of this building with any adjacent building when the lease was made. The court found the fact against her.

(3 and 5) In these two points the defendant asserts in different language that the leased premises will lose their identity if the changes are made. The trial court heard the testimony and found the facts against the defendant.

(4) The defendant asserts that the combining of the two buildings will work a radical

change in the general character of the California Bank building. That building was erected as an office building. When the changes are made it will be of the same character; the only difference being that it may be said to have an annex. The court found the facts against the defendant.

(6) The defendant contends that by connecting the buildings the wear and tear upon defendant's building is surely substantially increased. Of course it can be seen how it may be increased, and it may be seen how it may be decreased. The court found the facts against the defendant.

(7 and 8) The defendant asserts that making leases to tenants of space in both buildings will work a hardship on the defendant and will make a radical change regarding the marketable value of defendant's property. Neither subject was tendered as an issue by the pleadings nor by the proof.

[3] The defendant asserts that the changes will increase the fire risk and raise the insurance rates, and she argues therefore that such fact establishes that the general character of the building will be changed. We are not prepared to go to such lengths. Many little changes in a building will affect the rates as to fire insurance, but it does not follow that the character of the building is thereby changed. Moreover, as stated by the plaintiff, the amount of the fire rate is an immaterial issue in this case. By the terms of the lease the insurance to be taken out rests with the plaintiff and the burden of paying for the insurance rests on it.

It is also asserted by the defendant that the changes will be in violation of the specifications of the bank building. An examination of those portions of the specifications which have been brought up discloses that the change will have no such effect. In this connection the defendant makes the claim that the word "specifications," as used in the lease, means the same as "plans and specifications." It is not necessary for us to determine whether it does or not. The plans have not been inserted in the record. No part of the record is quoted showing to us that the changes will in any manner conflict with either the plans or the specifications or both. Moreover, if the plans and specifications are to be taken as the measuring rod, it would follow that the plaintiff may not even change the lock on a door. But it will not lightly be assumed that the framers of a lease for a term of ninety-nine years of a twelve-story office building ever intended to place on the lessee such extreme limitations.

[4, 5] In other words, the case as presented to the trial court involved two different kinds of questions. In the first place, the trial court was bound to ascertain the right and powers of the plaintiff. That involved primarily a construction of the lease, and was a question of law addressed to the trial court. In the second place, the trial court was bound to ascertain the physical changes the plaintiff desired to make and how those changes were to be effected. The latter questions were solely questions of fact. The defendant's briefs have not attempted to show us that the trial court erred in construing the contract. As we have shown above, the briefs are largely devoted to attacks on questions of fact which have been found against the defendant by the trial court.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

127 Cal.App. 118

RUPPE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 8474.

District Court of Appeal, Second District, Division 2, California.

Oct. 21, 1932.

1. Divorce ⇐269(1).

Failure to comply with order directing husband to make delinquent alimony payments within specified time is "constructive civil contempt."

[Ed. Note.—For other definitions of "Civil Contempt" and "Constructive Contempt," see Words and Phrases.]

2. Divorce ⇐269(3).

Proceeding for failure to comply with order directing husband to make delinquent alimony payments within specified time was special, criminal in character, and state was real plaintiff in interest.

3. Contempt ⇐61(2).

Disobedience of court order is fact question for court (Code Civ. Proc. § 1218).

4. Contempt ⇐55.

Until notice is given, court is without jurisdiction to proceed to judgment in proceeding for disobedience of order (Code Civ. Proc. § 1218).

5. Contempt ⇐63(1).

No intendment may be indulged in favor of order directing commitment for contempt, but charge, finding, and judgment must be construed most strictly in contemner's favor (Code Civ. Proc. § 1218).

6. Divorce ⇐269(8).

Husband could not be committed for failure to comply with order sentencing him unless he made delinquent alimony payments

within specified time without notice and merely upon ex parte affidavit of third person (Code Civ. Proc. § 1218).

Husband could not be committed for failure to comply with such order, since Code Civ. Proc. § 1218 provides that a judgment of contempt may be rendered only upon the answer and evidence taken, and since the order was expressly conditional it must affirmatively appear from the evidence that the conditional basis for the commitment existed prior to its issuance, in order that appellate court may determine by inspection of the record whether a contempt has in fact been committed.

Application by Louis E. Ruppe for a writ of review prayed to be directed to the Superior Court of the State of California, in and for the County of Los Angeles, to annul an order directing commitment for contempt.

Petitioner discharged.

William J. Clark and Nathan M. Dicker, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondent.

CRAIG, Acting P. J.

The petitioner having failed to comply with a judgment awarding alimony, as modified, and with subsequent orders of the superior court of Los Angeles county, was pronounced guilty of contempt of said court. He prays that the order last mentioned be reviewed upon the ground that it appears upon the face of the record that the same was in excess of the jurisdiction of the tribunal which made it, and that it should be annulled.

Upon an order to show cause why the petitioner should not be adjudged guilty of contempt for failure and refusal to pay certain monthly installments of alimony in accordance with a modified judgment, and which became due during 1931 and 1932, he appeared, and pursuant to a trial of the question he was directed to make delinquent payments within a specified time. This latter order recited that: "The court finds that the defendant is in arrears and is adjudged guilty of contempt in failing to make payments. * * * The court sentences the defendant to the county jail for a period of five (5) days unless all back payments are made within 20 days from date," and was entered in the minutes of the court. About one month thereafter, in the absence of the petitioner, and without further showing, the order in controversy was made wherein it was recited that the court had theretofore found "that the defendant has had the ability to comply with the said order," but had willfully failed and refused and still willfully fails and refuses to comply therewith, and "made its order adjudging the defendant guilty of contempt * * * and having on said date sentenced the defendant to serve a period of five (5) days * * *; and further appearing that more than twenty (20) days have expired since the making of said order adjudging defendant guilty of contempt, and that said payments so in default have not been nor has any part of them been paid; therefore it is ordered that the defendant, Louis E. Ruppe, be and he is now sentenced to serve five (5) days in the county jail of Los Angeles County, commencing forthwith."

It is contended that the order of commitment was void for the reason that the same was made pursuant to an alternative preceding order, without a showing that the petitioner had failed to make said payments, and without affording him an opportunity to be heard.

[1-6] The offense attempted to be charged was a constructive civil contempt (In re Wilson, 75 Cal. 580, 17 P. 698), sometimes defined as an "indirect" one. In re McCarty, 154 Cal. 534, 98 P. 540. The proceeding instituted for its punishment was special, criminal in character, and the state became the real plaintiff in interest. Ex parte Gould, 99 Cal. 360, 33 P. 1112, 21 L. R. A. 751, 37 Am. St. Rep. 57; Frowley v. Superior Court, 158 Cal. 220, 110 P. 817. The disobedience of an order of court is a question of fact to be determined by the court; issues are joined, and witnesses may be called and a trial be had as in other cases. Ex parte Cottrell, 59 Cal. 420; In re Buckley, 69 Cal. 1, 10 P. 69. Until notice is given, the court is without jurisdiction to proceed to judgment; notice is for the purpose of affording the party an opportunity of being heard upon the claim or charge made, and to speak, if he has anything to say, why judgment should not be rendered. "Any departure from those recognized and established requirements of law, however close the apparent adherence to mere form in method of procedure, which has the effect to deprive one of a constitutional right, is as much an excess of jurisdiction as where there is an inceptive lack of power." Younger v. Superior Court, 136 Cal. 682, 69 P. 485, 487. In the instant case the petitioner was admittedly in arrears, and the trial court found that having the ability to pay he had willfully failed and refused so to do, but the same order adjudging that he be confined in the county jail "unless all back payments are made." No complaint, order to show cause, or notice was thereafter issued to the petitioner, nor was he apprised of the claim that he had violated such order. The files disclose that said commitment was based upon the ex parte affidavit of a third person to that effect; yet the respondent does not attempt to justify it even upon corroborative evidence, much less

upon judicial discretionary determination of conflicting evidence after a trial of the issue thus presented. No intendment may be indulged in favor of the order, but the charge, finding, and judgment must be construed most strictly in favor of the accused. Schwarz v. Superior Court, 111 Cal. 106, 43 P. 580. Since the preceding order was expressly conditional, it must affirmatively appear from the evidence that the conditional basis for the commitment existed prior to its issuance, in order that an appellate court may determine by inspection of the record whether a contempt has in fact been committed. Selowsky v. Superior Court, 180 Cal. 404, 181 P. 652. It does not appear that the petitioner was charged with, nor that he in fact committed, the offense specified by the order directing that he make payment within the period of twenty days. A judgment of contempt may be rendered only upon the answer and evidence taken. Code Civ. Proc. § 1218; In re McCarty, supra.

The petitioner is discharged.

We concur: IRA F. THOMPSON, J.; STEPHENS, Justice pro tem.

127 Cal.App. 141

BALDOCK v. WESTERN UNION TELEGRAPH CO.

Civ. 8475.

District Court of Appeal, First District, Division 1, California.

Oct. 22, 1932.

Rehearing Denied Nov. 21, 1932.

Hearing Denied by Supreme Court Dec. 19, 1932.

1. **Municipal corporations** ⇐705(10).
Law does not require pedestrian to look in direction of traffic during every instant of his progress across street.

2. **Municipal corporations** ⇐706(5).
Evidence that pedestrian looked twice before attempting to cross from safety zone to sidewalk and saw no vehicle approaching *held* some evidence of care.

3. **Municipal corporations** ⇐706(7).
Evidence as to negligence of bicycle rider, who ran into pedestrian near curb, *held* for jury.

4. **Municipal corporations** ⇐705(10).
Last clear chance doctrine *held* to apply to bicyclist and continuing negligence of pedestrian in crossing street other than at crosswalk.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Edith Baldock against the Western Union Telegraph Company and another. From judgment for plaintiff, defendants appeal.

Affirmed.

Pillsbury, Madison & Sutro, of San Francisco, Francis R. Stark, of New York City, and Alfred Sutro and Eugene M. Prince, both of San Francisco (Eugene D. Bennett, of San Francisco, of counsel), for appellants.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for respondent.

PER CURIAM.

Plaintiff was struck and injured by a bicycle ridden by defendant Perez, who was an employee of defendant corporation. The jury returned a verdict in her favor for the sum of $1,750. Defendants moved for a directed verdict upon the grounds that there was no evidence of negligence on their part, and that plaintiff was guilty of contributory negligence in failing to look in the direction from which the bicycle was approaching. This motion was denied, and later a motion for judgment notwithstanding the verdict was made. The last motion was also denied, and defendants have appealed from the orders and from the judgment entered upon the verdict.

On May 29, 1930, plaintiff alighted from a street car which had been traveling in an easterly direction along Market street in San Francisco. The car had stopped at a safety station on the corner of Seventh street, where all traffic had been halted by a stop signal. Several automobiles had stopped between the safety station and the sidewalk. Plaintiff passed between two of the automobiles in the direction of the sidewalk, and was about to step upon the curb when she was struck by the bicycle, which was moving toward the crossing; its course being along the right-hand side of the automobile between them and the sidewalk.

Plaintiff testified that before passing between the automobiles she looked in both directions, and looked again when she had passed them, but saw no approaching vehicles. The distance between said safety station and the curb was eleven feet and a few inches, and plaintiff testified that the distance from the curb to the right-hand side of the automobiles was four or five feet. According to one witness, plaintiff was "just on the edge of the sidewalk" when she was struck, and another testified that she had one foot on the curb. Defendant Perez testified that two or three cars had stopped at the crossing, while another was moving by the side of the bicycle as it approached; that his bicycle was coasting at the rate of five or six miles an hour; and that the point of colli-

sion was about twenty-seven inches from the curb. He denied that he struck plaintiff; his version of the occurrence being that she came in contact with the side of the bicycle. He also stated that he was at all times looking in the direction of the crossing, and gave no signal of his approach; further, that had he seen plaintiff before the collision he could have stopped "right away." The testimony of the eyewitnesses and the physical facts sustain plaintiff's contention as to how and where the collision occurred, and the evidence also tends to show that defendant Perez was traveling at a higher rate of speed than he testified.

Defendants contend that plaintiff failed to use ordinary care for her own safety, while she claims that regardless of any negligence on her part Perez had the last clear chance to avoid injuring her, and negligently failed to do so.

As stated, plaintiff testified that she twice looked in the direction of approaching traffic, but failed to see the bicycle. A diagram in evidence shows that the traveled portion of the street between the car tracks and the sidewalk was narrowed over six feet by the safety zone, which was 60 feet in length. As a natural result of this condition, operators of vehicles would swerve to the right when they reached the westerly end of the zone, and this probably explains why the bicycle was not seen by plaintiff when she started to cross.

[1, 2] The law does not require a pedestrian to look in the direction of approaching traffic during every instant of his progress (Filson v. Balkins, 206 Cal. 209, 273 P. 578; Gett v. Pacific Gas & Electric Co., 192 Cal. 621, 221 P. 376; Rinker v. Carl, 102 Cal. App. 436, 283 P. 317; Nickell v. Rosenfield, 82 Cal. App. 369, 255 P. 760); and where, as here, plaintiff looked twice before attempting to cross the space between the safety zone and the sidewalk and saw no vehicle approaching, this was some evidence of the use of care for her own safety, and the jury might reasonably have concluded that the bicycle was not then in the line of her vision [Burgesser v. Bullock's, 190 Cal. 673, 214 P. 649; Long v. Barbieri (Cal. App.) 7 P.(2d) 1082; Strange v. Los Angeles Examiner (Cal. App.) 12 P.(2d) 678].

Defendants claim that regardless of other considerations plaintiff, by crossing where she did, violated an ordinance of the municipality prohibiting pedestrians from passing over roadways other than at a crosswalk, and was consequently guilty of negligence contributing to her injuries.

[3, 4] According to Perez, he was looking straight ahead at all times. In passing the westerly end of the safety zone, he had a clear view of the street, and his speed was such that he could have quickly stopped his bicycle. Under such circumstances the jury was justified in disbelieving his testimony that he did not see plaintiff in time to avoid the collision (Darling v. Pacific Electric Ry. Co., 197 Cal. 702, 703, 242 P. 703); and the question whether he apprehended her dangerous position was also one for its determination (Chappell v. San Diego & A. Railway Co., 201 Cal. 560, 258 P. 73). The last clear chance doctrine applies notwithstanding the continuing negligence of the plaintiff [Girdner v. Union Oil Co. (Cal. Sup.) 13 P. (2d) 915]; and here the plaintiff was so close to the curb when struck as to justify the conclusion that Perez by the exercise of ordinary care could have turned his bicycle sufficiently far to the left to avoid danger. We are satisfied that the evidence would fairly support a finding that he failed to use such care.

The verdict is sufficiently supported, and the motions mentioned were properly denied.

The judgment and orders appealed from are accordingly affirmed.

127 Cal.App. 115

SECURITY FIRST NAT. BANK OF LOS ANGELES v. BOARD OF SUP'RS OF RIVERSIDE COUNTY et al. (LOVELAND ENGINEERS, Inc., Intervener).

Civil No. 666.

District Court of Appeal, Fourth District, California.

Oct. 20, 1932.

1. Appeal and error ⇐766.

Purported statement on first page of brief of questions involved *held* sufficient, under circumstances, to prevent dismissal of appeal (Supreme Court Rule 8, § 2).

Purported statement in appellants' brief appearing on first page thereof was as follows: "This is an appeal from a judgment rendered in favor of the petitioner and against the defendants and intervener, in the Superior Court of the County of Riverside, State of California, Judge F. A. Leonard, of San Bernardino County, presiding. The decision being that the Hemet Irrigation District is invalid." While such statement did not accurately disclose what questions were raised as affecting validity or invalidity of the Hemet irrigation district, as required by Supreme Court Rule 8, § 2, the appellants had attempted to comply with rule, and, since brief was filed about two and one-

half months after such rule went into effect and before appellate courts had an opportunity to construe the same, motion to dismiss the appeal was denied.

2. Certiorari ⇐50.

Judgment roll in proceeding in certiorari consists of copy of judgment signed by clerk entered on or attached to writ and return (Code Civ. Proc. § 1077).

3. Appeal and error ⇐757(1).

Brief *held* to sufficiently comply with court rule requiring brief to set out nature of action and substance of pleadings in general terms (Supreme Court Rule 8, § 3).

Appellants' brief set out in chronological order various steps taken by board of supervisors in the purported creation of the irrigation district and parenthetically referred to those portions of the clerk's transcript in which copies of such proceedings appeared, and, although the substance of such return which must be viewed as a pleading may not have been stated with brevity contemplated by Supreme Court Rule 8, § 3, the statement contained in the brief was nevertheless a substantial compliance with rule.

Appeal from Superior Court, Riverside County; F. A. Leonard, Judge.

Petition by the Security First National Bank of Los Angeles, substituted for Henry E. Cooper, deceased, for a writ of review for the purpose of reviewing the proceedings of the Board of Supervisors of Riverside County and others, wherein the Loveland Engineers, Inc., intervened. From the judgment, defendants and intervener appeal. On motion to dismiss the appeal.

Motion denied.

Earl Redwine, Dist. Atty., and George A. French, Deputy Dist. Atty., both of Riverside, and James A. Hall, of Hemet, for appellants Board of Sup'rs and others.

James A. Hall, of Hemet, for appellant Loveland Engineers, Inc.

A. Heber Winder, of Riverside, for respondent.

AMES, Justice pro tem.

This is a motion to dismiss the appeal on the ground that the appellants failed to comply with certain portions of rule VIII of the rules of this court, adopted by the judicial council of the state of California on the 6th day of May, 1932, and which took effect on the 1st day of July, 1932.

In its notice of motion to dismiss the appeal respondent has not sufficiently designated the portions of rule VIII which it claims have been violated by the appellants, but from a memorandum of points and authorities attached to its notice of motion it appears that it relies upon certain portions of sections 2 and 3 of said rule. Specifically, it contends that appellants have failed to observe that portion of section 2 of rule VIII which reads as follows: "A statement of the question involved on an appeal in a civil action shall be set forth on the first page of the appellant's opening brief, and without any other matter appearing thereon." The purported statement in appellants' brief which appears on the first page thereof is as follows: "This is an appeal from a judgment rendered in favor of the petitioner and against the defendants and intervener, in the Superior Court of the County of Riverside, State of California, Judge F. A. Leonard, of San Bernardino County, presiding. The decision being that the Hemet Irrigation District is invalid."

[1] It will be noted that the foregoing statement does not accurately disclose what questions are raised as affecting the validity or invalidity of the Hemet irrigation district. However, appellants have attempted to comply with the said rule. Their brief was filed in this court on September 13, 1932, about two and one-half months after the above-quoted portion of rule VIII went into effect, and before the appellate courts had had an opportunity to construe the same. For that reason, and in the interest of securing a hearing upon the merits, we believe the motion upon that ground should be denied.

It further appears from the points and authorities attached to respondent's notice of motion that his motion is based upon appellants' failure to set forth in their brief in general terms the substance of the pleadings. The portion of rule VIII of which respondent claims this omission is a violation reads as follows: "The pleadings need not be printed in such briefs, but the nature of the action and the substance of the pleadings must be stated in general terms."

The proceeding in the lower court was instituted by filing a petition for a writ of review for the purpose of reviewing proceedings before the board of supervisors which terminated in a judgment annulling certain resolutions and orders of the board of supervisors purporting to create the Hemet irrigation district, and from such order the appeal is taken upon the judgment roll on a typewritten record.

[2, 3] In a proceeding in certiorari, the judgment roll consists of a copy of the judgment signed by the clerk entered upon or attached to the writ and return. Section 1077, Code Civ. Proc.; Rauer v. Justices' Court, 115 Cal. 84, 46 P. 870. It has also been held that the return to the writ constitutes the answer as well as the evidence. Rigdon v. Common

Council, 30 Cal. App. 107, 157 P. 513; Stumpf v. Board of Supervisors, 131 Cal. 364, 63 P. 663, 82 Am. St. Rep. 350. In conformity with the provisions of section 1077 of the Code of Civil Procedure, the judgment and return are incorporated in the record. In this case appellants' brief sets out in chronological order the various steps taken by the board of supervisors in the purported creation of the Hemet irrigation district, and parenthetically refers to those portions of the clerk's transcript in which copies of such proceedings appear, and, while the substance of this return which must be viewed as a pleading may not have been stated with the brevity contemplated by section 3 of rule VIII, we think that the statement contained in the brief is a substantial compliance with said rule.

It is ordered that the motion to dismiss the appeal be, and the same is hereby, denied.

We concur: BARNARD, P. J.; MARKS, J.

126 Cal.App. 771

STEWART v. MARPLE.

Civ. 689.

District Court of Appeal, Fourth District, California.

Oct. 13, 1932.

Appeal and error ⇐627(2).

No proceedings being pending for settlement of bill of exceptions or transcript, no notice for preparation of transcript having been filed, and statutory period for filing record having expired, appeal was dismissed (Code Civ. Proc. § 953a).

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Proceeding by Arthur R. Stewart against Walker F. Marple. From the judgment, plaintiff appeals. On motion to dismiss the appeal.

Motion granted, and appeal dismissed.

Walter E. Byrne, of San Bernardino, and Mills, Hunter & Dunn, of Los Angeles, for respondent.

MARKS, J.

This is a motion to dismiss this appeal. It appears from the certificate of the clerk of the court below that no proceedings are pending for a settlement of a bill of exceptions or a transcript on appeal and that no notice for the preparation of a transcript under the provisions of section 953a of the Code of Civil Procedure has been filed in his office. The statutory time within which a record on appeal may be prepared and filed under either method of appeal in this state has expired.

Upon the authority of Union Trust Company of San Diego v. C. J. Novotny (Cal. App.) 13 P.(2d) 974, the motion is granted, and the appeal is dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.

127 Cal.App. 93

The PEOPLE of the State of California, Plaintiff and Respondent, v. David F. MARTIN and Marian Deeds, Defendants and Appellants.

Cr. 74.

District Court of Appeal, Fourth District, California.

Oct. 18, 1932.

Motion to dismiss appeal by defendants from a judgment of the Superior Court of Riverside County, O. K. Morton, Judge, of conviction of contributing to the delinquency of minors and from an order denying motion for new trial. Appeal dismissed.

A. L. Wissburg, of San Diego, for appellants.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

JENNINGS, J.

Appellants were convicted in the superior court of Riverside county of the offense of contributing to the delinquency of minors. The verdict of conviction was returned on June 22, 1932, and the court fixed June 27, 1932, as the date on which judgment would be pronounced. On the last-mentioned date appellants presented to the trial court a motion for new trial, which motion was then and there denied. Thereupon, on said June 27, 1932, judgment was pronounced. A motion for arrest of judgment was then on said date made by appellants and denied by the court. Thereupon, on said June 27, 1932, appellants filed written notice that they appealed from the court's order denying their motion for a new trial and from the judgment rendered as aforesaid. On July 8, 1932, appellants filed a statement of their grounds for appeal and a demand for a transcript of the reporter's notes. Respondent moves to dismiss the appeal for the reason that the statement of grounds of appeal and demand for

transcript was not filed within the time required by the provisions of section 7 of rule II of the Rules of the Supreme Court and District Courts of Appeal. The aforementioned section of said rule requires an appellant to file a statement of the grounds of appeal and demand for transcript within five days after giving notice of appeal. The rule further provides that, if the application is not filed within the time provided, "the appeal shall be dismissed." Since the statement and application of appellants was not filed until more than five days had elapsed after they had filed their notice of appeal it follows that respondent's motion must be granted. People v. Schroeder, 112 Cal. App. 550, 297 P. 105; People v. Rutledge, 114 Cal. App. 728, 300 P. 828; People v. Sullivan (Cal. App.) 11 P.(2d) 420.

It is therefore ordered that the appeal herein be, and the same is hereby, dismissed.

We concur: BARNARD, P. J.; MARKS, J.

127 Cal.App. 106

HURT v. PICO INV. CO. et al.

Civ. 979.

District Court of Appeal, Fourth District, California.

Oct. 20, 1932.

1. Mortgages ⇐497(2).

Fee owner's title cannot be divested by mortgage foreclosure, unless owner is made party and served.

2. Mortgages ⇐496.

Record showing that fee owner was not served in mortgage foreclosure action, foreclosure decree *held* void and properly vacated, though application for vacation was made over year after judgment, and judgment had been satisfied of record.

That court's action might have been improper as to other defendants since, as to them, invalidity did not appear on face of record and application for vacation was made too late was of no importance in quiet title action, because it did not appear that such defendants had any interest in the land.

3. Mortgages ⇐538.

Foreclosure decree being void, commissioner's deed passed no title.

4. Mortgages ⇐496.

Vacation of foreclosure decree restores fee owner's title subject to mortgage.

5. Quieting title ⇐10(1).

Quiet title plaintiff must establish right by strength of own title, not by weakness of adversary's (Code Civ. Proc. § 738).

6. Quieting title ⇐47(2).

Although quiet title plaintiff alleges he is fee owner, court may find he owns lesser estate, if evidence so develops (Code Civ. Proc. § 738).

7. Quieting title ⇐49.

Where quiet title plaintiff alleged he was fee owner, and court adjudged defendant to be fee owner, defendant *held* not entitled to complain of portion of judgment, decreeing land subject to plaintiff's mortgage lien, on ground such portion was outside issues under pleadings (Code Civ. Proc. § 738).

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action to quiet title by Arthur C. Hurt against the Pico Investment Company and others. The court adjudged named defendant to be the owner of the real property involved, but subject to the lien of a mortgage held by plaintiff, and, from the adverse portion of the judgment, named defendant appeals.

Affirmed.

Perry F. Backus, of Los Angeles, for appellant.

James H. Howard and William A. Farner, both of Los Angeles, for respondent.

JENNINGS, J.

Plaintiff instituted this action to quiet title to certain real property. The complaint is in the form usually employed in actions of this character. It alleges ownership in fee in plaintiff and that defendants claim some interest in the property adverse to plaintiff which claim is alleged to be without right. The prayer is that defendants be required to set forth the nature of their claims and that it be adjudged that defendants have no interest in the property and that plaintiff's title thereto be quieted. The answer of defendant Pico Investment Company denies that plaintiff is the owner in fee of the land, admits that defendants, or some of them, claim some interest in the land which is alleged to be a valid claim, and closes with the prayer that plaintiff take nothing by his complaint. Upon the issues thus presented by the pleadings, the case was tried. During the trial of the action, plaintiff introduced in evidence a deed to the land, dated January 25, 1928, executed to him as grantee by a commissioner appointed by the superior court of Los Angeles county in an action instituted for the purpose of foreclosing a mortgage upon the land, and rested his case. The commissioner's deed

recites that in a certain action pending in the superior court of Los Angeles county it was decreed that the mortgaged premises be sold at public auction; that the sale was duly held and the premises were sold to the plaintiffs in said action; that thereupon the commissioner made the usual certificate of sale; that more than twelve months have elapsed since the date of the sale, and in the meantime the purchasers at said sale have sold and assigned the certificate of sale theretofore issued to them to plaintiff by virtue of an assignment duly recorded; that the commissioner to carry into effect the sale theretofore made by him and in pursuance of the decree grants and conveys the premises to plaintiff. Plaintiff thus established prima facie that he was the owner in fee of the land, title to which he sought to quiet in himself. It was then stipulated by the parties that at the time the mortgage was made title to the property was vested in the Security Realty Corporation. A deed from this corporation to L. A. Hamilton dated May 6, 1924, was then offered in evidence by defendants and was admitted. Defendant next introduced the entire file in the mortgage foreclosure action referred to in the commissioner's deed to plaintiff. This evidence shows that suit for foreclosure of the mortgage was begun on June 19, 1926; that the defendants in said suit, exclusive of fictitious defendants, were Security Realty Corporation, D. H. Penny and Jane Doe Penny, T. E. Newlun, and Susan Coe Hamilton (wife of L. A. Hamilton); that an affidavit for publication of summons upon defendant D. H. Penny was presented to the court, whereupon an order for service of summons upon said defendant by publication was made by the court; that affidavits showing personal service of process on defendants Security Realty Corporation and Newlun and service by publication on defendant D. H. Penny were made and filed and the default of said defendants entered; that thereafter on November 5, 1926, the court rendered its decree of foreclosure against defendants Security Realty Corporation and D. H. Penny and ordered that the mortgaged premises be sold at public auction and the commissioner appointed by the court, upon the expiration of the redemption period, should execute a deed conveying the property to the purchaser at such sale; that the commissioner made his return certifying that he had offered the property for sale at public auction and that the plaintiffs in the foreclosure action were the highest bidders thereat and the premises were accordingly sold to them; that thereafter, during the latter part of April, 1928, A. C. Hurt, plaintiff herein, gave notice that on May 3, 1928, he would move the court to set aside the decree made and entered in the foreclosure proceedings on the ground that no service of process was had upon defendants Security Realty Corporation or D. H. Penny, and the decree was not effective as to them; that on May 3, 1928, an order was entered in the minutes of the court granting plaintiff's motion to set aside the judgment; that thereafter plaintiff herein filed an amended and supplemental complaint in said foreclosure action, and the same, together with alias summons, was served upon defendants Security Realty Corporation and D. H. Penny; that notice of motion to quash the service of alias summons on said defendants and to strike the amended and supplemental complaint was duly given, and the court made its order quashing service of the alias summons and striking the amended and supplemental complaint; that thereafter plaintiff herein moved the court to be substituted in the place of the original plaintiffs in the foreclosure action, which motion was by the court granted; that thereupon said plaintiff gave notice that he would move the court for an order vacating the commissioner's certificate of sale and the deed issued pursuant thereto and the satisfaction of judgment or, as an alternative, for an order directing the issuance and service of a writ of assistance for the purpose of putting him in possession of the property, which motion was denied; that a writ of assistance was granted to plaintiff on March 18, 1929, but prior to the date on which it was to be operative was vacated on the court's motion, and, on an order to show cause why such writ of assistance should not be granted, the issuance of the writ was denied. A deed from L. A. Hamilton to D. H. Penny was then offered in evidence by defendants and was admitted. Finally there was offered in evidence by defendants and admitted a deed from D. H. Penny to Pico Investment Company, a corporation. The various deeds herein mentioned purported to convey title in fee to the real property, which is the subject of controversy herein. Upon the evidence thus presented, the trial court rendered judgment that the defendant Pico Investment Company is the owner, seized in fee, of the real property, title to which is, by this action, sought to be quieted by plaintiff, and that said real property is subject to the lien of the mortgage dated December 16, 1922, executed by the Security Realty Corporation in favor of James Hocking and Ella Hocking, and that plaintiff is the owner and holder of said mortgage and of the note whose payment it was given to secure. From that portion of the judgment decreeing that the land is subject to the lien of the mortgage, defendant Pico Investment Company prosecutes this appeal.

Appellant contends that the minute order of the court in the mortgage foreclosure proceedings instituted by James Hocking and Ella Hocking, which order purports to vacate the decree of foreclosure theretofore entered in said action, is void; that the decree of foreclosure is void as to its predecessor, D. H. Penny, for the reason that there was no service of process in said action upon D. H. Pen-

ny; that the decree of foreclosure is valid as to those defendants in said action who were served with process; that the plaintiffs in said action acquired by the commissioner's sale whatever interest in the property was owned by the defendants who were served with process; that the plaintiffs in said action caused satisfaction of the judgment therein rendered to be entered, thus effectually and for all time terminating this particular action; that by assignment of the commissioner's certificate of sale respondent acquired only the interest of his assignors, plaintiffs, in said mortgage foreclosure proceedings; that the court's judgment in the present action, in so far as it decrees that the land is subject to the lien of the mortgage, is not in accordance with the issues framed by the pleadings, and this portion of the judgment is therefore unauthorized.

In analyzing the situation presented by the record herein, it appears, first, that, when respondent produced a deed executed by the commissioner in the foreclosure proceedings to himself as grantee, he had prima facie established fee title to himself in the property. Appellant then produced deeds which deraigned title from the common source to appellant, and, for the purpose of showing that respondent's deed was ineffective as to appellant, introduced in evidence the entire record in the mortgage foreclosure proceedings. This ill-starred litigation has produced the confusion which pervades the present action. Through the mishandling of a common legal instrumentality, a plain and simple situation has become confused. No one who examines the record herein can fail to arrive at the conclusion that appellant was entitled to a decree establishing fee title in it and that the land is subject to the lien of the mortgage attempted to be foreclosed by the above-mentioned proceedings.

[1-4] Whether the order of the court made in the foreclosure action on May 3, 1928, vacating the decree of foreclosure is void or valid, there appears, at all events, to be no dispute between the parties that the decree of foreclosure was void as to D. H. Penny, appellant's grantor. As heretofore indicated, appellant contends that the application to vacate the judgment having been made more than a year after the rendition of judgment was too late, and that the court no longer had jurisdiction to make the order, and that it was a void order in so far as it attempted to vacate the judgment as to defendants other than D. H. Penny; that the plaintiffs in the foreclosure proceedings by their purchase at the commissioner's sale acquired whatever interest defendants other than D. H. Penny had in the property, and that, when the judgment was satisfied of record, the action was finally terminated; that respondent through the assignment to him of the commissioner's certificate acquired only whatever interest defendants other than D. H. Penny had in the property. It is to be observed, first, that the record shows that when the foreclosure action was instituted D. H. Penny was the owner of the fee-simple title to the property, and it does not appear that defendants other than D. H. Penny owned or claimed any interest whatever in the property. If appellant's contention is correct, it follows that neither respondent nor his assignors acquired anything by virtue of the foreclosure suit or through the decree therein or the sale of the property had in pursuance of the decree or the purchase by respondent of the commissioner's certificate and the commissioner's deed executed at the expiration of the redemption period. Nevertheless, though no interest in the property was in fact acquired, it is argued that, when the judgment was satisfied, the foreclosure suit was finally terminated and the court in the present action was in error in holding that appellant holds title in fee subject to the lien of the mortgage. But the mortgage, which was attempted to be foreclosed, actually created a lien on the land which at the time the foreclosure action was commenced was owned by D. H. Penny. Her title could not be divested by foreclosure of the mortgage unless she were made a party to the action and served with process therein. Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540. Since D. H. Penny was not properly served with process in the action, her title to the property was not affected by the decree of foreclosure. As to her the decree was void on the face of the record and properly vacated when the court which had rendered it was advised of the palpable insufficiency of the affidavit upon which the order for publication of summons was made. The object of the foreclosure proceedings was primarily to effect a valid sale of the mortgage premises and thereby to enforce payment of the debt secured by the mortgage lien. This purpose was obviously not accomplished. The authority of the commissioner to execute a deed to the property depended primarily upon a valid judgment, and, since the judgment was void as to the owner of the property, it could pass no title to such property. Phillips v. Hagart, 113 Cal. 552, 556, 45 P. 843, 54 Am. St. Rep. 369. Respondent as grantee in the commissioner's deed properly applied to have the judgment vacated by the court which had rendered it. The court properly vacated the judgment as to D. H. Penny, since its invalidity as to her appeared on the face of the record. That the court's action may have been improper as to other defendants since, as to them, the invalidity did not appear on the face of the record and the application was made too late is of no importance, since it does not appear that these defendants had any interest in the land. The record owner was in no manner prejudiced thereby. Any cloud upon her title to the land created by entry of the foreclosure decree was removed by the or-

der vacating it which had the effect of restoring her title subject to the lien of the mortgage.

[5-7] A more important attack upon the judgment rests upon appellant's contention that the court's conclusion that its title is expressly made subject to the lien of the respondent's mortgage is entirely outside the issues framed by the pleadings. Conceivably, when the court had found from the evidence presented to it, that the fee title to the land was in appellant, it might properly have rendered judgment that respondent take nothing by his complaint. It is axiomatic that, in a quiet title action, a plaintiff must establish his right to succeed by the strength of his own title and not by the weakness of that claimed by his adversary. Since the court was forced to conclude that respondent herein had no title to the property, it might with perfect propriety, have dismissed the action. However, section 738, Code of Civil Procedure, the statute by virtue of whose provisions the present action was instituted, provides that an action may be brought by any person against another who claims an estate or interest in real or personal property, adverse to him. The language of the statute indicates its comprehensiveness, and our courts have indulged in a very liberal construction of its terms. As was said in Peterson v. Gibbs, 147 Cal. 1, 81 P. 121, 123, 109 Am. St. Rep. 107, "The object of the action is to finally settle and determine, as between the parties, all conflicting claims to the property in controversy, and to decree to each such interest or estate therein as he may be entitled to." It is obvious, as was pointed out in Peterson v. Gibbs, supra, that, if a plaintiff in an action of this character fails to show any legal interest in the property in controversy, and as to which he asserts title, he must fail altogether. Nevertheless, although claiming to be the owner of title in fee, if it develops from the evidence presented that he owns some lesser estate, e. g., a life estate, the court is warranted in so finding. In Bashore v. Mooney, 4 Cal. App. 276, 87 P. 553, 555, plaintiff sued to quiet his title to a certain water ditch alleging ownership in fee. The court found and determined that plaintiff was the owner of an easement. On appeal it was urged that the court's findings were insufficient by reason of the allegation in the complaint that plaintiff was the owner in fee of the ditch. This objection was not upheld; the appellate court remarking: "That plaintiff claimed title in fee did not preclude the court from finding a right or ownership in the nature of an easement; the greater title alleged included the lesser. The judgment may not exceed the demand of the complaint, but there is no rule that would prevent the court from granting less relief than that demanded." In Bailey v. Cox, 102 Cal. 333, 36 P. 650, it is said: "A mortgage lien upon real property is an interest therein." In Burns v. Hiatt, 149 Cal. 617, 87 P. 196, 117 Am. St. Rep. 157, it was held that the grantee of the mortgagor who took subject to the lien of a mortgage could not maintain an action to quiet his title against the mortgagee nor recover possession from him without paying or offering to pay the mortgage debt, although it was barred by the statute of limitations. The trial court held that the plaintiff was owner in fee simple and entitled to possession of the property, but that he owned the same subject to the rights of the defendant under a certain mortgage. Both plaintiff and defendant appealed, the latter from the judgment in plaintiff's favor and the former from that portion of the judgment decreeing that his ownership of the property was subject to the rights of defendant under the mortgage. It was specifically held that the plaintiff could not complain of the judgment, as he was not entitled to a judgment decreeing him to be the owner of the property free and clear of the mortgage. Conversely, we are of the opinion that the defendant herein may not complain of a judgment decreeing that it was the owner in fee of the land in controversy, but that its ownership is subject to the lien of a mortgage given to secure the payment of a debt which has not been paid. Its ownership of the fee-simple title to the property is not disputed. The judgment specifically determines it. Its possession of the mortgaged premises is not disturbed. There is no pretense that the debt to secure whose payment the mortgage was given has been paid. The mortgage lien on the land was not foreclosed by a void decree of foreclosure properly vacated. Appellant has therefore no valid cause of complaint.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

ROBBIANO et al. v. BOVET, and three other cases. *

Civ. No. 8489.

District Court of Appeal, First District, Division 2, California.

Oct. 13, 1932.

Rehearing Granted Nov. 12, 1932.

1. Automobiles ⇐245(79).

On issue whether motorist was contributorily negligent in suddenly turning into middle traffic lane, inferences were for jury, in absence of direct testimony of deceased motorist.

2. Appeal and error ⇐930(4).

In support of judgment for plaintiff, presumption is that jury decided inferences in plaintiff's favor on issue of contributory negligence.

3. Appeal and error ⇐994(2).
Trial ⇐140(1).

Credibility of witness' testimony was for jury, and appellate court could not interpose its opinion on matter, as against contention testimony was perjured, and that additional irregularities required reversal.

4. Trial ⇐18.

That widow of motorist killed in collision broke down and cried at end of her examination in chief *held* not to justify finding that trial was unfair.

5. Appeal and error ⇐204(2).

Objection to question whether motorist killed in collision had served in World War *held* too late when made for first time on appeal.

6. Continuance ⇐26(5).

Refusing defendant's motion for continuance because of absence of unsubpœnaed witnesses *held* not to establish unfairness of trial.

7. Trial ⇐18.

In death action excluding testimony of deceased's criminal record and unemployment *held* not error as showing trial was unfair.

8. Witnesses ⇐269(2).

Cross-examination of widow of motorist killed in collision respecting deceased's unemployment *held* properly excluded, where matter was not gone into by plaintiff.

9. Trial ⇐133(6).

In action for death of motorist in collision, remarks of plaintiff's attorney during trial respecting insurance *held* not prejudicial to defendant where court admonished jury.

10. Death ⇐99(4).

$17,500 to widow and minor children for death of husband and father *held* not excessive.

Appeals from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Josephine Robbiano and others against Louis A. Bovet, Jr., in which defendant filed cross-complaint against John Ragno, as administrator of the estate of Sylvester Robbiano, deceased, and another, and wherein John Ragno, as administrator of the estate of Sylvester Robbiano, deceased, filed cross-complaint against defendant; and action by Mabel Morgan against John Ragno and another. From adverse judgments, defendant Bovet and plaintiff Morgan appeal.

Affirmed.

John Ralph Wilson, Aylett R. Cotton, and Bianchi & Hyman, all of San Francisco, for appellants.

Clifton Hildebrand, of San Francisco, for plaintiffs and respondents.

Crosby & Crosby, and Donahue, Hynes & Hamlin, all of Oakland, for cross-defendants and respondents.

STURTEVANT, J.

The above-entitled actions are appeals from judgment in personal injury cases. All of the appeals arose out of litigation involving the same accident. The actions were consolidated for trial, and the appellants have brought up the judgment roll and a bill of exceptions.

The accident occurred on the San Mateo-Hayward bridge about 6:25 p. m. on the evening of November 13, 1930. The bridge runs in a general easterly and westerly direction and has a railing 4 or 5 feet high on each side. It is 27 feet wide and is divided into three lanes of equal width, the lines being indicated by 6-inch markers. The bridge was lighted at the time of the accident with lights 210 feet apart staggered on opposite sides of the bridge. At the time of the accident a car occupied by the Joost family, headed east, was stalled in the southerly traffic lane. It was quite dark, but the car was seen by the witnesses at a considerable distance.

On the evening of the accident Sylvester Robbiano and his brother-in-law, John Ragno, had been visiting in Redwood City and were returning to their homes in Oakland. Each had his separate car. Robbiano was driving a Buick; Ragno was driving a Nash. As they proceeded easterly across the bridge, Ragno was in front and Robbiano was following. They were in the south lane and were traveling at a speed variously estimated at from 35 to 60 miles an hour. As they approached the Joost car Ragno turned out into the middle lane, passed the parked car, and then returned to the south lane. Robbiano turned out to pass the Joost car, and as he did so another car was approaching from the east. The latter car was occupied by the defendant Louis A. Bovet and Miss Mabel Morgan. They

were traveling in a Ford car. A head-on collision occurred between the Buick and the Ford cars. Whether the collision took place in the middle lane or the north lane and the exact distance of the point of the collision from the Joost car were controverted facts. The collision was so violent that Robbiano suffered injuries from which he died. His widow and children commenced an action against Bovet. The latter appeared and answered and filed a cross-complaint against John Ragno as administrator of the estate of Robbiano and against John Ragno and Josephine Robbiano personally. John Ragno as administrator of the estate of Sylvester Robbiano filed a cross-complaint against the defendant. Mabel Morgan commenced a separate action against John Ragno and Josephine Robbiano. As above stated, the actions were consolidated for the purpose of the trial. The jury returned a verdict against the defendant Bovet and from the judgment entered thereon he took an appeal. The trial court granted a nonsuit against Mabel Morgan in favor of Josephine Robbiano. It directed a verdict in favor of Ragno as against Mabel Morgan and from the judgment entered thereon she has appealed.

Robbiano et al. v. Bovet.

[1, 2] The first point made by the defendant is that the deceased was guilty of contributory negligence. He says: "There is therefore only one matter to be determined, namely, was Robbiano exercising ordinary care in suddenly turning into the middle lane at a speed of approximately 40 miles an hour without first ascertaining that the lane was free of approaching vehicles." Conceding that he was not, are those facts shown in the record? At the time of the trial Robbiano was dead. What he did or omitted to do at the time of the accident was never stated by him. As to what he saw or did not see, as to what he determined or did not determine, etc., are all matters on which there was no direct evidence. The inferences were for the jury. In support of the judgment it will be presumed that the jury decided the inference in favor of the plaintiffs. We are unable, therefore, to say that before attempting to pass the Joost car the deceased did not to his satisfaction ascertain and determine that there were no approaching vehicles. That he erred in making that determination seems to have rested on the fact that the defendant had no lights and that his car was not seen by the deceased.

[3-8] It is next asserted that the defendant did not have a fair trial. In support of the point the defendant calls to our attention that the plaintiffs called as a witness George E. Lyons who, the defendant contends, gave evidence that was in effect willful perjury. Thereupon the defendant contends that any irregularity in addition to the testimony so given by Lyons would be sufficient to create a reversal. We may not so hold. The witness Lyons was examined and cross-examined fully. The question as to whether he gave credible testimony was addressed to the jury. In view of the verdict rendered we must assume the jury believed that testimony. This court may not interpose its opinion on such a matter in the place of the opinion of the jury. In this connection the defendant claims that at the end of her examination in chief the widow of the deceased broke down and cried. That act would indicate that she was human, but would not justify this court in holding that she was guilty of intentionally imposing on the jury. In another place the defendant says that a question was asked as to whether the deceased served in the World War. No objection was interposed at the time and it is too late to make the objection at this time. Again, it is asserted that the trial court contributed to the unfairness of the trial by refusing a motion for a continuance. That motion was based on the fact that on the day of the trial the Joost family were not in attendance. They had not been subpœnaed. The fact that they had not been arose out of the strategy of the respective actors. The defendant lost the point. He had no one to blame but himself. Continuing this same point, the defendant complains because the trial court sustained objections and prevented the defendant from showing (1) the long criminal record of the deceased and (2) that the deceased was not employed. It is hard to understand why the defendant should seriously contend he had the right to show as independent pieces of evidence in the case on trial that the deceased had committed certain crimes and misdemeanors when he had not taken the stand as a witness. The subject of the employment was not gone into by the plaintiffs when the widow of the deceased was on the stand as a witness. Nevertheless the defendant attempted to cross-examine her on that subject; and in that connection to show that the deceased was a bootlegger. It was not proper cross-examination and the evidence was properly excluded.

[9] It is next claimed that error was created by the fact that in reply to questions propounded by the defendant's attorney to the witness Lyons on cross-examination the witness said he had made statements to the defendant's insurance man. The answer to the attack is that the attorney should not have so framed his questions. After the witness had given some testimony as to the defendant's insurance man, the plaintiffs' attorney made some remarks about insurance. The defendant's attorney objected to the remarks as misconduct. The court admonished the jury to disregard those remarks. We cannot say the remarks of plaintiffs' counsel influenced the jury under all of those circumstances.

As to the giving and not giving of instructions the defendant makes complaint. As to

the instruction not given the record does not show that defendant requested that it be given. As to instructions 26 and 31, which were given, it is enough to say that both were correct statements of the law and both were pertinent to the case on trial.

[10] The jury returned a verdict in the sum of $17,500. The defendant asserts it was excessive. Under all of the facts of this case we are not able to say it was.

The judgment is affirmed.

Morgan v. Ragno et al.

The plaintiff asserts that when Ragno was about to pass Joost he did not give a signal. She quotes Bovet, "I did not see him give a signal." She argues that because Ragno gave no signal Robbiano drove into the extreme left lane and thus collided with Bovet. Hence Ragno's omission was the negligence that was the proximate cause. The point is not well founded. If Ragno had blown a horn that would have meant one of many things, but not solely that he was going to swerve to the left. If he had held his hand out it would have indicated his intentions. But, when he actually turned his act indicated his intentions and was an ocular demonstration thereof.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

126 Cal.App. 670

PEOPLE v. BOARD OF SUP'RS OF CALAVERAS COUNTY et al.

Civ. 4783.

District Court of Appeal, Third District, California.

Oct. 7, 1932.

Rehearing Denied Nov. 5, 1932.

Hearing Denied by Supreme Court Dec. 5, 1932.

1. Taxation ⇐452.

Statute providing for cancellation of tax assessment on property conveyed to state after assessment has become lien thereon *held* constitutional (Pol. Code, § 3804a; Const. art. 11, § 12, and art. 13, § 6).

Such statute does not violate Const. art. 13, § 6, providing that power of taxation shall never be surrendered by any grant or contract to which state shall be party, nor art. 11, § 12, vesting in county authority to assess and collect taxes for county purposes.

2. Taxation ⇐473.

Taxes assessed against land subsequently conveyed to state for park purposes should have been canceled on park commission's application approved by Attorney General (Pol. Code, §§ 470, 3804a; Const. art. 11, § 12; art. 13, § 6; and art. 13, § 1, as amended in 1914).

Proceeding for writ of mandate by the People, acting by and through its State Park Commission, against the Board of Supervisors of the County of Calaveras and others, to compel cancellation of taxes assessed against certain land.

Peremptory writ issued.

U. S. Webb, Atty. Gen., and Neil Cunningham, and Jess Hession, Deputy Attys. Gen., for the People.

Virgil M. Airola, Dist. Atty., of San Andreas, for respondents.

JAMISON, Justice pro tem., delivered the opinion of the court.

This proceeding is based upon a petition for a writ of mandate requiring the defendants, constituting the board of supervisors, to make an order directing the officer having charge of the records thereof to cancel an assessment of taxes assessed against land now owned by the state of California, and acquired by it for park purposes.

The said petition sets forth, in substance, the following facts: That the above-named defendants are the duly elected and qualified supervisors of said county of Calaveras; that the park commission is a duly authorized body created by act of the Legislature of this state for the purpose, among other purposes, of acquiring real estate for park purposes; that petitioner is now the owner of, and ever since the 23d of June, 1931, has been the owner of, certain lands described in its petition; that said lands were acquired from one Whitesides by deed dated June 24, 1931; that for the fiscal year 1931–32 the county assessor of said county assessed the said lands for taxation; that on or about the 5th day of November, 1931, application was made by the said park commission to said board of supervisors for the cancellation of said assessment and levy upon said property for the fiscal year 1931–32; that with said application petitioner presented satisfactory proof to said board of supervisors that said lands had been deeded to the state of California; that said application for cancellation of said tax was made upon the ground that said property was exempt from taxation under the provisions of section 1, article 13, of the State Constitution, and that said assessment should be canceled under the provisions of section 3804a of the Political Code; that on June 14, 1932, the Attorney General, acting in place of the district attorney, under section 470 of the Political Code, gave his consent in writing to the making of

an order by said board of supervisors directing that the said taxes be canceled; that the said board has failed and refused to order the cancellation of said taxes.

Upon the filing of this petition, an alternative writ of mandate was issued directing the said board of supervisors to make said order or show cause why the same should not be done. Thereupon the said defendants demurred to said petition upon the ground that it failed to state facts sufficient to constitute a cause of action, and warranted the relief prayed for. Defendant also filed a verified answer to the petition in which it is alleged that prior to the acquisition of said land by plaintiff, that is to say, prior to June 23, 1931, one Whitesides was the owner thereof and had been such owner for many years, and was such owner when the lien for said tax had attached and become fixed. And upon information and belief alleged that at the time the owner thereof deeded the said land to plaintiff, the said owner obligated himself to pay all taxes and liens then existing against said land.

It must be conceded that under the provisions of section 1 of article 13 of the Constitution lands belonging to the state are exempt from taxation.

The question then for determination is whether or not lands acquired by the state after the lien for taxes thereon has attached can be canceled by complying with the requirements of section 3804a of the Political Code. This section of said Code provides in part that when property is acquired and owned by the state, county, city, etc., and that prior to such ownership there had been an assessment of said property, which at the time of said assessment became a lien, and which because of such public ownership is not subject to sale for delinquent taxes, may, upon satisfactory proof thereof, be canceled by the officer having custody of the record thereof upon the order of the board of supervisors, or other governing board, with the written consent of the district attorney, city attorney, or other legal adviser of said board.

This section further provides that no cancellation should be made of such charges on property exempt from taxation in event of failure to comply with this law, if any, relative to manner of claiming exemptions.

Respondent relies upon the case of Santa Monica v. Los Angeles County, 15 Cal. App. 710, 115 P. 945, 946. In that case there had been assessment of land for county purposes, and the lien of said assessment had attached before the city acquired ownership. The city paid the taxes so assessed, and then brought suit against the county of Los Angeles. Judgment was rendered in favor of the city, and upon appeal the court in reversing it used the following language: "Under the law, counties are authorized to levy taxes for certain school and county purposes, and when collected the taxes are so applied. With reference to such matters the city may not exercise any right. Plaintiff by its organization as a part of the state government has not been vested with power to aid the state in connection with county government or school government under the control of the county authorities. The taxes so levied upon the property were levied and assessed by the county for purposes within its jurisdiction. The bare acquisition of the premises upon which the tax levy attached did not carry with it any interest or estate in the lien therein created for county purposes. There was, therefore, no vesting of any lesser estate, held in the same right or otherwise, through which a merger could be said to result. The plaintiff, when it acquired this land, took it subject to the lien for county purposes to the same extent as would a private purchaser."

No mention is made in said decision of section 3804a of the Political Code.

As a matter of fact, it was not in existence at that time. This decision was rendered March 8, 1911, and the said section was enacted and became a law on June 8, 1911 (St. 1911, p. 312), but as then enacted it did not contain the provision for cancellation hereinbefore set forth, and it was not until the amendment of 1925 that the said provision was incorporated in said section.

[1] Respondent contends that section 3804a of the Political Code, in so far as it provides that an assessment after the time said tax or assessment becomes a lien thereon, shall be canceled, is in conflict with article 13, § 6, of the Constitution, and also in conflict with article 11, § 12, of said Constitution, and therefore void.

No authorities are cited in support of this contention, except City of Santa Monica v. Los Angeles County, supra, which does not pass upon this question.

It is true that article 11, § 12, of the Constitution, vests in the county the authority to assess and collect taxes for county purposes, and in the instant case, the assessment was made for county purposes, and as was held in Santa Monica v. Los Angeles County, supra, the bare acquisition by the state of the premises upon which the assessment attached did not carry with it any interest or estate in the lien, and therefore there was no vesting of a lesser estate, held in the same right, through which a merger could result, but since that decision was rendered there has been the enactment of a law providing for the cancellation of a lien for taxes attaching prior to the acquisition of the premises by the state.

This law is contained in section 3804a of the Political Code, and if it is not in violation of the Constitution, then unquestionably

the petitioner has the right to have the said assessment canceled.

Respondent contends that this section of the Political Code is in violation of section 6, article 13, of the Constitution, and therefore void. This section of the Constitution is as follows: "The power of taxation shall never be surrendered * * * by any grant or contract to which the State shall be a party."

[2] We find nothing in this record indicating that the power of taxation has been surrendered by the state either by grant or contract. The facts before us show that the power of taxation was exercised, and that by operation of law it has ceased to be a charge upon the land, for the reason that the land is now the property of the state.

We are of the opinion that, upon the showing made by petitioner, it was the duty of respondents to order the cancellation of the said assessment.

The demurrer to the petition is overruled.

Let the peremptory writ issue as prayed for.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

127 Cal.App. 63

HUPP v. GRIFFITH CO.

Civ. 952.

District Court of Appeal, Fourth District, California.

Oct. 17, 1932.

Rehearing Denied Nov. 14, 1932.

Hearing Denied by Supreme Court Dec. 16, 1932.

1. Automobiles ⇐245(38).

In truck driver's action against paving company, for whom driver's employer was hauling, for injuries received when defendant's heavily loaded trailer "jack-knifed" truck going down grade, throwing driver to ground, defendant's negligence, as regards condition and operation of brake on trailer, handled by defendant's employee, and failure to warn of dangers of grade, *held* for jury.

2. Automobiles ⇐245(67).

In truck driver's action against paving company for whom driver's employer was hauling, for injuries received when defendant's heavily loaded trailer "jack-knifed" truck going down grade, throwing driver to ground, truck driver's contributory negligence in allegedly not choosing less dangerous route, operating truck too fast, and locking wheels, *held* for jury.

3. Trial ⇐252(1).

Instruction assuming fact not in evidence *held* properly refused.

4. Automobiles ⇐246(23).

Instruction requiring truck driver suing for injuries to use safer route than one he took, if one existed, *held* properly refused, since driver was entitled to take route taken if it were such as reasonable man might have taken.

5. Trial ⇐260(1).

Instruction fully covered by other instructions *held* properly refused.

6. Damages ⇐132(3).

$21,500 for injuries received by truck driver, 41, earning $150 per month, including brain injury of indefinite duration, *held* not excessive.

Truck driver was unconscious for several days, and remained in the hospital from May 20 to August 5, received a depressed skull fracture, a fracture of his right shoulder blade, and numerous abrasions and contusions, and a serious brain injury consisting of a hole in his head of nearly an inch in diameter, resulting in lapses in speech and memory. There was evidence that the fracture of the skull extended over to the nose, and necessitated the extraction of four or five teeth. Truck driver was unable to work at the time of the trial, 14 months after the accident, was still suffering from headaches and dizzy spells, his outlook for ultimate recovery was problematical, according to his attending physician, and special damages proved amounted to $3,100 for medical expenses and loss of income up to the time of trial.

Appeal from Superior Court, San Diego County; C. E. Beaumont, Judge.

Action by Claude Hupp against the Griffith Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Stearns, Luce & Forward, of San Diego, for appellant.

Noon & Noon and Charles A. Brinkley, all of San Diego, for respondent.

BARNARD, P. J.

At the time involved herein the defendant was engaged in paving certain streets in a section of San Diego known as Point Loma. The plaintiff was employed as a truck driver by the Orndorff Company, which company, under an agreement with the defendant, was hauling materials for this paving and also doing such towing for the defendant as might be required. For our present purposes it may be said that Santa Cruz avenue runs east and west, being intersected at right angles by Santa Barbara avenue, which runs north and south. It is also intersected by Venice street,

which is a block east of Santa Barbara avenue, and by Catalina boulevard, which is a block east of Venice street. On May 20, 1930, the defendant notified the Orndorff Company that it desired to have a trailer towed from this paving job to the scene of another operation in East San Diego, some ten or fifteen miles away. The plaintiff, while hauling a truckload of material, was notified of the request and of the fact that another truck sent for the purpose had broken down. Being himself in charge of assigning work to the various truck drivers for the Orndorff Company, the plaintiff dumped his load and proceeded with his truck to the corner of Santa Cruz and Santa Barbara for the purpose of doing the towing required. He there found a trailer belonging to the defendant weighing about seven tons and upon which was loaded a road roller which weighed about twelve tons. The trailer was attached to the truck, and the plaintiff was told where it was to go, but was given no instructions as to the route to be followed.

It is conceded that, in following the best and most practical route, it was necessary for the plaintiff to first proceed in some manner to the corner of Santa Cruz avenue and Catalina boulevard, which corner was two blocks east of the starting point. The main controversies in this case center upon whether, in order to arrive at the corner of Catalina boulevard and Santa Cruz avenue, the plaintiff should have taken the direct route east on Santa Cruz avenue for two blocks, or whether, as a reasonable man, he should have proceeded south on Santa Barbara avenue for three blocks to Orchard avenue, then east two blocks on Orchard to Catalina boulevard, and north three blocks on that street to its intersection with Santa Cruz. Santa Cruz avenue had just been paved; the pavement having been completed and accepted by the city about a week before the date in question. All of the streets in this neighborhood were hilly in nature; the grades ranging from 1½ per cent. to 15 per cent. Santa Cruz avenue for two-thirds of a block to the east of Santa Barbara had a grade of 7 per cent., followed by a grade of 3.8 per cent. to Venice street, then 5 per cent. for a third of a block, then 15 per cent. for a third of a block, and then 9½ per cent. for the remainder of the block, all of these grades being downhill. Beyond Catalina boulevard the grade of Santa Cruz avenue was 7½ per cent. uphill. The other suggested route, south on Santa Barbara, east on Orchard and north on Catalina, contained thirteen different grades, some uphill and some downhill, the grades ranging from 1½ per cent. to 5½ per cent. Santa Barbara and Orchard were not paved.

The trailer which was to be towed had six wheels, two in front and two at each side of the rear, being equipped with a brake on the two left rear wheels only. The evidence indicates that this brake was not on the trailer as originally built, but that it had been subsequently installed thereon. This brake consisted of two wide steel shoes which were pressed against the rubber on the two left wheels when a long lever was pushed down. There was no way of fastening this lever down, and the braking force was applied by a man on the trailer, who pushed the lever down and held it as long and as hard as the occasion demanded. It appears that the mechanism operating the brake was made partly from a crankshaft out of a car, with two Ford connecting rods, and there is evidence that these two connecting rods would occasionally buckle.

On the afternoon in question this trailer with its load was standing near the corner of Santa Cruz avenue and Santa Barbara avenue, but facing south on Santa Barbara. After it was attached to the truck, the plaintiff started forward in low gear, turning almost immediately to the east on Santa Cruz avenue. An employee of the defendant, named Latham, rode on the trailer for the purpose of operating the brake thereon. While going down the steeper part of Santa Cruz avenue, between Venice and Catalina and in less than two blocks from the point of starting, the heavy weight of the trailer and roller pushed the rear end of the truck around in a manner commonly called "jack-knifing," with the result that the whole equipment crashed into the curbing, throwing the plaintiff to the ground and inflicting serious injuries upon him. This action which followed resulted in a verdict and judgment for the plaintiff, from which judgment this appeal is taken.

It is appellant's contention that the evidence utterly fails to show any negligence upon its part, but, on the contrary, shows, as a matter of law, that the respondent was guilty of contributory negligence. This theory is based upon the contention that it conclusively appears from the evidence that the accident was caused by the negligence of the plaintiff in choosing the route over which the equipment should be taken and in driving his truck too fast under the circumstances, and not in any degree by the condition or operation of the brake upon the trailer or by any action on the part of any employee of the appellant. These two questions are closely related, but will be separately considered, so far as possible.

[1] We think there is some evidence of negligence on the part of the appellant. While we have but briefly described the brake on this trailer, the record contains much evidence which could well have convinced the jury that this brake was entirely inadequate for the control of such heavily loaded equipment over such grades as existed in that neighborhood. An employee of the appellant

testified that on previous occasions he had worked with this same trailer, testifying as follows: "I am familiar with the mechanism of the brakes on that trailer. I know how it is constructed. It works with two Ford connecting rods. As you pull down on that lever you clamp the two pieces of steel down on the tires. When the lever is pulled down the two pieces of steel press on the top of the two rear tires. While using that trailer I have had difficulty with the use of the brake. I have had it buckle up with me in pulling down too hard on it. By pulling the lever down too hard you would lose control of the trailer. It wouldn't work. The two Ford connecting rods would buckle right up. The effectiveness of the brake would be lost. I don't remember just the date on which, before Hupp was hurt, the brake buckled up. It happened several times. We generally stopped and fixed it on level ground."

Latham, an employee of the appellant, who operated the brake on the trailer on this occasion, testified that he made no inspection of the brake before starting on this trip, although there was evidence that he had operated the brake a few hours before, when this trailer was being towed to the point where the roller was loaded upon it, and that at that time the brake was not sufficient to hold the weight of the empty trailer as it was being towed over the hills. While there was evidence to the contrary, we are not here concerned with this conflict. Latham also testified that just prior to the accident he used every effort to hold the trailer with this brake, but that the heavily loaded trailer forged ahead and pushed the truck around, that shortly before the accident two bolts on the brake sheared off, and that he let go of the brake and got around behind the roller. While it is true that he testified that the truck had begun to weave a little from side to side, and that its wheels were locked before these bolts on the brake were cut off, it by no means appears certain that such weaving as the truck did would inevitably have produced the accident, that such weaving was not in part due to the failure of the brake to hold the heavy weight of the trailer and its load, nor that the fact of the shearing off of these bolts or the fact that this employee let go of the brake and sought a place of safety, thus releasing the entire load of nineteen tons, did not have very considerable to do with the accident in question.

While there is evidence that the appellant had instructed its employees that, when a trailer and its load was to be moved, it was to be taken along streets with little or no grade, and further evidence that the grade on this street was known to these employees to be excessive, the evidence shows that nothing was said to the respondent as to what route should be taken. While the appellant relies on evidence that the pavement on Santa Cruz avenue was in an extremely dangerous condition because of a slippery curing substance recently applied, the same employees of appellant who testified as to this dangerous situation, and who had been engaged in paving the street, said nothing about it to the respondent.

In view of the fact that the appellant, through its employee, remained in charge of the operation of the brake on the trailer, the condition of this brake and the manner of its operation are important considerations here. Having thus undertaken at least a part of the responsibility for transporting this equipment, we think its failure to in any manner warn the respondent of such dangers of grade and surface as, to the minds of its employees, rendered the route taken too dangerous to be considered, also has a bearing upon the question as to the appellant's negligence. A number of questions of fact are presented, which were for the jury, and its implied finding of negligence on the part of the appellant is, in our opinion, sustained by the evidence.

[2] The principal contention of appellant is that the respondent was guilty of contributory negligence, as a matter of law, in not choosing a less dangerous route, in operating his truck too fast, and in locking the brakes thereon. It is argued that the respondent had knowledge of all of the streets in this vicinity, and that his selection of this particular street was negligence because it included the steepest hill in the neighborhood, and because there had been freshly applied thereto a slippery curing substance, which fact was known to him. In regard to the selection of the street, the respondent testified as follows: "I selected Santa Cruz Street to go down. That is where the accident happened. There are other roads in that vicinity a whole lot steeper. Narragansett would be I believe, if I went that direction. Narragansett would have been in back of me. Del Monte has a 14% grade about two hundred feet, that is, about straight down. At the same time, this street from Santa Cruz Street to Orchard Street was all torn up and had just been refilled where they put in pipes along there, and in going along there with a truck you had to be very careful you did not hit one of those places or you went down clear to the axle. It was the same way on Orchard Street. If I dropped this trailer in there with this load, there would have been lots of fun taking it out. To the best of my knowledge, that was the condition of Santa Barbara Street and Orchard Street at the time I started moving the trailer. At the time of the accident I knew it was that way. That is one reason I picked out the paved street. I know that I picked out a paved street because I helped put that paving in there and hauled the material for Santa Cruz. At the time I did not know I picked out Santa Cruz Street. They told me that is where the accident happened.

As far as that is concerned, that is all I know about it. I knew all the time I was working out there that Santa Barbara Street was soft in sections down toward Orchard Street. I could not say the exact spot, but between Santa Cruz and Orchard there were soft places and also on Orchard between Santa Cruz. There were soft places between Santa Cruz and Del Mar and Santa Barbara Street. They were all along between Santa Cruz and Del Mar. I know that because I helped to pull trucks out of there that were stuck there. It was three or four days or a week before this accident that I pulled a truck out of there. I helped pull three or four trucks out of there to the best of my knowledge. That was before the accident—sometime after we started the job until the accident happened. To the best of my knowledge, the soft part between Coronado and Santa Cruz started at the property line on Santa Cruz and continued clear down."

All of the streets in that neighborhood contained grades ranging from to 1 or 2 per cent. up to 13 per cent., 14 per cent., and 15 per cent., the latter grade being found on this one-third of a block on Santa Cruz avenue. The question now before us is whether it can be said that a reasonable man could draw but one conclusion from all of the evidence, and that to the effect that the respondent was negligent in proceeding down Santa Cruz avenue. While it appears that the route now advocated by the appellant, which was six blocks longer than the one chosen, had less percentages of grade, the respondent's evidence indicates conditions thereon which might well have made him prefer a shorter paved street over which to take this heavy load. There were other possible routes in between, but these were from two to six blocks longer, required a zigzagging course, and the only one which was over a paved street had one grade of 13 per cent. The street chosen was the direct route, it was paved, it had been open to the public for traffic for about a week, it was only two blocks long, and the steep part of its grade was only a third of a block long. The respondent testified: "There were down grades any way you would go to get to the Cooper Street job. San Diego is made up of hills. You have to go down hill to get any place you want to go of any distance. Catalina Boulevard was as steep as Santa Cruz and Santa Barbara Street. From the Naval Training Station garage on Catalina Boulevard to where you go down to the tide flats is very steep and if you went out University, going down underneath the Florida Street bridge, it is very steep, and you have two more hills, Arizona Street and Texas Street. If you went out El Cajon Avenue, you had a steep hill to pull up to El Cajon and two hills to go down to Florida Street and two more hills down in that direction. To the best of my knowledge, from Catalina Street you would have had steep hills. If I had arrived at Catalina Street safely I would have had other steep hills before I arrived at the job."

He further testified that he was familiar with Santa Cruz street, and knew "approximately its grade and how it sloped." In this journey many hills of varying grades were to be encountered. Might not a reasonable man expect a trailer, whose brake was in charge of another, to be equipped with brakes sufficient for any reasonable grade? Was this a reasonable grade? Would a reasonable man prefer for such a load a short paved street instead of a longer, unpaved road, partly in bad condition? Could the respondent have reasonably believed that this paved street, opened for traffic, and with its steep portion only a third of a block long, would be safe if the trailer was properly equipped with brakes and properly handled? These, and many other questions that might be suggested, are questions of fact. If it could ever be fixed, as a matter of law, at what point a grade becomes too steep for a given load, we have here a complication suggested by the responsibility of another for the condition and manner of operation of the equipment containing the larger share of that load.

In regard to the slippery condition of the street, while the respondent testified that he knew that the street was paved with concrete, he also testified that he did not remember having noticed any curing substance on the pavement, and that he did not remember having been over the street since the paving was completed. While the record contains evidence that an oily and slippery curing substance was on the pavement, there is other evidence to the contrary. A motorcycle officer who accompanied an ambulance to the place of the accident testified as follows: "The pavement may have been concrete with a black curing process on it. I know it was black pavement, that is all. I thought it was asphalt. It was dry. I don't believe the oil, or material on it, whatever it was, could be slippery. I know it was a perfectly dry pavement and it had been done for some time; it should have been cured." A question of fact arises both as to the presence of an oily and slippery substance and as to any knowledge thereof on the part of the respondent.

As to the claim that the respondent drove too fast and improperly locked his brakes, the witness Latham testified as follows: "When we got around the turn and started down Santa Cruz I don't know how fast the truck was going. We started out rather fast and we slowed down some when we got to the hill until the time we got to the intersection. We were going probably fifteen miles an hour. After that it slowed down some." On the other hand, the respondent testified that, when he started out, he placed his truck in low gear, and that he remembered nothing

thereafter. When the truck was found after the accident it was in low gear. There was evidence that this truck could not travel more than two or three miles an hour while in low gear. Appellant relies upon the following testimony of respondent as showing that he was negligent in the operation of his truck on this occasion: "So I had approximately nineteen tons behind me. My truck was empty. I have had experience in towing these heavy weights. When I have an empty truck towing nineteen tons behind me my traction is not as good as though the truck was loaded—in fact the truck would weigh about six tons empty. I know that it is dangerous to tow a heavy weight of that kind at any speed greater than a low speed. I also know that it is dangerous to go down any kind of steep hill with that kind of a load. I also know that with the equipment I had that day in the trailer if I applied my brakes sufficiently to lock my back wheels, it probably would cause the heavy trailer behind me to swing the back end of my truck around and 'jackknife' it. When I lock my wheels or when the wheels of my truck are locked it is very difficult to control it with the weight behind it of nineteen tons. It would be liable to cause is to swing or weave. The moment the truck and trailer got out of alignment, it would be almost impossible to hold it if I let it get out of my control."

Not only is a question of fact presented as to whether or not the truck was being operated too fast, but another arises as to when the wheels of the truck became locked and the relation thereto of what was occurring on and in connection with the heavily loaded trailer, and all this must be considered in connection with an apparently great emergency. It cannot be held that negligence on the part of the respondent, as a matter of law, is conclusively established by the fact that at one time during its course down the hill the wheels of the truck were locked.

An important part of the question before us is whether the respondent's negligence, if any, proximately contributed to the accident. While appellant argues that it is perfectly clear from the evidence that the cause of the accident was the extreme steepness of the grade on a street wrongfully chosen by the respondent, there is evidence in the record which justifies the jury in reaching a different conclusion. Latham, who was operating the brake on the trailer, testified as follows: "When we got to the 15% pitch where it broke sharply down we just kept on going. The first thing that happened that indicated any trouble or accident was that about a third of the way down the hill, or possibly more, the truck began to swing a little bit. Both wheels of the truck were sliding. At that time the brake was still operating and functioning on my trailer. The bolts had not broken at that time. When the wheels began to slide on the truck it weaved a litle bit and finally ran in and nosed around. By that I mean it swung around in the opposite direction. I don't recall at just what period the bolts broke but I am sure it was after the truck began to weave and after the wheels on the truck were sliding. At some period after that the bolts sheared away * * * The effect upon the truck when its wheels began to slide was that it weaved a little bit. I don't know any more than to say that it just weaved and turned around. I suppose the wheels on the truck locked from having the brakes applied. I don't know. They were not turning around. I suppose the nineteen tons coming behind shoving this truck with the wheels locked simply shoved against the rear end and shoved the rear end forward and the front end swung around. During all this period I was applying my brakes to the utmost. The brakes held. There was no defect in their operation or in their ability to control the trailer until after the truck swung around."

While he says the bolts broke after the truck began to weave, and that later the truck turned around, the inference is possible, especially in view of the evidence as to the construction and method of operation of the brake on the trailer, that this brake was applied only on one side of the trailer, and that it had been insufficient to hold the trailer, when empty, on the same day, that the route chosen would have been safe had the braking equipment on the trailer been sufficient and properly operated, and that any improper operation of the truck, by respondent, may have been caused by his efforts to meet conditions which were chargeable to the appellant. It may well have been that, while the respondent was endeavoring to meet these conditions as best he could, the shearing of the bolts or the dropping of the lever by Latham, as he sought safety, may have released the heavy mass which then rushed down the hill and turned the truck around. The motorcycle officer above referred to testified that, when he examined the trailer immediately after the accident, "there were six or eight bolts which held that plate down, and those bolts were either so loose or broken that when the lever was brought completely down as far as it would go, there was some obstruction on the body of the truck which stopped the lever, and when it was brought clear down to the limit of the movement, those iron shoes that normally rub on the tires did not exert any pressure on the tires whatever." Latham testified that he supposed the nineteen tons coming behind shoved the truck around. The question naturally arises whether this would have occurred had the brakes on the trailer been adequate or had they been properly operated. In this connection, while Latham here testified that the brakes held, at another time he testified in reference to the same time, as follows:

"When I applied the lever to the brake to try and hold the trailer back I stayed on the trailer at all times and held the lever down all the time until the truck came to a stop." At still another time he testified that he changed his position on the trailer, "as we were going down the hill. I got behind the roller so I would be out of the front of it. I let go of the brake and got behind the roller."

Not only in relation to the operation of the truck and trailer as they proceeded down the hill, but also in regard to the responsibility of the appellant for the condition of the brake upon the trailer, in connection with choosing the route to be traveled, and in reference to warning the respondent as to hazards to be there found, there are questions of fact affecting the question of proximate cause, which make it impossible to say that the only inference possible is one unfavorable to the respondent.

It would serve no useful purpose to analyze the many cases cited. The general rules as to contributory negligence and proximate cause are well settled, and there is no controversy between the parties hereto as to what these rules are. Under these rules and the facts shown we think the question of contributory negligence as a proximate cause of this accident was one of fact for the jury.

[3-5] Appellant next complains of the refusal of the trial court to give three specific instructions. The only argument made is that the instructions in question were correct statements of the law, and that they were applicable to the defendant's entire defense. The first of these instructions assumed a fact not in evidence. In general, it related to the degree of care required in connection with the dangers and risks involved, with a specific application to some of the facts in this case. The degree of care necessary, as applied to the circumstances of the case, was covered in another instruction given. The second instruction assumed that the respondent was in control of the entire equipment, and that the appellant owed no duty in reference to the choice of a route over which the equipment should be transported. It also told the jury that the respondent was bound to use a safer and less dangerous route than the one taken, if one existed. This would not be true if the route taken was such as a reasonable man might have taken, and this portion of the instruction left out of consideration the possible effect of the condition and manner of operation of the trailer upon the choice of a route. The correct portion of the instruction was elsewhere covered. The third instruction complained of went only to the degree of care required, a matter that was fully covered. We have examined all of the instructions given and refused, and find no error therein.

[6] The only other point raised is that the amount of the verdict, $21,500, is excessive. This is based upon the contention that the respondent was not shown to have been permanently injured. There was evidence of very serious injuries. The respondent was unconscious for several days and remained in the hospital from May 20 to August 5. The doctor who attended him testified as follows: "He had a depressed skull fracture on the right side, back of his ear, a fracture of his right shoulder blade, and numerous abrasions and contusions. The serious injury was the brain injury. This hole in his head was about nearly an inch in diameter and very nearly circular, and the bone which was missing in this region was shattered into a number of pieces which were pushed down into the brain substance about one inch. There was a good deal of brain substance lost, oozing out of the opening, and some of it had to be removed and probably some of it had already escaped, so it is impossible to say just how much brain tissue he lost. On account of the fact that he was in a good deal of shock at that time, I didn't operate on him until the following morning. Then I did what we call a trephine operation. That is, I removed * * * I enlarged this opening in his skull and had removed all the bone which had been pushed down into the brain substance. He got along quite well and stayed in the hospital about ten weeks, I think it was, until the 5th of August, when he left the hospital. When I say that he got along well I mean that he recovered promptly as far as any danger to his life was concerned, but his brain don't work right. He had, after a few days, when he began to talk and began to remember where he had been and what had happened, he would miss certain words when he would attempt to talk, and he would have to go back and try several times in order to get some word that he couldn't quite make * * * get at, when he was trying to talk. The same thing happened in his reading, when he would read the newspaper, he would read a whole paragraph and then be unable to tell what it had been about, and frequently he would be unable to recognize some of the ordinary words with which he should have been perfectly familiar."

There was evidence that the fracture of his skull extended over to his nose and necessitated the extraction of four or five teeth. The respondent was unable to work at the time of the trial, 14 months after the accident, and was still suffering from headache and dizzy spells. The doctor further testified: "As to his future outlook, ultimate recovery, I think it is more or less of a problem as to what the future is going to bring for him. A brain injury is a very serious thing, especially when some of the brain has

been lost. This injury wasn't only an injury at this side here, back of his ear where the depression was, but also there was a fracture which ran from that point clear down under the base of the brain, a long, what we call a linear fracture, that is a line fracture extending into the base of the skull, and there may be injury to other parts of the brain as well as the part of the brain that was under the depression. In my opinion I believe the man is unable to work at the present time and I cannot say how long he is going to be in that condition. That may be a very long time or may clear up in a few more months. I wouldn't express any opinion as to the length of time he is going to be disabled, his condition is liable to continue for an indefinite period of time. He's been in the same condition now for practically a year and shows no signs of improvement during that time. He tires out just as quickly and gets these headaches and these dizzy spells and his double vision just as much now, apparently, as he did at that time a year ago."

On cross-examination, the doctor testified that he was unable to say whether he might recover or not. There was evidence that at the time of the accident the respondent was earning $150 per month, and the special damages proved amounted to $3,100 for medical expenses and loss of income up to the time of the trial. The respondent was 41 years of age at the time of the accident, and his condition at the time of the trial was about the same as when he left the hospital. While there is no direct testimony that the injuries would certainly be permanent, the inference is reasonable that they would be long continued if not permanent. The evidence would justify a very substantial judgment, and we are unable to hold that the amount found by the jury indicates passion or prejudice. Under the familiar rule, we think this verdict cannot be set aside as excessive.

For the reasons given, the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

127 Cal.App. 50

GAYTON v. PACIFIC FRUIT EXPRESS CO. et al.

Civ. 940.

District Court of Appeal, Fourth District, California.

Oct. 17, 1932.

1. Master and servant ⇐302(6).

Deviation from course of employment in attending to personal matter will be considered immaterial as regards employer's liability to third person injured if employee combined his with master's business.

2. Master and servant ⇐302(6).

To release master from liability for injury to third person, employee's deviation from course of duty must amount to entire departure.

3. Automobiles ⇐245(30).

Whether employee returning from trip on employer's business after stopping to call on friend and while deviating slightly from shortest route in taking companion home was acting in course of employment when injuring pedestrian *held* for jury.

4. Appeal and error ⇐999(3).

Jury's finding that employee was acting in course of employment when injuring third person cannot be disturbed on appeal.

5. Automobiles ⇐245(6).

Negligence of truck driver striking pedestrian walking on right-hand side of street at night *held* for jury (St. 1923, p. 554, § 113(a), as amended by St. 1927, p. 1437).

6. Automobiles ⇐245(72).

Whether pedestrian walking on right side of street when struck by automobile at night was guilty of contributory negligence *held* for jury (St. 1923, p. 517, § 150½, as added by St. 1929, p. 546, § 66).

7. Negligence ⇐122(1).

Contributory negligence is affirmative defense.

8. Evidence ⇐53.

Presumption is evidence in favor of party who is given right to deduce from it given state of facts (Code Civ. Proc. § 1957).

9. Evidence ⇐86.

Where law establishes conclusive presumption, evidence will not be received to contradict it (Code Civ. Proc. §§ 1957, 1959, 1962, subd. 7).

10. Automobiles ⇐242(1).

Statutory presumption conclusively establishes street is outside business or residential district, absent evidence on question (St. 1923, p. 554, §§ 115, 116, as amended by St. 1927, p. 1438).

11. Automobiles ⇐242(8).

Defendant could invoke conclusive statutory presumption that accident occurred outside business or residential district in support of defense of contributory negligence, where deceased walked on right side of street (St. 1923, p. 554, §§ 115, 116, as amended by St. 1927, p. 1438).

12. Appeal and error ⇐1170(9).

Refusal of instructions and giving of another instruction resulting in taking from jury question whether negligence of pedestri-

an in walking on right-hand side of street contributed to his death when struck by automobile *held* prejudicial error (St. 1923, p. 2122, §§ 115, 116, as amended by St. 1927, p. 1438; Const. art. 6, § 4½).

Requested instructions were, in substance, that it was unlawful for pedestrian to walk upon highway outside of business or residence district otherwise than close to left-hand edge of highway, and that every public highway should be conclusively presumed to be outside of business or residential district unless existence within business or residential district should be established by clear and competent evidence, and the instruction given was that the deceased had right to travel on foot on right-hand side of street on night in question.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by Catalina A. Gayton against the Pacific Fruit Express Company and another. From a judgment for plaintiff, defendants appeal, and they also attempt to appeal from an order denying a motion for new trial.

Judgment reversed, and attempted appeal from order denying new trial dismissed.

Griffith R. Williams, of San Francisco, Noon & Noon, of San Diego, C. B. Smith and Whitelaw & Whitelaw, all of El Centro, and Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants.

W. E. Abraham, of Brawley, and Harry B. Ellison, of Los Angeles, for respondent.

MARKS, J.

This is an appeal from a judgment of the superior court of Imperial county, wherein the respondent recovered judgment in the sum of $7,000 damages resulting from the death of her husband, Jose G. Gayton, caused by his being struck by an automobile truck belonging to the appellant corporation and driven by William Nighswonger on a public street in the city of Brawley on the morning of January 1, 1931. Appellants also attempt to appeal from an order denying their motion for a new trial.

The facts of the case may be summarized as follows: The Pacific Fruit Express Company, a corporation, employed William Nighswonger as its supervisor in Imperial county. He had no regular hours of employment, but was subject to call upon the duties of his employer at any hour of the day or night. The appellant corporation furnished him with a light automobile truck which he used in the course of his employment and which he was permitted to use for his own pleasure. The truck, when not in use, was kept either in the garage of the employer in the city of Brawley or at the home of the employee. On the afternoon of December 31, 1930, Nighswonger was required to go upon the business of his employer from the city of Brawley to the city of El Centro. He left Brawley about 4:30 o'clock in the afternoon, taking with him, as his guests, his wife, and R. P. Maxwell, another employee of the appellant corporation. He completed his business at El Centro at about 6 o'clock in the evening, and with his two companions went to the city of Mexicali on a trip in no wise connected with the business of his employer. The three had dinner in Mexicali and returned to Calexico at about 9 o'clock. They went to the residence of one Burnett on a social visit, where they remained until about 1 or 1:30 o'clock in the morning of January 1, 1931, when they started on their return to Brawley passing through the city of El Centro. Maxwell lived at the office of the appellant corporation in the city of Brawley. The most direct route from El Centro to the home of Nighswonger did not pass this office. In making the return trip to his home, Nighswonger deviated from the most direct route in order to leave Maxwell at the office. This deviation was slight. In proceeding to the office, Nighswonger drove the truck over K street, a public thoroughfare of the city of Brawley, running in an easterly and westerly direction. In traveling easterly over this street, he struck the deceased, who, with a companion, was walking easterly upon his right-hand side of the street. The impact broke his neck and both legs, causing instant death.

K street was 50 feet in width between the curbs, and had a 20-foot strip of pavement in the center with dirt shoulders 15 feet in width on each side of the pavement. There were no hard-surface sidewalks along the sides of the street, but a fairly smooth dirt path existed on the southerly side between the curb and the property line outside of the 50-foot roadway.

Witnesses for the appellants testified without substantial contradiction that just before the accident the truck was being driven along the southerly edge of the paved portion of K street upon its right side of the center; that an automobile approached from the east, the headlights of which momentarily blinded Nighswonger; that, when he passed the blinding rays of the lights, he saw the deceased about 10 or 15 feet in front of his truck; that he applied his brakes and swerved to his left, but struck the deceased with the right front headlight and front fender of the truck; that the speed of the truck was not more than thirty miles per hour; that the truck proceeded easterly between 25 and 30 feet from the point of impact before it was stopped; that there was broken glass and blood on the pavement at the point of impact; that the deceased was walking on the pavement between 2 and 6 feet northerly from its southerly edge. As is usual in cases of this kind, wit-

nesses disagreed on the length of the skid marks made by the tires of the truck. Some of them testified that they commenced at the point of impact, while others testified that they started as much as 25 or 30 feet westerly from such point. The evidence would indicate that K street, at the point of the accident, passed through a residential section of the city of Brawley, though the record is barren of any evidence showing the number of residences or business structures along that street on either side of the point of collision. One witness, a police officer of the city of Brawley, who had patrolled K street, among others, for over three years, testified that he had seen no traffic speed signs on K street during that entire period.

Appellants urge numerous grounds for a reversal of the judgment, which we may summarize as follows: First, that the accident did not happen when Nighswonger was engaged in the business of his employer and in the course of his employment; second, that the evidence fails to disclose any negligence on the part of Nighswonger; third, that the evidence shows the deceased guilty of contributory negligence as a matter of law; fourth, that the court misdirected the jury, refusing to give proper instructions requested by appellants and giving improper instructions requested by respondent and upon its own motion. We will consider these questions in the order in which they are stated.

Appellants base their contention that Nighswonger was not engaged on the business of his employer at the time of the accident upon the decision of this court in the case of Hanchett v. Wiseley, 107 Cal. App. 230, 290 P. 311. The difference in the facts of the two cases is easily discernible. In the Hanchett Case Wiseley was employed as an automobile salesman in the city of San Diego, and was furnished an automobile by his employer which he was permitted to use as a demonstrator. He had no regular hours of employment, but was required to return the automobile to his employer's place of business each day at the close of business. The employer specifically instructed him not to take the automobile into Mexico. On the day of the accident, Wiseley, with a friend, drove the car into Mexico, where he consumed a considerable quantity of intoxicating liquor, and on his return to San Diego the accident happened in which the plaintiff was injured and for which damages were recovered against both Wiseley and his employer. This court reversed the judgment against the employer upon the ground that a trip into Mexico against the express direction of the employer and solely for the purpose of a drinking bout could not be considered his employer's business nor in the course of his employment. Had the accident in the instant case happened while Nighswonger was on his trip from El Centro to Mexicali, or the return to El Centro, the Hanchett Case would be authority for a holding that the employee was not on his employer's business during those particular parts of his journey. The accident did not happen upon that portion of the journey, but during the portion when the employee was returning from El Centro, where the business of his employer called him, to his home in Brawley, which return trip was necessary in the course of his employment.

[1, 2] The rules of law prevailing in this state applicable to the facts of the case before us are clearly stated in the case of Kruse v. White Brothers, 81 Cal. App. 86, 253 P. 178, 180, as follows: "In Gousse v. Lowe, 41 Cal. App. 715, 183 P. 295—where it appeared that it was the duty of a servant to drive his employer's automobile from a garage to the home of the latter four blocks to the west, but who drove the car on a mission solely his own to a point 2½ miles to the east, a collision occurring while returning to the garage—it was held that the act of the servant was not within the scope of his employment, following the general rule there stated that if a servant abandons or departs from the business of the master and engages in some matter suggested solely for his own pleasure or convenience, or pursues some object which relates to an end or purpose which may be said to be the servant's individual and exclusive business, and while so engaged commits a tort, the master is not answerable. Kish v. California State Auto Ass'n, 190 Cal. 246, 212 P. 27. To exonerate the master, however, it is essential that the deviation be for purposes entirely personal to the servant (39 Cor. Jur., p. 1297, Master and Servant, §§ 1493, 1494); and a deviation will be regarded as immaterial if the latter combines his own business with that of the master or attends to both at substantially the same time (Brimberry v. Dudfield Lumber Co., 183 Cal. 454, 191 P. 894). A mere deviation from the strict course of his duty does not release the master from liability. In order to have that effect it must be so substantial as to amount to an entire departure. 39 Cor. Jur. p. 1297, Master and Servant, § 1493. As the rule has been stated: 'One does not cease to be acting within the course of the master's employment because his most direct and immediate pursuit of the master's business is subject to necessary, usual or incidental personal acts, nor even by slight and immaterial delays or deflections from the most direct route for a personal or private purpose, the pursuit of the master's business continuing to be the controlling purpose. Such acts, not amounting to a turning aside completely from the master's business so as to be inconsistent with its pursuit, are often only what might be reasonably expected, to which, therefore, the master's assent may be fairly assumed; or they are in many instances

the mingling with the pursuit of the master's business some purpose of the servant's own.' Shearman & Redfield, Negligence (6th Ed.) § 147a. Whether there has been a deviation so material or substantial as to constitute a complete departure is usually a question of fact. In some cases the deviation may be so marked, and in others so slight relatively, that the court can say that no conclusion other than that the act was or was not a departure could reasonably be supported; while in still others the deviation may be so uncertain in extent and degree in view of the facts and circumstances as to make the question of what inferences should be drawn from the evidence properly one for the jury." These rules have been approved in Waack v. Maxwell Hardware Co., 210 Cal. 636, 292 P. 966.

[3, 4] Appellants make the further contention that, if it be conceded that Nighswonger returned to the duties of his employment when he reached the city of El Centro on his return trip from Mexicali, he again deviated from the duties of his employment in not taking the most direct route to his home and in deviating from this route to pass the office of his employer in Brawley for the purpose of leaving Maxwell at his place of abode. It is true that the most direct route would not have taken Nighswonger along K street where the accident occurred. It is also true that the employer had not specified any route over which it required its employee to travel on this particular trip. It has been held that under such circumstances a slight deviation of the employee from the most direct route of travel is not necessarily a departure from the business of the employer even though the deviation be made for the purpose of taking a fellow employee to his place of residence. Dennis v. Miller Automobile Co., 73 Cal. App. 293, 238 P. 739. The question of whether or not such slight deviation constituted an abandonment of the business of the employer is usually a question of fact for the jury and not a question of law for the court. Dennis v. Miller Automobile Co., supra; Kruse v. White Bros., supra; Waack v. Maxwell Hardware Co., supra. We therefore conclude that, as the question of whether or not Nighswonger was acting on his employer's business and in the course of his employment at the time of the accident was a question of fact which the jury resolved against appellants, the finding of the jury cannot be disturbed on appeal.

[5] We also conclude that, under the circumstances disclosed by the record, the question of whether or not Nighswonger was guilty of negligence in the operation of the truck at the time of the accident was a question of fact for the determination of the jury and not a question of law to be decided by the court. Under the provisions of subdivision (a) of section 113 of the California Vehicle Act (as amended by St. 1927, p. 1437) and numerous recent decisions of the Supreme and appellate courts, the question of whether or not a motor vehicle was operated in accordance with the provisions of this subdivision is, in the ordinary motor vehicle accident case, a question of fact, and, in the absence of special and unusual circumstances which do not appear in the case before us, an appellate court will not disturb the findings of the jury upon such a question.

[6] Appellants maintain that the deceased was guilty of contributory negligence as a matter of law because he was walking along his right-hand side of K street contrary to the provisions of section 150½ of the California Vehicle Act (added by St. 1929, p. 546, § 66), which at the time of the accident provided as follows: "It shall be unlawful for any pedestrian to walk along and upon any highway outside of a business or residence district otherwise than close to his left-hand edge of the highway." We will assume for the present that the place of the accident was outside of a business or residence district. It cannot be doubted that the violation of the provisions of this section by a pedestrian constitutes negligence per se on his part. Whether or not such negligence contributed to his injury is a question of fact to be decided by the jury, in the ordinary accident case, under numerous recent decisions in California. Skaggs v. Wiley, 108 Cal. App. 429, 292 P. 132; Hepner v. Libby, McNeill & Libby, 114 Cal. App. 747, 300 P. 830; Shannon v. Fleishhacker, 116 Cal. App. 258, 2 P.(2d) 835; Blodget v. Preston (Cal. App.) 5 P.(2d) 25; Morehead v. Roehm (Cal. App.) 4 P.(2d) 995; Klemko v. Ryer (Cal. App.) 4 P.(2d) 998.

Appellants complain of the refusal of the trial court to give their requested instructions, which were as follows: "You are instructed that it is unlawful for any pedestrian to walk along and upon any highway outside of a business or residential district, otherwise than close to the left hand edge of the highway." "Every public highway shall be conclusively presumed to be outside of a business or residential district unless its existence within a business or residential district shall be established by clear and competent evidence as to the nature of the district, and unless sign posted when and as required by the California Vehicle Act"—and in lieu thereof gave the following: "You are instructed that the deceased, Jose G. Gayton, had a right to travel eastward on foot on the right hand side of 'K' Street on the night in question."

It will be observed that the proposed refused instructions stated the substance of subdivision (c) of section 28½, and of section 150½ of the California Vehicle Act (as added by St. 1929, pp. 510, 546,

§§ 7, 66), and that the instruction given was contrary to the provisions of section 150½, if the place of the accident was outside of a business or residential district as defined in section 28½. In determining whether or not the trial court erred in refusing the requested instructions and in giving the quoted instruction, it will be necessary for us to determine whether or not the place of the accident was within or without a business or residential district as defined in section 28½ with particular reference to the expression, "conclusively presumed," as used in subdivision (c) of this section. We do this with the decision in the case of Corcoran v. Pacific Auto Stages, Inc., 116 Cal. App. 35, 2 P.(2d) 225, before us.

Respondent seeks to justify the action of the court below by advancing two arguments: First, that, as K street was a public street within a city in Imperial county, the trial court could take judicial notice of the structures erected along it and also the traffic signs posted upon it, and, upon its knowledge of the conditions existing at the time, determine for itself whether or not that part of K street upon which the accident happened was or was not a business or residential district; that, as the trial court refused the proposed instructions, which could only be correct if the place of the accident was without a business or residential district, and gave the quoted instruction, we must presume, in support of the judgment, that the judge drew upon his judicial knowledge and from it determined as a fact that the accident happened within a business or residential district. Second, that the defense of the contributory negligence of the deceased was an affirmative defense, and that appellants were required to affirmatively prove all its necessary elements, including the fact that the accident happened outside of a business or residential district.

It is true that judicial notice is a form of evidence (section 1827, Code Civ. Proc.; 10 Cal. Jur. 691, and cases cited) upon which a court can rely to supply necessary evidentiary facts otherwise missing from a record (Wood v. Kennedy, 117 Cal. App. 53, 3 P. (2d) 366, and cases cited). The force of respondent's argument is greatly weakened when we find that the trial court instructed the jury that the speed limit at the place of the accident was forty miles an hour. The correctness of this instruction depended entirely upon the fact that the accident happened without a business or residential district. It cannot be very well contended that a trial judge drew upon his judicial knowledge of a fact to support one instruction, and a moment later drew upon the same judicial knowledge to support another instruction, the correctness of which depended upon the existence of a contrary fact. In this state of the record we cannot conclude that the trial judge took judicial notice of the fact that the place of the accident was within a business or residential district as they are defined by the California Vehicle Act.

[7] It is true that contributory negligence is an affirmative defense, the elements of which must be proved by the parties relying upon it. Is it true that it must be established by affirmative evidence other than a conclusive presumption of a necessary fact which the law gave to the defendants in this case? The question would seem to contain its own answer and deserve brief consideration were it not for the language used in the case of Corcoran v. Pacific Auto Stages, Inc., supra. In the Corcoran Case the appellate court was of the opinion that there was evidence in the record that the place of the accident was in a residential or business district. This being the case, the mandate of section 150½ of the California Vehicle Act that outside of such districts a pedestrian must walk along a highway close to his left-hand edge thereof would not become operative, and the presumption of section 28½ of the same act would not necessarily become conclusive in the face of evidence concerning the actual character of the district. Therefore what was said in the Corcoran Case about the necessity of producing evidence to establish the facts to bring the case within the provisions of these two sections in order to support a defense of contributory negligence would not seem entirely necessary to the conclusion there reached. The cases cited in support of this theory (Kohler v. Wells, Fargo & Co., 26 Cal. 606, 611; Wilson v. California C. R. Co., 94 Cal. 166, 174, 175, 29 P. 861, 17 L. R. A. 685; Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567, 570, 112 P. 454) go no further than to announce and apply the general rule of section 1869 of the Code of Civil Procedure that "each party must prove his own affirmative allegations."

In the instant case it is not disputed that the deceased was walking on his right-hand half of the highway, probably about 8 feet to his right of its center line with the curb about 17 feet to his right. There is no evidence in the record tending to show that the place of the accident was within a business or residential district as these districts are defined in the California Vehicle Act. There is evidence to show that the speed signs described in sections 115, 116, of this act (amended by St. 1927, p. 1438) were not posted on K street. Whether or not they were posted on any intersecting streets does not appear. The question then presents itself whether or not the presumption established by section 28½ of the California Vehicle Act was available to appellants as evidence in support of their defense of contributory negligence.

Subdivision (c) of section 28½ of the California Vehicle Act provides as follows: "Every public highway shall be conclusively pre-

sumed to be outside of a business or residential district, unless its existence within a business or residential district shall be established by clear and competent evidence as to the nature of the district, and unless signposted when and as required by this act."

[8, 9] Section 1957 of the Code of Civil Procedure classifies a presumption as indirect evidence. It cannot now be doubted that a presumption is evidence in favor of the party who is given the right to deduce it from a given state of facts. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; sections 1957, 1959, Code Civ. Proc. Subdivision 7 of section 1962 of the Code of Civil Procedure provides that "Any other presumption which by statute, is expressly made conclusive," is deemed a conclusive presumption. It is well established in California that, where the law establishes a conclusive presumption, evidence will not be received to contradict it. Calkins v. Howard, 2 Cal. App. 233, 83 P. 280; Filipini v. Trobock, 134 Cal. 441, 62 P. 1066, 66 P. 587; Estate of Mills, 137 Cal. 298, 70 P. 91, 92 Am. St. Rep. 175; Estate of Walker, 180 Cal. 478, 181 P. 792; Estate of McNamara, 181 Cal. 82, 183 P. 552, 7 A. L. R. 313; McCreery v. Charlton, 185 Cal. 37, 195 P. 670; People v. Leong Fook, 206 Cal. 64, 273 P. 779; People v. Ellis, 206 Cal. 353, 274 P. 353.

[10-12] We conceive the true construction of the application of subdivision (c) of section 28½ of the California Vehicle Act to be that during the progress of a trial either party may introduce evidence to determine whether or not a portion of a given street is in a business or residence district as defined in the other two subdivisions of this section and as to whether or not the signs described in sections 115, 116, of the act are posted as there required. Where, as in the present case, there is no evidence that the signs were posted and a complete failure of evidence on the question of the street being in either a business or residential district, the presumption established by subdivision (c) of the section comes into play at the close of the evidence and conclusively establishes the street as outside a business or residential district. This conclusive presumption becomes evidence which defendants may invoke in support of a defense of contributory negligence. It follows that the trial court should have given the requested instructions and should not have given the quoted instruction of which appellants complain. A study of the case of Corcoran v. Pacific Auto Stages, Inc., supra, has satisfied us that the final decision there reached does not conflict with our decision in this case because of the difference in the facts and the evidence in the two cases.

Having reached the conclusion that the trial court erred in refusing to give, and in giving, instructions to the jury, it becomes necessary for us to determine whether or not these errors were prejudicial. Section 4½, art. 6 of the Const. From what we have said it appears that one of the main defenses interposed by appellants was contributory negligence on the part of deceased. This contributory negligence, if any, mainly consisted of the violation of the provisions of section 150½ of the California Vehicle Act. Appellants were entitled to have this question submitted to the jury under proper instructions. This the trial court did not do. It refused to instruct under the terms of this section, and erroneously instructed the jury "that the deceased, Jose G. Gayton, had a right to travel eastward on foot on the right hand side of 'K' street on the night in question," contrary to the express terms of the section. This took away from the jury consideration of the question of whether or not this negligence per se of the deceased, if any, contributed to his death. As this was one of the main defenses of appellants upon which they principally relied, the error in refusing these proper instructions and in giving the improper one could have no other effect than to prejudice them by depriving them of a proper defense against the suit of respondent.

The attempted appeal from the order denying the motion for new trial is dismissed. Section 963, Code Civ. Proc.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

In re McCARTHY'S ESTATE.

McCARTHY v. DOYLE et al.

Civ. 8636.

District Court of Appeal, First District, Division 1, California.

Oct. 18, 1932.

Rehearing Denied Nov. 17, 1932.

1. Appeal and error ⇐994(3).

Credibility of witnesses, though uncontradicted, is for determination of trial court as trier of facts (Code Civ. Proc. § 1847).

2. Evidence ⇐588.

Court, in determining credibility of witnesses, may consider their motives and interest.

3. Wills ⇐490.

Evidence sustained finding that testator's testamentary disposition of his "business" included real property containing garage used for storage of vehicles and equipment employed in that business.

4. Wills ⇐881.

Widow who had not accepted benefits under husband's will and who opposed petition for distribution, as widow and residuary legatee, *held* not to have elected to take under will; therefore she was not estopped to assert that part of property bequeathed by testator was community property.

The widow was not estopped to assert that she had a community interest in property constituting part of deceased's business which he bequeathed by will, since widow had not accepted any benefits under will, since there was no provision in will fixing time when election should be made, and since actual distribution had not been had.

5. Wills ⇐792(3).

Widow has right to be advised as to whether property of husband's estate is separate or community before making election to take under will.

6. Husband and wife ⇐257.

Part of profits of husband's business may be community property, though at time of marriage capital invested in such business was husband's separate property.

7. Wills ⇐433.

Deceased husband's declaration in will that business was his separate property *held* incompetent to establish as against widow that property was community property.

8. Evidence ⇐271(20).

Allegation of deceased husband's supplementary complaint in divorce suit that there was no separate property *held* mere self-serving declaration, where record contained no evidence of interlocutory decree to which supplementary complaint referred.

9. Evidence ⇐208(2).

Deceased husband's original complaint in divorce action, in which wife defaulted, alleging that there was no community property, *held* admissible against widow in subsequent proceedings for partial distribution of estate.

10. Husband and wife ⇐262(2).

In proceedings for partial distribution under will, in which deceased's widow claimed community interest in deceased's business bequeathed by will, legatees had burden to show amount of husband's separate property invested therein and that husband was entitled to return of more than legal interest.

11. Husband and wife ⇐264.

In proceedings for partial distribution under will, evidence *held* insufficient to support finding that widow had no community interest in property sought to be distributed.

While deceased husband's original investment in the business constituted his separate property, apparently no effort was made to show value of deceased's estate at the time of his marriage nor the annual profits from the business, and it was not shown that increased value of business between his marriage and his death may not have been due to some extent to his efforts and ability.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Petition by Frank McCarthy for the partial distribution of the estate of George McCarthy, deceased, opposed by Gertrude A. McCarthy. From a decree of partial distribution, Gertrude A. McCarthy, widow and an heir at law of deceased, appeals.

Reversed and remanded, with directions.

Lewis F. Byington and William Penn Humphreys, both of San Francisco, for appellant.

Heller, Ehrman, White & McAuliffe, Joseph D. Toohig, and Lloyd W. Dinkelspiel, all of San Francisco, for respondent Frank McCarthy.

Wm. M. Malone and Wm. J. Brennan, both of San Francisco (John G. Jury, of San Francisco, of counsel), for respondents Doyle and Fox.

PER CURIAM.

An appeal by Gertrude A. McCarthy, the widow of George McCarthy, deceased, from a decree of partial distribution to Frank McCarthy.

The will of decedent, which was holographic, contained the following provision: "I * * * leave and bequeath to my wife one-

third of the business known as John McCarthy & Son, owned by me solely; one-third of the business known as John McCarthy & Son and owned by me to John Fox, my foreman, and one-third of the business known as John McCarthy & Son and owned by me to my nephew Frank McCarthy (son of my brother Frank McCarthy); balance of my estate to my wife Gertrude Agusta McCarthy—she to dispose of same as she sees fit."

The evidence shows that the business—that of draying and forwarding—was established by decedent's father, and that decedent purchased the same in 1907. According to the inventory and appraisement, which was filed on June 23, 1931, the following property was part of the business, namely: Money on deposit in the Bank of California in the name of John McCarthy & Son; certain trucks and trailers, a tractor and other vehicles, with certain office equipment, and three lots on the corner of Thirteenth and Howard streets in San Francisco, on which lots was situated a garage. The property was appraised at a total of $57,170.43. The remainder of the estate was appraised for the sum of $35,506.67; its total value being $92,677.10.

A petition was filed by said Frank McCarthy for the distribution to him of one-third of the property which, according to the inventory, was comprised in said business. He subsequently amended the petition to include certain accounts receivable and money outstanding which were not included in the inventory. Appellant opposed the petition, but the court found that decedent was the sole owner of the business, and that the expression "business known as John McCarthy & Son and owned by me solely" as used in the will referred to all the property used by him in the business, including the property set forth in the petition, together with good will, all of which the court found was decedent's separate property. A decree was entered accordingly.

Appellant relies upon two assignments of error; namely, that the court erred in finding that the real property at Thirteenth and Howard streets and the garage building thereon constituted part of the property embraced in the expression "business known as John McCarthy & Son and owned by me solely," and that appellant had no community interest in any of the property comprised in the business.

Appellant married decedent in August, 1915, and was his wife at the time of his death on June 10, 1930. As stated, the business of John McCarthy & Son was purchased by decedent in 1907, and in 1908 he bought one of the lots in question which fronted on Thirteenth street. In the years 1919 and 1924 the other two lots, which fronted on Howard street and adjoined the first lot, were acquired by him. The lot first mentioned was purchased with money borrowed from the mother of decedent's first wife, who forgave the debt in her will; and the last two, together with the garage building erected thereon, were paid for with funds taken from the business. The parties stipulated that the vehicles enumerated in the decree were purchased after the marriage between appellant and decedent.

[1-3] The first question presented is whether the real property upon which the business was conducted was also covered by the above expression. Appellant and another witness testified to a certain conversation with decedent from which inferences might be drawn in support of her contention that it was not; and, while this testimony was uncontradicted, the credibility of the witnesses was a question for the trial court. Code Civ. Proc. § 1847. The same rule applies, notwithstanding a want of contradiction (Staples v. Hawthorne, 208 Cal. 578, 283 P. 67), as the court in determining the credibility of the witnesses may take into consideration their motives and interest in the result of the case. 27 Cal. Jur. Witnesses, § 154, p. 180. It was shown that the garage on the property was used for storage of the vehicles and other equipment used in the business, and it was testified that the "drivers operated from there." Upon the building was painted the name of the concern, and the structure was used exclusively for the above purposes. The taxes on the property were paid by checks drawn on the deposit in the Bank of California, which, as stated, was in the name of John McCarthy & Son. In this connection it was shown that decedent had deposits in other banks standing in his own name. Other facts appear from the testimony which, though of slight relevancy standing alone, together tend to support the finding that the lots were part of the business and were so considered by decedent.

The facts are similar to those in Estate of Friedrichs, 107 Cal. App. 142, 290 P. 54, where the business of decedent was bequeathed, and one of the questions was whether certain real property on which the same had been conducted by him was a part of the business within the meaning of his will. It was held to be a fair inference from all the circumstances that such was his intention, and a decree distributing the property in accordance therewith was affirmed.

Appellant seeks to distinguish this case upon the facts, but no material differences between the cases have been shown.

Appellant also relies upon Shaw v. Hollister Land & Imp. Co., 166 Cal. 257, 135 P. 965. There the question was whether a sale of real property by defendant corporation constituted a violation of section 361a of the Civil Code as it then read, and which prohibited a sale by a corporation of its "business, franchise and property, as a whole" without the

consent of stockholders holding of record at least two-thirds of its issued capital stock. It was held that the sale in question did not necessarily prevent the corporation from continuing its business, and consequently was not a violation of the section. The court said that a sale of the property on which the business is conducted does not embrace or carry with it the business itself, nor a bequest of a business include the premises on which it is carried on. The reference to a bequest of a business was, however, unnecessary to the decision, and we are satisfied that, as was the case in the Estate of Friedrichs, supra, the evidence supports the conclusion of the trial court that the word "business" as used by the testator referred to and was intended to include the real property upon which the garage was situated.

[4, 5] The question remains whether appellant has a community interest in the property. If she has, this interest is not subject to the testamentary disposition of her husband (Civ. Code, § 1401), and she may claim the same unless, as respondents contend, she has elected to take under the will and is thereby estopped.

The petition for partial distribution was not filed by appellant or on her behalf, and it does not appear that she has accepted any benefits under the will. It has been held that, before a widow can be denied her right to elect upon distribution to take her half of the community property, it must be found that, with knowledge of her rights, by unequivocal acts evidencing her intent, she has so dealt with the property left her by the will that it would be inequitable to permit her to avoid those acts and disclaim her intent. In re Estate of Smith, 108 Cal. 115, 40 P. 1037. A wife is not estopped by causing the will of her husband to be probated or by becoming the executrix thereof (In re Gwin's Estate, 77 Cal. 313, 19 P. 527); nor does her declaration before distribution that she intends to assert her rights in the community property have that effect, as she has the right to ascertain what part of the estate is community property before being required to elect (Estate of Dunphy, 147 Cal. 95, 81 P. 315). Nor do we think the fact that the appellant in her written opposition to the petition was described as the "widow and residuary legatee" of decedent should conclude her. There is no provision in the will fixing a time when the election shall be made, and, as was said in the case last cited, there is no provision of the laws of this state as to the time when a widow shall make her election. Estate of Dunphy, supra, 147 Cal. 104, 81 P. 315. According to appellant's counsel, if her community interest proves to be of the value which they estimate, it will be to her advantage to claim such interest rather than the portion given her by the will. While it has been held that she must elect before distribution (Cunha v. Hughes, 122 Cal. 111, 54 P. 535, 68 Am. St. Rep. 27; Estate of Vogt, 154 Cal. 508, 98 P. 265), nevertheless, in accordance with the above decisions, she has the right to be advised as to whether the property of the estate is separate or community before making her election.

Respondents cite Palenske v. Palenske, 281 Ill. 574, 118 N. E. 46, in support of their contention. There a widow answered a bill seeking a construction of her husband's will, and it was held that she thereby elected to ratify the will. But in the case at bar no benefits of the will have been sought nor accepted; no claims which are necessarily inconsistent have been made nor an intention to elect indicated. Estate of Smith, supra; Estate of Moore, 62 Cal. App. 265, 216 P. 981.

In support of her claim to a community interest, appellant relies mainly on the presumption created by section 164 of the Civil Code.

[6] It is the rule that, where at the time of his marriage the husband has a definite amount of his separate property invested as capital in his business, which he continues to conduct, the entire profits therefrom are not necessarily his separate property, but may be the result of his energy and ability. Estate of Gold, 170 Cal. 621, 151 P. 12. In determining what portion of such profits is community property, while it must be presumed, in the absence of evidence, that some thereof were due to the capital invested, and would equal at least the usual interest on a long-term investment well secured, yet, if the husband claims that his capital was entitled to a greater return than legal interest, the burden of showing the fact rests upon him. Pereira v. Pereira, 156 Cal. 1, 11, 103 P. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107; Estate of Caswell, 105 Cal. App. 475, 288 P. 102; Estate of Fellows, 106 Cal. App. 681, 289 P. 887.

[7] The will was before the court, and respondents urge that decedent's declaration therein that the business was separate property is some evidence of the fact; but, as has been held, such declarations were not competent against appellant, and must be disregarded. Estate of Granniss, 142 Cal. 1, 75 P. 324; Bias v. Reed, 169 Cal. 33, 145 P. 516; Crowley v. Savings Union Bank, etc., Co., 30 Cal. App. 144, 157 P. 516; Potter v. Smith, 48 Cal. App. 162, 191 P. 1023. The same rule applies to similar statements in the inventory and appraisement. Baum v. Reay, 96 Cal. 462, 29 P. 117, 31 P. 561; Malville v. Kappeler, 4 Cal. Unrep. Cas. 843, 37 P. 934; Estate of Regnart, 102 Cal. App. 643, 283 P. 860.

[8, 9] There were offered by respondents, and admitted in evidence over objection, an original and a supplemental complaint in an action for divorce filed against appellant by

decedent in 1926. Appellant failed to answer the original complaint, and her default was entered by the clerk of the court. Thereafter, in 1929, a supplementary complaint was filed reciting the above facts, and that an interlocutory decree had been entered, but alleging that the parties became reconciled and that the decree was vacated. The latter pleading alleged acts of cruelty by appellant following such reconciliation, and prayed for a decree of divorce. A summons was issued, but it does not appear that the same was ever served upon appellant, and it is conceded that the parties continued to live together until decedent's death. Both complaints averred that there was no community property, but the record contains no evidence of the entry of an interlocutory decree, and the allegations of the supplemental complaint were merely self-serving declarations not admissible against appellant. 10 Cal. Jur. Evidence, § 311, p. 1064. As to the original pleading, however, it has been held that, where a judgment has been entered upon a default, the essential allegations of the claim upon which the judgment was entered are admissible in another proceeding as evidence of an admission by silence. Wigmore on Evidence, §§ 1066, 1072; Millard v. Adams, 1 Misc. 431, 21 N. Y. S. 424; Bonazzi v. Fortney, 94 Vt. 263, 110 A. 439. As was said by Justice Peckham in Eisenlord v. Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836, with reference to the rule admitting such evidence: "It is not the judgment which is to form the evidence. It is the admission contained in the pleading or by the suffering of a default." And it would seem that here the complaint was in principle admissible, although it has been held that such admissions have but slight probative value. 22 Cor. Jur. Evidence, § 372, p. 331, and cases cited.

Respondents also offered copies of income tax returns said to have been filed by decedent and to contain declarations similar to those above, but these do not appear to have been admitted in evidence.

[10, 11] It is not contended that appellant invested in the business; but, according to her testimony, she was employed by an insurance company for about four years after her marriage, and she also worked in her husband's office for a time. While presumably she received something for her services, and her earnings, if any, were community property (Estate of Pepper, 158 Cal. 619, 112 P. 62, 31 L. R. A. [N. S.] 1092), there is no evidence of the amount nor of its disposition. It was testified that the business of the concern was profitable, but that decedent took no active part therein after 1925, contenting himself with visiting the office daily, its management being intrusted to his foreman. In 1924 he was absent from the state for about two months; during portions of the years 1925 and 1926 he was in Europe; and in 1927 spent from two to three months in Alaska. He also visited South America in 1928, where he remained for about five months. No effort appears to have been made to show the value of decedent's estate at the time of the marriage, nor the annual profits from the business. With the exception of the above testimony to the effect that the business was profitable, the record is silent on this question. It appears that the books were available, and no reason is shown for respondents' failure to disclose these facts. Under the cases cited, the burden rested upon them to show the amount of the investment and that decedent was entitled to a return of more than legal interest thereon; and while, as stated, there is evidence that decedent did not actively participate in the management after 1925, this was insufficient to show that the increased value of the business between his marriage and death—which increase appears to have been considerable—was not to some extent due to his efforts and ability. It was respondents' duty to clarify the history of the property and to show by a preponderance of the evidence what part of the same was separate property. Estate of Fellows, supra. This in our opinion they failed to do; nor was the implied admission by appellant in the divorce action sufficient to support a finding that there was no community property at the time of her husband's death.

In view of the foregoing, we are satisfied that the real property mentioned was part of the business within the meaning of the will, but that the evidence is insufficient to support the finding that appellant had no community interest in any of the property sought to be distributed; further, that there has been no election by her to take under the will, and, until her community interest, if any, is ascertained she will not be required to elect—this, of course, being subject to the general rule that her election must be made before distribution. Cunha v. Hughes, supra; Estate of Smith, supra; Estate of Dunphy, supra; Estate of Vogt, supra. This question should be determined in the present proceeding with respect to all the property of the estate in order that appellant may act with full knowledge of her rights.

The decree is accordingly reversed, and the cause remanded for a determination of the question as to what portion of the property of the estate, if any, is community property.

CULLEN v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al.*

Civ. 8695.

District Court of Appeal, First District, Division 2, California.

Sept. 29, 1932.

Rehearing Denied Oct. 29, 1932.

Hearing Denied by Supreme Court Nov. 28, 1932.

1. Schools and school districts ⇐141(1).

Statute prohibiting dismissal of permanent teacher except for cause *held* applicable to all teachers, though elected before enactment (School Code, § 5.650, repealed and re-enacted by St. 1931, p. 1395).

2. Schools and school districts ⇐141(2).

San Francisco teacher, duly classified as permanent, could not be removed without cause (School Code, §§ 5.500, 5.650 et seq., repealed and re-enacted by St. 1931, pp. 1394, 1395; St. 1931, p. 3057, § 135).

3. Schools and school districts ⇐141(2).

One duly classified as permanent teacher, and assigned to both day and evening high schools in San Francisco for not exceeding eight hours daily, *held* to have one "position" from which teacher could not be removed without cause (School Code, §§ 5.500, 5.650 et seq., repealed and re-enacted by St. 1931, pp. 1394, 1395; St. 1931, p. 3057, § 135).

Teacher having been assigned to duty in both day and evening schools, such assignment must be taken as making up the "position" from which teacher could not be removed, and teacher having served in that "position" for more than probationary period had become automatically re-elected to that position.

[Ed. Note.—For other definitions of "Position," see Words and Phrases.]

4. Schools and school districts ⇐141(1).

Right of "tenure" does not guarantee that teacher be retained in particular school or assigned to teach particular classes (School Code, §§ 5.500, 5.650 et seq., repealed and re-enacted by St. 1931, pp. 1394, 1395; St. 1931, p. 3057, § 135).

Teacher's right of "tenure" is one which teacher enjoys to continue in position or positions to which he has become elected, i. e., in position or positions of rank and grade equivalent to that occupied for probationary period.

[Ed. Note.—For other definitions of "Tenure," see Words and Phrases.]

Original proceeding in mandamus by Caleb G. Cullen against the Board of Education of the City and County of San Francisco and others.

Peremptory writ granted.

Andrew F. Burke, of San Francisco, for petitioner.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for respondents.

NOURSE, P. J.

This is an original proceeding in mandamus to compel the respondents to restore petitioner to his position as teacher in the evening high schools. Respondents rest upon their demurrer to the petition.

For eight years prior to May 4, 1932, petitioner was a duly elected and certified teacher in the high schools of the city and county of San Francisco, assigned to duty as such in the Galileo High School as an instructor in day classes conducted in that school. For more than six years prior to May 4, 1932, petitioner, under similar election and certification, was assigned to duty in the Humboldt Evening High School as an instructor in evening classes. On May 4, 1932, the respondent board of education dismissed petitioner from his position in the Humboldt Evening High School without cause and without charges or hearing. The question presented in this proceeding is whether the tenure provisions of the school law or of the municipal charter give a permanent status to a teacher who is employed in different schools conducted by the same district. The parties agree that there are no authorities on the question, and the opinion must, therefore, be one of first impression.

Section 5.500 of the State School Code provides that: "Every employee of a school district * * * who after having been employed by the district for three complete consecutive school years in a position, or positions, requiring certification qualifications, is reelected for the next succeeding school year * * * shall * * * become a permanent employee of the district." St. 1931, p. 1394.

Section 135 of the charter of the city and county of San Francisco (St. 1931, pp. 2973, 3057) provides: "All teachers, heads of departments, vice-principals, principals, * * * shall be classified as permanent employees in their respective positions after they have been successfully employed in such positions in the school department for a probationary period of three years. * * *"

[1] Sections 5.650 et seq. of the School Code prohibit the dismissal of permanent employees in positions requiring certification qualifications except for cause. Similar restrictions are found in section 135 of the San

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Hearing denied 16 P.(2d) 272.

Francisco Charter. We have referred to the existing law in each instance as amended or enacted in 1931 for the reason that the new law applies to all teachers elected either before or after the enactment. Kennedy v. Board of Education, 82 Cal. 483, 492, 22 P. 1042.

[2] The conceded facts are that petitioner had taught successfully in both day and evening schools for more than three years and had been duly classified as a permanent teacher. As such he could not be removed without cause under either the state School Code or the municipal charter. (Except, as pointed out in Kennedy v. Board of Education, 82 Cal. 483, 493, 22 P. 1042, where the school is abolished, or the position has ceased to exist, or some similar conditions arise.) Hence it is immaterial whether the state School Code or the municipal charter governs in the matter of tenure of teachers employed in the San Francisco schools, and we purposely refrain from determining that question. The rights and duties of the parties to this proceeding are the same under both statutes.

[3] The petitioner's tenure as a permanent teacher became fixed by operation of law. His "position" from which he could not be removed except for cause was the employment which the statute automatically effected upon his classification as a permanent teacher. But it is wholly immaterial that a teacher may be assigned to duty in one or more schools or school buildings maintained by the school district. The teacher is the employee of the school district; the district is the entity which becomes the employer; the schools are merely instruments of the district. It cannot matter that a district may maintain two or more school buildings, or school groups, which are given separate names, or that some classes are conducted before noon, some after noon, and some after sunset. The power of the board of education to assign its employees to these various duties is not questioned and when such assignments have been made they must be taken as making up the "position, or positions" to which the tenure law applies.

Here it is admitted by the demurrer that petitioner served as teacher in both day and evening schools for a period of more than six years prior to his dismissal, and that his total period of service in any one day did not exceed eight hours. We are inclined to hold that these assignments constitute but one "position" within the meaning of the tenure law and that petitioner, having served in that "position" for more than the probationary period, has become automatically re-elected to that position. In this respect we can see no distinction between this case and one where a teacher is assigned to teach for short periods in three or more day schools of the same district. If such employment continues for the statutory period, the statutory election to that "position" becomes complete.

[4] But we should not be understood as holding that this right of tenure guarantees that a teacher must be retained in any particular school or assigned to teach any particular class or classes. This right of tenure is a right which the teacher enjoys to continue in the position or positions to which he has become elected under the statute—i. e., in a position or positions of a rank and grade equivalent to that occupied for the probationary period and to which the teacher has thus become "elected" under the statute.

Further discussion would be merely argumentative. Our judgment is that the petitioner should have a peremptory writ restoring him to duty in the Humboldt Evening High School, or to a position of equal grade and rank, and directing the respondents to annul their order purporting to dismiss him from those duties.

Let a peremptory writ issue accordingly.

We concur: STURTEVANT, J.; SPENCE, J.

216 Cal. 536

Ex parte BEAR.

Cr. No. 3507.

Supreme Court of California.

Oct. 21, 1932.

1. Commerce ⇐60(3).

Statute requiring notice on food packages of use of imported egg products *held* not void as interfering with interstate and foreign commerce (St. 1931, p. 584).

2. Food ⇐1.

Statute requiring persons manufacturing, selling, or serving food products to give notice of use of imported egg products *held* within state's police power (St. 1931, p. 584).

3. Statutes ⇐110½(1).

Legislative provisions for labeling food containers and for posting notice of use of imported egg products *held* sufficiently germane to title referring to inspection and certification of imported egg products (St. 1931, p. 584; Const. art. 4, § 24).

4. Statutes ⇐109.

Title which gives reasonably intelligent reference to subject of legislation is sufficient (Const. art. 4, § 24).

PRESTON and CURTIS, JJ., dissenting.

In Bank.

Original proceeding by Minor E. Bear for a writ of habeas corpus to secure release from custody under an arrest.

Writ discharged.

Lyon, Fleming & Robbins, and Clay Robbins, all of Los Angeles, for petitioner.

Charles P. Johnson, City Pros., and John L. Bland and Joe W. Matherly, Deputy City Prosecutors, all of Los Angeles, for respondent.

Milton D. Sapiro, of San Francisco, amicus curiæ in behalf of respondent.

LANGDON, J.

This is a petition for a writ of habeas corpus. Petitioner was arrested on November 2, 1931, in Los Angeles, and charged with violation of an act (St. 1931, c. 280, p. 584, Deering's Gen. Laws, 1931, vol. I, Act 2214, p. 1035) providing for the inspection and certification of liquid, frozen, and dried eggs, and any other egg products. At the time of his arrest he was engaged in the manufacture of a meringue powder, using such egg products imported from without the United States, and failed to comply with the provisions of the act requiring that each package of his manufactured commodity be stamped with the information of such use of imported egg products. Petitioner alleges that the dried eggs or egg powders used by him are pure and fit for human consumption and that they have been inspected by federal officials.

It is contended that the statute is unconstitutional, for the following reasons: First, because it interferes with the power of Congress over interstate and foreign commerce; second, because it is an unreasonable and arbitrary exercise of police power; and, third, because the provision under which petitioner is charged is not embraced within the title of the act. None of these objections is, in our opinion, substantial.

A brief examination of the act and its purposes is necessary. It applies to all preserved egg products intended for human consumption, and not to whole eggs in the shell. It covers both domestic products and those imported from outside the United States. Its purposes are to secure satisfactory quality in such products, and to protect the consumer from fraud in their sale, either in the form of egg products or as part of another manufactured food product. It requires compliance with the pure food laws of this state if the egg products are prepared here; and if prepared in another state of the United States, compliance with such laws of the state of origin, and a certificate of inspection from the proper authorities. With respect to egg products imported from a foreign country, additional requirements are made. They must be inspected by our state board of health, and a certificate of inspection given to the importer or consignee, for each container. This certificate must be affixed to the container so as to be plainly visible to the buyer. The container must also have stamped upon it in letters at least two inches high the name of the manufacturer and the country where the contents were produced, and retailers must sell the products in the original container, so stamped and certified. Restaurants, hotels, cafés, bakeries, and confectioneries using the imported product must keep a sign, with letters at least four inches high, in a conspicuous place, reading: "Frozen eggs (or dried eggs, or liquid eggs, or egg products, as the case may be) imported from without the United States used here." Manufacturers of food products using such imported egg products must stamp on each package of their food product, in letters not less than one-quarter inch in size, a statement to the effect that the egg products used were imported. It is to these last two requirements that petitioner objects. He does not attack the inspection or certification provisions. He does attack the provisions requiring persons manufacturing, selling, or serving food products, to give notice of the use of imported egg products. The questions before us are, therefore: First, whether the Legislature can constitutionally make such a requirement; and, second, whether the title of the act covers it.

[1] In support of the argument respecting interstate commerce, petitioner cites State of Oregon v. Jacobson, 80 Or. 648, 157 P. 1108, L. R. A. 1916E, 1180, which resembles the instant case in its facts. That decision, rendered some years ago, was criticized and disapproved in Parrott & Co. v. Benson, 114 Wash. 117, 194 P. 986, 987, where it is said: "The Oregon court, in State v. Jacobson, supra, seems to have wholly lost sight of the fact that the portion of the act we are now considering can only operate after the eggs have lost their status as articles of foreign or interstate commerce, and have become a part of the great mass of domestic property as completely as though produced within our borders. Surely when an egg reaches a restaurant, hotel, or bakery and is taken from the package, cooked or mixed with other ingredients, and served to the guest or purchaser as food, it requires no argument or authority to establish beyond cavil that it is no longer an article of foreign commerce over which Congress alone has control; otherwise no article once brought from without into the state, no matter how changed by any conceivable process, could ever become subject to state legislation; but authorities are as numerous as the question is simple. In re Agnew, 89 Neb. 306, 131 N. W. 817, 35 L. R. A. (N. S.) 836, Ann. Cas. 1912C, 676; Weigle v. Curtice Bros. Co., 248 U. S. 285, 39 S. Ct. 124, 63 L. Ed. 242; Armour & Co. v. North Dakota, 240 U. S. 510, 36 S. Ct. 440, 60 L. Ed. 771, Ann. Cas. 1916D, 548." The reasoning of the Washington court is plainly sound, and other cases may be cited to the same effect. See Amos Bird Co. v. Thompson (D. C.) 274 F. 702, 705; Crescent Cotton Oil Co. v. Mississippi, 257 U. S. 129, 42 S. Ct. 42, 66 L. Ed. 166; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 22 S. Ct. 120, 46 L. Ed. 171; Patapsco Guano Co. v. Board, 171 U. S. 345, 18 S. Ct. 862, 43 L. Ed. 191; Savage v. Jones, 225 U. S. 501, 32 S. Ct. 715, 56 L. Ed. 1182; Corn Products Refining Co. v. Eddy, 249 U. S. 427, 39 S. Ct. 325, 63 L. Ed. 689; Plumley v. Massachusetts, 155 U. S. 461, 15 S. Ct. 154, 39 L. Ed. 223; Moulton v. Williams Fruit Corporation (Cal. App.) 14 P.(2d) 88.

[2] The next argument is that the provisions in question are too unreasonable to be justified under the police power. Respondent and amicus curiæ, however, point to evidence before the Legislature tending to show that sanitary conditions in the Orient, the source of most imported egg products, are far below those prevailing in this state, and that the ordinary inspection which can be made is seldom adequate to give an assurance of complete wholesomeness. With this and other evidence before it, the Legislature was fully warranted in requiring that the use of imported products be made known to the consumer. A statute which makes such a requirement is neither unusual nor unreasonable, and it is a justifiable exercise of the police power to prevent fraud. In Amos Bird Company v. Thompson, supra, the court said:

"Eggs, under ordinary conditions, deteriorate rapidly. Foreign importations, as a general thing, would necessitate their being brought from a considerable distance, ordinarily requiring handling and lapse of time, both of which, it is well known, tend to impair the soundness of an egg. By reason of the nature of its structure, upon casual observation, the quality, condition, and soundness of an egg are not readily disclosed.

"If a state law absolutely prohibiting the sale of oleomargarine is valid, because its appearance was so like that of butter as to render it likely that a buyer would be deceived or mistaken, and purchase it for butter (Powell v. Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, 1257, 32 L. Ed. 253), it follows, as a matter of course, that a law requiring that reasonable notice be given concerning the origin of a food similar in such respect, which may reasonably be considered as liable to impairment because of conditions attendant upon its removal from the place of its origin to the place of its consumption, is valid, for the greater must include the less. The power to prohibit includes the power to regulate."

Similarly, in Parrott v. Benson, supra, it is said: "While there is some evidence in the record tending to show that eggs imported from China are wholesome and equal to the domestic product, except in size, yet there is much tending to the contrary, purporting to show conditions under which eggs are produced, handled, and shipped, which might well justify the consumer in exercising a choice between domestic and such foreign eggs, and all this act can do is to identify imported eggs, either as eggs or as ingredients in other merchandise, so as to permit of such choice. Surely if the foreign egg is entirely fresh and wholesome when placed upon our markets, it can stand upon its own merits and win its way to popular favor under its true designation. We cannot hold anything to be unjust discrimination or unreasonable restriction which requires merchandise to be sold for just what it is, and prevents its sale as something other than it is. Hathaway v. McDonald, 27 Wash. 659, 68 P. 376, 91 Am. St. Rep. 889; Hutchinson [Ice Cream Co.] v. Iowa, 242 U. S. 153, 37 S. Ct. 28, 61 L. Ed. 217, Ann. Cas. 1917B, 643."

In re Foley, 172 Cal. 744, 158 P. 1034, Ann. Cas. 1918A, 180, held invalid a statute requiring each imported egg to be stamped, without making any general provision for inspection, or regulating the sale of eggs of inferior quality. The court was of the opinion that the excessively burdensome requirement accomplished no legitimate object. The opinion recognized, however, that a statute

properly framed could validly regulate the sale of imported eggs, and this is undoubtedly the law, as the cases cited above demonstrate. The provisions of the statute involved herein are not too burdensome, and, coupled with the general plan of inspection, they tend to protect the individual consumer against deception.

[3, 4] The final question is whether the title of the act is sufficient to cover the provisions which are attacked, as required by article 4, § 24, of the California Constitution. The said title reads as follows: "An act to provide for the inspection and certification of liquid eggs, frozen eggs and dried eggs and any other egg products produced in the State of California and within the United States and imported into the State of California from without the United States for the purpose of human consumption; to prescribe certain powers and duties of the state department of public health with respect thereto, and to provide penalties for violations of the provisions of this act." Specifically, the question is whether the requirements of labeling the container of food in which imported egg products are used, and posting notice of such use in places where food is served, are reasonably related to the "inspection and certification" of egg products. We think that they are. Provisions for labeling or branding products are within the purpose of statutes providing for inspection because they tend to assist the inspection. Knowledge of where the imported product is used is essential to an adequate system of inspection, and identification by stamping the container is of great value. With respect to food served in restaurants, etc., no mark can be placed upon the food served, and the substitute therefor, a notice posted in the place where the food is served, fulfills the same purpose. Furthermore, the term "certification" may, in its broad sense, refer to the giving of information describing the quality or contents of certain food products—certifying to their origin, in this case. We have had occasion to point out in an increasing number of decisions that a liberal rule should prevail in the interpretation of the constitutional requirement of a descriptive title, and that nothing more is required than a reasonably intelligent reference to the subject of the legislation. "* * * The title of an act need not embrace an abstract or catalogue of its contents, but need only contain a reasonable intimation of the matters under legislative consideration. * * * The general subject need not appear in the title, if it is clearly disclosed or readily inferred from the details expressed." Heron v. Riley, 209 Cal. 507, 510, 511, 289 P. 160, 161. See, also, to the same effect, Pacific Coast Dairy v. Police Court (Cal. Sup.) 8 P.(2d) 140; Evans v. Superior Court (Cal. Sup.) 8 P.(2d) 467; In re Halck (Cal. Sup.) 11 P.(2d) 389. In Pacific Coast Dairy v. Police Court, supra, the title of the act declared the purpose to be to prevent the *manufacture* and *sale* of unwholesome dairy products, and to regulate the business of producing, buying and selling dairy products. One of its sections provided that every person finding or receiving milk bottles marked with a registered brand should return them to the owner thereof. The constitutionality of this section was upheld, the court saying 8 P.(2d) 144: "* * * Where the Legislature has deemed it necessary, in order to prevent the sale and delivery of unwholesome dairy products, to require the branding or marking of the containers in which such products are sold or delivered, then the prohibition of the unlicensed use of such containers by those who are not entitled to use them is a reasonable regulation to that end and germane to the general subject-matter contained in the title. * * *" In Coca Cola Bottling Co. v. Mosby, 289 Mo. 462, 233 S. W. 446, the title stated that the act was to provide for "the inspection" of soft drinks, and it contained a provision for labels showing the nature of the beverage. The provision was upheld. In State v. McKinney, 29 Mont. 375, 74 P. 1095, 1 Ann. Cas. 579, a title which referred to the creation of the office of meat and milk inspector was held sufficient to cover a requirement that milk conveyances carry a license. In People v. Worden Grocer Co., 118 Mich. 604, 77 N. W. 315, a title referring to the manufacture and sale of vinegar was held to cover a requirement of branding and labeling with the name of the substance from which it was made. In State v. Snow, 81 Iowa, 642, 47 N. W. 777, 11 L. R. A. 355, the title referred to fraud in the sale of lard, and it was held to cover a provision that persons selling any mixture of substances for use as lard must use a label stating that it was "compound lard," and setting forth the proportion of each ingredient. It is unnecessary to carry this review further. The title of the act in question is sufficient, under the test applied by us in numerous cases.

There being no merit in any of the constitutional objections raised by petitioner, the writ is discharged.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; TYLER, Justice pro tem.

PRESTON, J.

I dissent.

This habeas corpus proceeding presents the question of the constitutionality of certain provisions, hereinafter quoted, of chapter 280, Statutes of 1931, pages 586, 587.

Petitioner, in his business of manufacturing food products for human consumption, used imported dried egg powder which was pure, sweet, and in every way wholesome

food and had been inspected and certified by federal officials at the time of its importation; however, he neglected and failed to comply with the provisions of said statute requiring him to post a sign or print a statement respecting his use of such import. He was therefore charged, under two criminal complaints, with violation of these provisions, and by this writ of habeas corpus he later secured his release upon bail. He claims that he is entitled to a full discharge from custody because the said statute is unconstitutional and void in that it unduly interferes with and restricts foreign and interstate commerce; that it is discriminatory and that it is an unwarranted exercise of the police power, burdening foreign and interstate commerce, in violation of the protection afforded by the federal Constitution. However, these questions will not be considered, because I am reluctantly led to hold the view that the portions of the act here under review are not properly referred to in the title as required by section 24 of article 4 of the Constitution. In this conclusion I am mindful, too, of the liberality with which we are to apply this provision, as shown by numerous decisions, several of the later cases being McClure v. Riley, 198 Cal. 23, 243 P. 429; Heron v. Riley, 209 Cal. 507, 289 P. 160, and In re Halck (Cal. Sup.) 11 P.(2d) 389.

The title to the act in question is: "An act to provide for the *inspection* and *certification* of liquid eggs, frozen eggs and dried eggs and any other egg products produced in the State of California and within the United States and imported into the State of California from without the United States for the purpose of human consumption; to prescribe certain powers and duties of the state department of public health with respect thereto, and to provide penalties for violations of the provisions of this act."

Section 1 of the act provides for the production of egg products under sanitary conditions where produced in California or the United States. Section 2 provides that such egg products imported into this state from without the United States shall be sold in this state subject to inspection and labeling as provided for later in the act. Section 3 provides that such products shall not be sold until inspected by the state board of health and until a permit shall be issued by that board. It further provides that such products shall be sold only from the original containers upon which shall appear a certificate of the board of health in black letters, not less than one inch high, to the effect that the article was imported into the state from without the United States and had been inspected upon a certain day by the state board of health. Section 4 provides that importers and wholesale distributors of such products shall, when requested, furnish said board a record of the manufacturers to whom such products are sold in order to facilitate inspection. Section 5 provides that the container in which such imported products are sold shall have a label, not less than two inches high, giving the name of the manufacturer and country of manufacture and that all retailers shall sell the products from said container and shall inform each purchaser of the origin of said products. Then follow the provisions here under review (being the remainder of said section 5), which read as follows: "All restaurants, hotels, cafes, bakeries and confectioneries using or serving frozen eggs, dried eggs, liquid eggs or other egg products imported from without the United States must place a sign in letters not less than four inches high in some conspicuous place in their places of business so that the consumer or customer entering their places of business can see it, which sign shall read 'frozen eggs (or dried eggs, or liquid eggs, or egg products, as the case may be) imported from without the United States used here.' All manufacturers of any food products using liquid eggs, frozen eggs, dried eggs or other egg products imported from without the United States in the manufacture of food products shall stamp on each individual package or container of said food products in letters not less than one-quarter inch in size a statement to the effect that frozen eggs (or liquid eggs, or dried eggs, or other egg products, as the case may be) imported from without the United States have been used in the manufacture of this product."

It seems too clear for controversy that the inspection and certification of such eggs and egg products provided for by the title suggests only that the products, before reaching the channels of trade in this state, be inspected as to their fitness for human consumption and, if found so fit, that this fact be authenticated by official authority. Indulging the utmost liberality in the consideration of this title, the mind cannot come to rest upon the proposition that a restaurateur, by displaying a conspicuous sign in a conspicuous place to the effect that he is using the article already inspected and certified, in the manufacture of other food products, is thereby further certifying to its wholesomeness for consumption. Manifestly the object of these latter provisions is to discourage the consumption of these articles and to restrict the sale and use thereof rather than to proclaim or certify to their virtue as food. In short, the provisions in question can be properly referred to only by a title covering regulation of the sale and use of such products, for the equivalent of which reference we look in vain to the title of this act. The word "certification" as used in the title thereof can by no stretch of the imagination be held a sufficient reference to the provisions here under discussion, which are regulatory provisions to be observed in the sale or use

of the products after they have lost their identity as articles of commerce. The Legislature of the State of Washington enacted substantially similar legislation and used as its title the following: "An act relating to and regulating the sale of eggs providing for the classification, labeling and marking thereof and providing penalties for violation thereof." Parrott & Co. v. Benson et al., 114 Wash. 117, 194 P. 986.

For the above reasons it is my opinion that the writ should be sustained and the prisoner discharged.

I concur: CURTIS, J.

216 Cal. 554

TARIEN v. KATZ et al.

S. F. 14415.

Supreme Court of California.

Oct. 24, 1932.

Rehearing Denied Nov. 21, 1932.

1. Husband and wife ⇐262(1).

Law presumes personal property in possession of husband at time of his death to be common property of spouses.

2. Husband and wife ⇐264.

Evidence *held* not to overcome presumption that personal property in possession of husband at time of his death was common property of spouses.

3. Divorce ⇐172.

Divorce decree *held* not res judicata of widow's claim to husband's personalty as community property, where, though complaint alleged and court found community property existed, amount, character, or value thereof was not placed in controversy, and decree did not dispose thereof.

4. Divorce ⇐322.

Where divorce decree adjudged that community property existed, but failed to dispose thereof, parties became tenants in common of property.

5. Husband and wife ⇐273(12).

In action by widow to quiet title to personal property in possession of husband at his death, evidence showed widow was not guilty of laches.

6. Judgment ⇐252(1).

Order requiring executor and depository of assets of estate to deliver to widow one-half of personal property decreed to her, *held* within pleadings (Code Civ. Proc. § 580).

The complaint alleged the existence and possession of the property in defendants, setting up plaintiff's right to possession thereof, and prayed for an order requiring its delivery to her, and the answer of defendants showed the property to be in their possession.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Emma R. Tarien, formerly Emma R. Parker, against Phil C. Katz and others, wherein W. C. Coffer, executor of the last will and testament of Charles Parker, deceased, the Bank of Italy National Trust & Savings Association, a national banking association, and another, were substituted as defendants. Plaintiff consented to a nonsuit against the second named substituted defendant. From a judgment in favor of plaintiff, the other defendants appeal.

Affirmed.

Livingston & Livingston, of San Francisco, for appellants.

Joseph C. Meyerstein, of San Francisco, for respondent.

PRESTON, J.

Appeal from judgment for plaintiff quieting her title to certain personal property, and directing a delivery of possession thereof.

The action was commenced by plaintiff on April 8, 1930, against defendant Katz, as administrator of the estate of Charles Parker, deceased; John Doe et al., defendants. It was later discovered that decedent died testate, and on May 29, 1930, W. C. Coffer was appointed executor of his last will and testament, whereupon said administrator, by order of the superior court, delivered to Anglo-California Trust Company, as depository, all the assets claimed by the estate. In the present cause leave was granted to plaintiff to file an amended and supplemental complaint substituting W. C. Coffer, executor, and the Anglo-California Trust Company, a corporation, as defendants in the place of said Katz, administrator; John Doe et al. The Bank of Italy was also named as defendant, but during the course of the trial plaintiff consented to a nonsuit against it.

The amended and supplemental complaint alleged that plaintiff married Charles Parker on December 9, 1919; that on May 11, 1926, she secured an interlocutory decree of divorce against him upon substituted service on the ground of willful neglect, and on June 2, 1927, procured a final decree of divorce; that in said divorce action it was adjudged that there was community property belonging to plaintiff and said Charles Parker, but that the value and disposition thereof were not

determined. The pleading further alleged that at the time the final decree of divorce was granted, plaintiff and said Charles Parker owned personal property as follows: $7,000 deposited with the Guaranty Building & Loan Association on January 5, 1926; $1,274 deposited with Bank of Italy, and 14 Straus Safe Deposit Company bonds, par value $1,000 each, thereafter exchanged for a later issue of 11 bonds of said company of $1,000 par value each and $3,000 in cash; that plaintiff was the owner of and entitled to immediate possession of an undivided half interest in and to said personal property, despite the adverse claims of the other defendants thereto; that said Charles Parker died testate at Miami, Fla., about January 30, 1930. The prayer of the complaint was that defendants be required to set forth the nature of their respective claims; that it be adjudged that said claims were without right or title; that plaintiff was the owner of said undivided one-half interest; that it be decreed that defendants deliver said interest to her; and that plaintiff have judgment for her costs, and other relief.

Defendants Coffer and Anglo-California Trust Company filed separate answers. The answer of defendant Coffer denied the material allegations of the complaint and affirmatively alleged that, by the judgment in the divorce suit between plaintiff and decedent, all issues with respect to their community property were finally adjudicated; that prior to their marriage an agreement was executed whereby plaintiff released any right or interest in the property of decedent, and that plaintiff's cause was barred by laches. The answer of the Anglo-California Trust Company likewise denied all material allegations of the complaint save those to the effect that by order of the probate court on May 29, 1930, it was made the depository of the assets of said estate, consisting of $8,179.18 in cash and 11 bonds, par value $1,000 each, of said Straus Safe Deposit Company, which assets it held as an officer and appointee of said probate court.

Upon these pleadings issue was joined and the cause went to trial, with judgment for plaintiff, as noted above. The judgment roll in said divorce action was introduced in evidence as well as certain papers showing the status of the Parker estate probate proceeding. Other than this, the record consists largely of the testimony of plaintiff herself, which is in many respects contradictory and somewhat evasive, but, if credited, furnishes quite sufficient support for the findings of the court below.

The question of importance is whether the personal property in the possession of decedent at the time of his death was formerly common property of himself and plaintiff, as husband and wife. The decedent was a professional gambler, specializing in the game commonly called "poker," and he had no other gainful occupation. The source of the property in dispute was known to exist as early as July, 1922, and certain other accumulations were known to be in existence in 1926. From these assets were traced the property in suit. The character thereof must be determined from the testimony of plaintiff herself. She and decedent were married in Reno in December, 1919. Prior to her marriage she signed an antenuptial agreement, which, if binding, would destroy her claim to said property. But she testified, and the court found, that within a few days after her marriage the contract was mutually rescinded and annulled, and, at the husband's suggestion, destroyed with this intent. The sufficiency of the evidence to support this finding appellants concede.

Plaintiff further testified that upon the marriage decedent showed her a bank book showing deposit entries aggregating about $22,000, and that he likewise possessed a city lot in Reno and a half interest in a gambling house there. Whether this deposit had been depleted by checking thereon does not appear. In January, 1920, decedent sold his business, and for the next two and one-half years he traveled from place to place in various parts of the world. He was ill to a considerable extent during that period, and for that reason had unusual expense. He traveled from Reno to New York; then back to Reno; thence to Oregon, and in 1921 to vancouver; from there he went to Australia, and returned from Australia to California. Again in 1921 he took a trip to New York; thence to South America, and then back to Taft and other points in California. What his fortune consisted of at the end of these travels, no one knows. His wife says he was without funds when he went to Australia, and likewise without funds when he returned to California, and she, therefore, obtained employment for herself. Appellant says that the statements of decedent with respect to lack of funds must be discounted, as plaintiff admits that such complaints were chronic with him. But at any rate, there came from Taft, Cal., in 1922, the funds which are the foundation of the property here in suit.

[1, 2] This the law presumes to be common property, and the court found in accordance with this presumption. Can we say this presumption has been overcome? It may well be that if the facts were known, the property could be traced to the funds on hand in Reno in 1919, but to so assume would be to create at most but a conflict of presumptions of law. Who knows whether the fickle goddess of fortune frowned or smiled upon decedent during the two and one-half years in question? It is admitted by appellants that his fortune must have fluctuated during this period.

Who can say that a tidal wave may not have swept it away entirely? We hesitate to upset a finding of the trial court when to do so implies stability and constancy to a gambler's bank roll. We cannot say that the money sent to San Francisco from Taft was not a "new stake"; hence the finding must be upheld.

[3, 4] Appellants next assert that the divorce decree is res judicata against the claim of plaintiff. We regard this position as untenable. It is true that the complaint alleged and the court found that community property existed, but the amount, character, and value thereof were not put in issue, nor did the decree in anywise attempt to dispose thereof. Under such circumstances the parties became tenants in common of the community property. The case of Brown v. Brown, 170 Cal. 1, 147 P. 1168, followed in Metropolitan, etc., Co. v. Welch, 202 Cal. 312, 260 P. 545, 547, is in nowise similar to the situation here. In the first case mentioned, the complaint alleged and the court found that there was no community property. In the second case mentioned, the complaint set up certain specific property as the property of the community, and the court decreed this to plaintiff, and then undertook to distribute all the other common property; therefore this court held that, as the complaint set up the existence of certain specific property only, the decree awarding it was an adjudication against the rights of plaintiff in any other common property that might thereafter be found to exist. But even in that case we find this statement: "This rule, of course, would not be applicable when the final decree makes no disposition whatever of the community property. In such a case the former spouses become tenants in common in the community property, and their rights thereto could be determined in a subsequent action. Estate of Brix, 181 Cal. 667, 676, 186 P. 135."

[5] The court also found against the claim of laches, and we see nothing which compels us to overthrow this finding. At the time the divorce action was filed in 1926, the decedent fled the jurisdiction of California, and was served by publication of summons as a resident of Canada. There is no evidence that the wife knew where the common property could be found. The nature of the property, the nature of the husband's business, and the itinerant habits possessed by him, all served to support the finding of the court. The claim that the wife should be denied relief because in 1929, shortly before the passing of decedent, and while she was living with another husband at Salinas, she refused to see decedent, does not seem to be of sufficient strength to overcome the conclusion announced above. As already noted, decedent died within a short time thereafter, and she could have had no accurate information as to the character and extent of the property or its location.

[6] Complaint is made that the direction to defendants executor and trust company, to deliver to plaintiff the one-half of the property decreed to her, is too broad and not within the pleadings; hence it should not be sustained. The complaint, however, alleged the existence and possession of the property in defendants, setting up plaintiff's right to possession thereof, and prayed for an order requiring its delivery to her. Moreover, the answer of defendants showed the property to be in their possession. The order requiring its delivery is therefore in full accord with the issues as made by the pleadings. Section 580, Code Civ. Proc. There is nothing in the case of Baar v. Smith, 201 Cal. 87, 255 P. 827, that in anywise is at variance with this holding. Again, the property of plaintiff never became the property of the estate of decedent, and there is no rule of law which prevents an executor who has possession of property which does not belong to his decedent from being required to surrender it to the proper party.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.; TYLER, Justice pro tem.

216 Cal. 585

In re OLMSTEAD'S ESTATE.

L. A. 13628.

Supreme Court of California.

Oct. 26, 1932.

1. Executors and administrators ⇐510(2).

Order denying executors' petition to require special administrator to account for portion of commissions received by him *held* not appealable (Probate Code, §§ 468, 615, 1240; Code Civ. Proc. § 963, subd. 3).

2. Executors and administrators ⇐85(9).

Executors could not recover any portion of amount received by former special administrator in compromise of judgment claim for attorney's fee in administering trust (Probate Code, §§ 468, 615, 1240; Code Civ. Proc. § 969 subd. 3).

In Bank.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

In the matter of the estate of Millicent H. Olmstead, deceased. On motion to dismiss appeal by executors from an order denying their petition to require an accounting by Robert M. Clarke, former special administrator, of portion of fees received by him.

Appeal dismissed.

Arthur J. Mullen and Henry K. Elder, both of Los Angeles, for appellant.

Clarke & Bowker, Don G. Bowker, and Dixie Dunnigan, all of Los Angeles, for respondent.

PRESTON, J.

Motion to dismiss appeal. In order to properly review this motion, it is necessary to set out the following facts:

The decedent, Millicent H. Olmstead, between the years 1905 and 1923, was possessed of an estate valued at some five or six hundred thousand dollars, and was also prolific in the making of deed and trusts, having set up by a series of deeds what is known as the Walker Trust, designed for the building and maintenance of an institution to be known as the Olmstead Memorial Hospital. She had theretofore made a will, the terms of which are not important here. In August, 1923, she filed an action in her own name to quiet title against the trustees named in said deeds of trust, and about the same time she made a second will nominating petitioners herein as executors thereof. Likewise, at the same time, by a series of conveyances and a trust agreement, she set up another trust on the same property with the Security Trust & Savings Bank of Los Angeles. In October, 1923, she died, and soon thereafter Robert M. Clarke was appointed special administrator of her estate for the purpose of carrying on said litigation, and he was substituted in her place as plaintiff in said above-mentioned action. The said bank, however, cross-complained and interpleaded all parties, setting up the validity of the trust made to it. The case was tried in the court below, and a judgment was rendered declaring the so-called Walker Trust invalid and upholding the later trust in the bank. In the judgment also Robert M. Clarke was allowed from the trust funds for his attorney's fee the sum of $7,500. Later these petitioners, having qualified as regular executors of the estate of said decedent, were substituted in said litigation in the place and stead of said Robert M. Clarke, special administrator. The cause was later appealed by the Walker trustees, but neither the special administrator nor the executors thereafter appointed appealed. The full history of this litigation may be found in Dingwell v. Seymour, 91 Cal. App. 483, 267 P. 327.

Pending said appeal, Robert M. Clarke compromised his claim for attorney's fees allowed him by said judgment, and received in full settlement thereof the sum of $5,000, which item covered also a waiver of all claims as special administrator. Later the judgment as to the Walker Trust was set aside, being reversed, as was also the portion of the judgment allowing the said attorney's fees. But the reversal of the judgment did not affect the validity of the compromise with Clarke.

Now, by the petition before us, come said executors of decedent's estate, who ask the probate court to compel said Clarke as former special administrator of said estate to account to them for a portion of said item pursuant to section 468 of the Probate Code, which provides that, when the same person does not act as special administrator and executor, the commissions and allowances shall be divided between the special administrator and executor in such proportion as the court shall deem just.

An order to show cause issued and was served upon the respondent Clarke, who answered, denying the claims of petitioners. The matter thereupon came on for hearing and upon this alone as a record the petition was denied. Petitioners have attempted to appeal from this order, supported only by the record made as above stated.

[1, 2] This proceeding is difficult to classify under any known method of procedure. If the claim of petitioners in fact comes under section 468, an order made thereunder is not appealable, same not being found in section 1240 of the Probate Code, which, when taken in connection with section 963, subdivision 3 of the Code of Civil Procedure, measures the right of appeal in probate matters. If it be classified as an attempt to discover assets of the estate pursuant to section 615 of the Probate Code, no appeal is allowed from an order made pursuant to that section, its object being to place the executor or administrator in possession of such facts as would authorize a suit on the civil side of the court to restore to the estate the property thereof held by another. Neither is the order in any sense of the word a proceeding to review an order refusing to allow payment of a debt, claim, legacy, or attorney's fee under section 1240, Probate Code. So, under no conceivable aspect of the matter, is this order appealable. Moreover, on the merits of the matter as shown by the present record, the amount received by Mr. Clarke was from the trust estate by way of compromise and not from the estate of said decedent. In other words, the amount received by him cannot be held to be upon any theory an asset of the estate of decedent.

The appeal is dismissed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.; TYLER, Justice pro tem.; SEAWELL, J.

216 Cal. 594

BLOOM v. BLOOM et al.

S. F. 14371.

Supreme Court of California.

Oct. 27, 1932.

Appeal and error ⇐1214.

Reversal of judgment requiring reconveyance on defendant's payment of secured indebtedness *held* not to authorize taking evidence on value of property on retrial.

On former appeal, judgment requiring reconveyance on defendant's payment of indebtedness secured by deed was reversed because judgment did not require payment within reasonable time, and court was directed to quiet title under the deed securing indebtedness if defendant failed to pay the indebtedness within the specified reasonable time, and appellate court specifically stated in the order that trial court's findings as to value of property were sustained by evidence, and therefore, on resubmission, trial court erred in receiving evidence of value of property.

In Bank.

Appeal from Superior Court, Santa Cruz County; H. C. Lucas, Judge.

Action to quiet title by W. R. Bloom against Irvin T. Bloom, also known as Irwin T. Bloom, and others. From the judgment, plaintiff appeals.

Reversed with directions.

Lucas F. Smith, of Los Angeles, and Stanford G. Smith, of Santa Cruz, for appellant.

Rittenhouse & Snyder, of Santa Cruz, for respondents.

SEAWELL, J.

This is the second appeal taken by plaintiff in this action. The facts are sufficiently stated in our consideration upon the first appeal, reported in Bloom v. Bloom, 207 Cal. 70, 276 P. 568. The plaintiff in the original action filed a complaint in the usual form to quiet his title to three parcels of land in the county of Santa Cruz. The defendant answered, denying absolute title in the plaintiff, and alleged that the plaintiff's interest was founded upon a deed conveying to him the title to the three parcels of land described in the complaint and two other parcels described in the answer, which deed, although absolute in form, was alleged to be in fact a conveyance of the title to the plaintiff upon the trusts resulting from an agreement of the parties and evidenced by a letter exchanged between them whereby the title was to be held by the plaintiff as security for loans and advances; reconveyance to be had upon payment to the plaintiff of the amount of such loans and advancements. The defendant prayed that an accounting be had as to all five parcels and that upon the ascertainment of the amount due from the defendant to the plaintiff, the plaintiff be required to reconvey the three parcels described in the complaint upon the payment or tender to the plaintiff of the amount so found to be due. Prior to the commencement of the action the plaintiff had conveyed the two parcels described in the answer to innocent third parties for value without notice of the defendant's claims. The accounting was had and the amount of the loans and advances due from the defendant to the plaintiff was found by the court to be the sum of $8,930.24, with interest at the legal rate from June 9, 1925. The court found that the deed was as and for the purposes alleged in the answer and adjudicated that the plaintiff's title be not quieted, but that the plaintiff execute a deed conveying to the defendant the title to the property described in the complaint upon the payment to the plaintiff of the amount found to be due in accordance with the agreement of the parties. The plaintiff in said first appeal from the judgment based his appeal on the ground that the evidence was insufficient to support the findings and that the judgment was uncertain and incomplete, in that no time was fixed within which the defendant was required to pay the amount found to be due the plaintiff as a condition upon which the defendant would be entitled to a reconveyance. We held in our former decision that the evidence was sufficient to support the findings, but as the judgment did not adequately protect the plaintiff's rights nor completely dispose of the controversy, the cause was remanded, with directions as stated in our opinion. We were of the view that the judgment as it then stood imposed the burden of further advances by way of taxes and maintenance charges upon the plaintiff and the defendant was permitted to delay indefinitely the payment of the amount found to be due, and therefore if the judgment were permitted to stand, the plaintiff's title was not quieted, notwithstanding the fact that defendant might never pay the amount found to be due. The plaintiff suggested that the proper method to have been pursued was that an interlocutory judgment should have been rendered, directing that a reconveyance be executed on the payment by the defendant of the amount found to be due from the defendant to him, and that a time should have been fixed within which the defendant should have been permitted and required to make such payment, in default of which the plaintiff's title should be quieted. Or, as another alternative, that the court should have ordered the property sold, subject to the right of the defendant to redeem

as in foreclosure. We held, however, that under the contract of the parties and the allegation of the defendant's answer and the form of his prayer for affirmative relief, he had consented to the procedure first suggested by the plaintiff; that is to say, that upon payment of the amount found to be due by defendant to plaintiff within a time to be fixed by the court, the property in question should be reconveyed to said defendant, but in default of such payment the plaintiff's title should be quieted. Upon the first appeal the defendant filed no brief and stipulated that the appeal might be determined on the record and upon plaintiff's opening brief. Upon this stipulation we held that the defendant must be deemed to have waived any equity of redemption which he might otherwise have had and to have consented to the procedure last above set out. We further held that under the circumstances shown the trial court should have entered an interlocutory judgment requiring the defendant to pay the amount found to be due the plaintiff, within a specified reasonable time, that upon such payment within the time specified the defendant would be entitled to reconveyance, and that in default of said payment the plaintiff would be entitled to a decree quieting his title. While this procedure was outlined and an interlocutory judgment was actually ordered to be prepared by the trial court, the procedure was not followed, but a final judgment was signed and entered, with the infirmity above indicated. We further set out in our former opinion that the situation of the parties under their contract and pleadings was such as to indicate that the plaintiff, in order to protect his interest in the property, probably had been required to make further advances, or assume further financial burdens since the close of the accounting had, or at least since the entry of the judgment. We then ordered the judgment reversed and the cause remanded for further proceedings consistent with the views therein expressed.

It will be borne in mind that the defendant took no appeal either from the judgment rendered in the first trial or from the judgment rendered in the present action. This appeal is taken solely by plaintiff. Upon the going down of the remittitur in the first appeal, neither the trial court nor the attorneys in the case seemed to have understood the effect of the language of our order, and so stated during the proceedings had upon a return of the case for further consideration. The defendant, however, proceeded to produce evidence going to the value of parcels 4 and 5 which had been sold by the plaintiff and which were found to be of the aggregate value of $400 by the trial court in its findings when this matter was considered by it upon the first hearing. This court expressly affirmed the finding and the judgment of the trial court as to this issue, and the value of these two parcels was not left open for further determination by the trial court upon a return of the cause. Our order specifically stated the matters to be considered by the trial court upon a resubmission and the value of the two parcels in question is not included within our said order. The question of value was foreclosed by the finding of the court in its first order, and by the order of this court upon said appeal. This matter could not be said fairly to come within the language: "The judgment is reversed and the cause is remanded for further proceedings consistent with the views herein expressed." There is a wide discrepancy between the value of parcels 4 and 5 as found by the trial court upon the second hearing and the valuation placed upon said parcels at the first hearing. We have examined the evidence taken at both trials as to value, and we are in nowise impressed with the testimony offered to fix value at the second hearing. The two parcels in dispute are rural lots without valuable improvements upon them and the value placed upon said property at the second trial appears to be grossly excessive. It seems that after the case had been submitted the court reopened it for the purpose of appointing two appraisers who were directed to determine the value of said parcels and report their findings to the court. Said appraisers reported a valuation several thousand dollars beyond that originally found by the court and from which no appeal had been taken by the defendant. We feel that it is not necessary to enter into a discussion of the merits of this case, but it may be stated in general that the equities seem to be largely with the plaintiff, who advanced the sum of $4,682.31 to defendant, who was his cousin, many years prior to the commencement of the action. It may be observed that the conduct of the parties strongly tends to support plaintiff's testimony to the effect that a final settlement had been made several years before the commencement of the action between plaintiff and defendant as to their entire business relations and defendant did in fact surrender to plaintiff all of his right and interest to the property in suit, with the intention and understanding that the entire transaction was at an end. While the trial court felt that the testimony of the defendant was sufficient to create a conflict as to this issue, it is very doubtful if the greater weight of the testimony does not in fact support plaintiff's contention of previous settlement of all business transactions between said parties.

Upon the record presented we are of the view that the order made by this court did not reopen the case as to the value of said two parcels of land, and that the judgment should be reversed with directions to the lower court to enter a judgment in the form of the judgment appealed from, except as to

the amount required to redeem. That amount shall be computed as follows: The sum of $8,930.24, found due for principal, interest and taxes up to June 9, 1925, by the decree first appealed from, plus interest on said sum and the amount of further advances made by plaintiff from June 9, 1925, to the time of redemption, with interest from date on said advances. Credit for the value of two parcels transferred in the sum of $400 has already been allowed defendant in computing the figure of $8,930.24.

With this direction, the judgment is reversed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; TYLER, Justice pro tem.

216 Cal. 619

HOPKINS v. WOODWARD et al.

S. F. 14352.

Supreme Court of California.

Oct. 31, 1932.

1. Injunction ⇐59(1).

Owner of dramatic rights in play *held* not entitled to restrain producer from asserting rights under contract to produce play on ground that opening performance was delayed for week due to leading actor's injuries (Civ. Code, § 3275).

Owner could not restrain the producer from asserting his rights under the contract, where the producer offered to pay such damages as the owner had suffered by reason of the delay in the opening performance, since to terminate the contract would result in a loss to the producer, "in the nature of a forfeiture" within Civ. Code, § 3275, authorizing party to be relieved from loss in nature of forfeiture by making full compensation to other party.

2. Contracts ⇐318.

Whenever possible equity will relieve from default party who has acted in good faith, given reasonable excuse for delay, and thereafter promptly tendered performance (Civ. Code, § 3275).

3. Appeal and error ⇐1050(1).

In action to restrain producer from enforcing rights under contract to produce play to be opened in city, admitting evidence of producer's custom to "break in" cast in small towns *held* harmless, where producer did not "break in" cast in small towns (Civ. Code, § 3275).

In Bank.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Arthur Hopkins against O. D. Woodward and others. From the judgment dissolving a preliminary injunction and refusing to perpetually enjoin defendants from asserting rights under certain contract, plaintiff appeals.

Affirmed.

Humphrey, Searls, Doyle & MacMillan, of San Francisco, for appellant.

Morris M. Grupp, of San Francisco, for respondent.

WASTE, C. J.

Plaintiff appeals from a judgment dissolving a preliminary injunction and refusing to perpetually enjoin the defendants from asserting any rights under a certain contract.

[1, 2] It appears that plaintiff, as the owner of the dramatic rights in a certain play entitled "Holiday," had by written agreement with the defendant Woodward licensed the latter to produce and stage said play in the cities of San Francisco and Los Angeles on or before May 1, 1929. As the result of negotiations between the parties, the date of the opening performance was extended, by mutual consent, to August 5, 1929. There are provisions in the contract looking to the termination of defendant Woodward's rights thereunder in the event of his failure fully to comply with its terms. This action was instituted to terminate such rights and to perpetually enjoin Woodward, and those claiming under him, from producing or publicly presenting the designated play or from interfering with plaintiff's production thereof through any other licensee. Plaintiff based his prayer for such relief on three alleged violations of the contract by the defendant Woodward, viz. his alleged breach of the provision requiring the staging of the play in San Francisco or Los Angeles on or before August 5, 1929; his alleged breach of the provision against assignment resulting from an asserted transfer to the defendant Holt of a portion of his interest under the contract; and a further alleged breach of the provision against assignment resulting from the filing by the defendant Woodward of a voluntary petition in bankruptcy.

Upon the conclusion of the trial of the cause, the court below found against the plaintiff on all of the issues raised by the complaint and the answers thereto. Judgment was accordingly entered dissolving the preliminary injunction theretofore issued, and dismissing the defendants with their costs. This appeal followed.

Plaintiff has apparently abandoned his contention based upon the two asserted breaches of the provision against assignment, for upon this appeal he confines his argument principally to the proposition that the defendant Woodward has lost all rights under the contract by failing to stage the play in San Francisco or Los Angeles on or before August 5, 1929. Upon this issue the trial court found, in substance, that the defendant did not produce the play in San Francisco or Los Angeles, or elsewhere, on August 5, 1929; that defendant's failure to so produce the play was attributable to circumstances wholly beyond his control; that production was not commenced on August 5, 1929, because of certain serious injuries incurred in an automobile accident by one Richardson, who had been selected to play the leading male character in the play; that, though Richardson's injuries prevented defendant from producing the play on August 5, 1929, as agreed, defendant was nevertheless ready and able to produce the play on August 12, 1929, had he not been restrained by order of court in this action; that prior to the filing of this action the defendant informed plaintiff of his willingness and ability to reimburse plaintiff for any damage suffered by reason of the delay of one week; that such delay of one week did not cause irreparable loss to the plaintiff; and that such loss, if any, might be compensated for in damages.

Examination of the transcript discloses that the foregoing findings are amply supported by the evidence. The injuries to, and the consequent inability of, Richardson, the leading male character in the play, to appear on August 5, 1929, having resulted from circumstances entirely beyond the control of the defendant Woodward, and plaintiff not having suffered irreparable injury thereby, the court below was warranted in refusing to terminate the contract and enjoin the defendant Woodward from asserting any rights thereunder. Assuming, but not deciding, that the inability of Richardson to appear on August 5, 1929, was not such an "irresistible, superhuman cause," within the meaning of section 1511 of the Civil Code, as to excuse defendant's failure to strictly comply with the letter of the contract, we are of the opinion that the facts of this case, as found by the trial court, present a situation within the contemplation of section 3275 of the Civil Code. That section provides that "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty." To terminate the contract, as plaintiff would have us do, would result in a loss to the defendant Woodward "in the nature of a forfeiture." Equity abhors forfeitures and penalties of the character here sought to be imposed, and will, whenever possible, and in the absence of irreparable damage, relieve a party from default when it appears that he has acted in good faith, given some reasonable excuse for the delay, and thereafter tendered performance promptly and with reasonable diligence. Steele v. Branch, 40 Cal. 3, 11; Knight v. Black, 19 Cal. App. 518, 526, 126 P. 512. To terminate the contract and enjoin the defendant Woodward from asserting any rights thereunder, because of his temporary inability to produce the play on August 5, 1929, as agreed, which inability arose through no fault of his, but from circumstances entirely beyond his control, would be inequitable and oppressive. Particularly is this true, when, as found by the trial court, any loss resulting from the delay of one week in producing the play was not irreparable, but could be adequately compensated in damages. This latter finding is substantiated by the fact that the parties had by mutual agreement extended the opening date of the production from May 1, 1929, as originally fixed in the contract, to August 5, 1929. Having theretofore consented to a three months' extension of the opening date, plaintiff should not now be permitted to terminate the contract and claim irreparable damage because of a further delay of one week, which latter delay, as we have shown, was sufficiently accounted for and wholly the result of circumstances beyond the defendant Woodward's control. We are not here concerned with any question of damages. Neither the complaint nor the evidence touches upon the damage, if any, suffered by plaintiff as a result of the delay of one week above discussed.

On July 29, 1929, the defendant Woodward sent a telegram to the plaintiff informing him that the cast for "Holiday" was complete and would play "three small towns to break in." Upon receipt of a reply telegram from the plaintiff insisting "upon performance of Holiday contract in exact accordance with terms thereof," the defendant again wired the plaintiff that he would "comply with all terms of Holiday contract." Plaintiff now sets up defendant's expressed desire or intention to open the play outside of San Francisco or Los Angeles as such a breach of the contract as requires a termination thereof. There are two sufficient answers to this proposition, viz. the play was never produced outside of San Francisco or Los Angeles in violation of the contract; and, upon objection from the plaintiff, defendant apparently abandoned his plan to open outside of the territory designated in the contract and immediately informed plaintiff, as shown above, that he would "comply with all terms of Holiday contract."

[3] Plaintiff also complains that it was error for the court below to admit evidence of the existence of a custom among Western producers to "break in" a cast by opening in small towns. Assuming this evidence to have been erroneously admitted, a point we do not decide it could not have constituted prejudicial error for, as a matter of fact, the defendant did not "break in" the cast in small towns. Inspection of the findings discloses that the admission of this evidence had no bearing whatever upon the trial court's disposition of this cause. The judgment is based on a theory entirely independent of such evidence.

Upon an examination of the entire record, we are satisfied that plaintiff is not entitled to the permanent injunction prayed for.

The judgment is, therefore, affirmed.

We concur: SHENK, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; TYLER, Justice pro tem.; CURTIS, J.

216 Cal. 588

LOS ANGELES CITY SCHOOL DIST. OF LOS ANGELES COUNTY v. PAYNE, County Auditor.*

L. A. 13717.

Supreme Court of California.

Oct. 26, 1932.

Rehearing Denied Nov. 23, 1932.

Schools and school districts ⇐103(2).

Taxes for acquiring school lands, constructing and repairing buildings, and equipment thereof, within statutory limits may be levied without first securing electors' consent as being for "building purposes" (School Code, §§ 4.375, 4.376, as added by St. 1931, pp. 2492, 2494).

The words "building purposes" in School Code, § 4.375, as added by St. 1931, p. 2492, increasing from 15 cents to 70 cents maximum rate which may be levied in any one year on each $100 of assessed valuation in elementary school districts for building purposes, must be given same meaning as in Political Code, former section 1838, and School Code 1929, § 4.460, which defined "building purposes" as including "purchasing school lots for building, or purchasing one or more school buildings or making alterations or additions or repairs to any school buildings, or repairing, restoring or rebuilding any school building damaged, injured or destroyed by fire or other public calamity, or insuring school buildings, or supplying school buildings with furniture or necessary apparatus or improving school grounds."

[Ed. Note.—For other definitions of "Building Purposes," see Words and Phrases.]

In Bank.

Proceeding for writ of mandate by the Los Angeles City School District of Los Angeles County against H. A. Payne, as County Auditor of Los Angeles County.

Writ granted.

Erwin P. Werner, City Atty., Frederick Von Schrader, Asst. City Atty., and Arthur Loveland, Deputy City Atty., all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, for respondent.

PRESTON, J.

This proceeding in mandate presents the problem of properly interpreting the language of section 4.375 of the School Code of California (St. 1931, c. 1184, p. 2492).

Petitioner school district sets forth the great need in Los Angeles county of new elementary schools and of the expenditure of funds for the maintenance and repair of existing school buildings, and for the payment of insurance premiums for their protection, etc., and alleges that requisitions in due form have been made upon respondent auditor for the following purposes: (1) California Trust Company, purchase of school lots; (2) Anton Johnson Co., Inc., building school buildings; (3) Eric Flodine, altering school buildings; (4) Geo. Mittry, additions to school buildings; (5) B. L. Whitmore Pioneer Shingle Company, repairing school buildings; (6) J. E. Dwan, Inc., fencing to improve school grounds; (7) Green-Campbell Company, insuring school buildings; (8) California Hardware Company, supplying school buildings with equipment; (9) William Martin, improving school grounds; (10) Broadway Department Store, Inc., linoleum to repair school buildings.

Petitioner further alleges that there is on deposit with the Los Angeles county treasurer a sufficient fund to meet all payments which might be necessary for such purposes, but that respondent county auditor has refused to approve and issue warrants therefor, pending a court ruling as to the meaning of the section of the School Code above cited, wherefore petitioner prays for the issuance of a writ of mandate to compel such approval and allowance by respondent.

To state the issue another way, a school budget was duly prepared by the board of education, approved by the county superintendent of schools, and presented to the board of supervisors to be raised by taxation as

by law provided, a portion of which budget related to a fund known as the building tax fund and contemplated an expenditure from said fund of some $573,213 for the purchase of school land, new buildings and equipment, as well as alterations, repairs, improvement, and maintenance of existing buildings. Respondent auditor based his refusal to allow requisitions and warrants for such expenditure upon the ground that the items were not proper charges against the building tax fund, that they were not authorized by said statute, and that they had not been specially authorized by a vote of the people of the district.

A brief review will now be made of the legislation which preceded the enactment of section 4.375.

Section 1830 of the Political Code (St. 1927, p. 727, c. 436) provided that a board of school trustees might call an election and submit to the electors of the district the question of whether a tax should be raised to furnish additional school facilities, to maintain any school, to build schoolhouses, to improve school grounds, etc. This section became, in substance, section 4.410, chapter 2, of the School Code, which was adopted in 1929.

Section 1838 of the Political Code (St. 1927, p. 316, c. 168) provided that the board of school trustees or education must, before the 10th day of July, "submit to the county superintendent of schools an estimate of any amount of money which will be required for purchasing school lots for building or purchasing one or more school buildings or making alterations or additions or repairs to any school building or buildings, for repairing, restoring or rebuilding any school building damaged, injured, or destroyed by fire, or other public calamity, for insuring school buildings, for supplying school buildings with furniture or necessary apparatus, or for improving school grounds in their several districts for the ensuing school year"; that the county superintendent submit said estimates, with his approval or disapproval thereof, to the board of supervisors and county auditor at the time he submitted his estimate for the county school tax for the ensuing year; that, if approved, the board of supervisors must levy and collect the additional tax, provided that the maximum rate should not exceed 15 cents on each $100; further provided, that the section should not be so construed as to repeal sections 1830 and 1837, inclusive, and 1840 of the Political Code. Said section further provided that "the funds so levied and collected shall be known as the special building fund of . . . school district * * * and shall be available for any or all of the purposes hereinbefore enumerated. * * *" This section in substance became sections 4.460–4.466, chapter 4, of the School Code.

Section 1839 of the Political Code provided that the maximum rate of tax levied by a district in any one year for building purposes must not exceed 70 cents on each hundred dollars and the maximum rate levied for other school purposes must not exceed 30 cents on each hundred dollars in any one year. This section became, in substance, section 4.490 of the School Code as amended (chapter 397, School Code, p. 334).

Thus under the above legislation an election was required to authorize any school tax over the 15 cents per $100 rate and within the maximum 70 cents per $100 rate.

It appears that the School Code, as adopted in 1929, contained four chapters, in substantially the same general language (chapters 4, 5, 6, 7 of part 3), providing funds, respectively, for elementary school districts, junior high school districts, high school districts, and junior college districts. In 1931 these four chapters, part of chapter 2 and chapter 397 were repealed; that is, the repeal included all of the sections above reviewed (St. 1931, c. 1184, p. 2492, and St. 1931, c. 1177, p. 2486, repealing chapter 2, §§ 4.410–4.434, inc., pt. 3, div. 4, of the School Code). At the same time various new provisions were enacted, including section 4.375, which was evidently designed to replace, in a simplified form, the several repealed sections above mentioned. Said section 4.375 reads as follows: "4.375. Except as otherwise provided elsewhere in this code, the maximum rate which, under the provisions of this chapter, may be levied in any one year on each one hundred dollars of assessed valuation within the district must not exceed the following: 1. For any elementary school district, seventy cents for building purposes, and thirty cents for other school purposes. * * * 2. For any high school district, seventy-five cents, the proceeds of which may be used in the discretion of the governing board * * * for building or other purposes. 3. For any junior college district, fifty cents, the proceeds of which may be used * * * for building or other purposes." (St. 1931, p. 2493, c. 1184.)

From this section itself, and from section 4.376 (St. 1931, p. 2494, c. 1184), which provides that any maximum rate of tax for any district may be increased by a majority vote of the qualified electors of the school district, it is clear that taxes within the limits prescribed may be levied without the necessity of securing the consent of the electors of the district. It is also clear that under section 3 of the School Code we must give the statute a liberal construction to effect its objects and to promote justice. The prime duty of specifying the purposes for which money will be needed rests upon the "governing board" of the several districts (section 4.360). It is the duty of the board of supervisors to levy and cause to be collected a tax to meet this

budget (section 4.372). It is conceded that every item here involved was properly payable out of the "building fund" under former section 1838, Political Code, and likewise payable out of the "building fund" under sections 4.460 and 4.463 of the School Code of 1929. The only vital difference between the situation now and then is that now, instead of a limit of 15 cents without a vote of the district, the limit has been raised to 70 cents.

We hold that by the repeal of the above-mentioned sections it was not the intention of the Legislature to cripple the school system, but, on the contrary, it was its intention to nurture it and to simplify the procedure to that end. Building purposes, under former sections 1838, Political Code, and 4.460, School Code, included: "Purchasing school lots, for building or purchasing one or more school buildings or making alterations or additions or repairs to any school building or buildings, for repairing, restoring or rebuilding any school building, damaged, injured, or destroyed by fire, or other public calamity, for insuring school buildings, for supplying school buildings with furniture or necessary apparatus or for improving school grounds in their several districts for the ensuing year." Section 4.460, School Code of 1929.

We conclude that the phrase here in question must be given the same meaning—a special and well-understood meaning which it has acquired in the school law. Moreover, were we construing the phrase anew we would not restrict its meaning, as contended for by respondent, to the erection of new school buildings only.

Let the writ issue as prayed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; LANGDON, J.; TYLER, Justice pro tem.

216 Cal. 574

In re HUBBELL'S ESTATE.

S. F. 14186.

Supreme Court of California.

Oct. 24, 1932.

1. Appeal and error ⇐162(3).

Acceptance of amount of judgment by party whose right thereto is uncontroverted does not preclude appeal based on claim that he was entitled to greater amount.

2. Appeal and error ⇐162(3).

Legatees' acceptance of amounts to which they were entitled under will did not preclude appeal from distribution decree not allowing interest on such amounts (Probate Code, § 162).

3. Wills ⇐734(1).

Interest is due on legacy, not as penalty for nonpayment, but as part of or accretion to legacy (Probate Code, § 162).

4. Wills ⇐734(11).

Payment to legatee of less than aggregate amount of legacy and interest thereon does not extinguish right to interest on legacy (Civ. Code, § 3290; Probate Code, § 162).

5. Wills ⇐734(11).

Legatees' failure to appeal from decree of partial distribution did not limit them to recovery of interest only on sum distributed to them under final distribution decree (Probate Code, § 162).

6. Executors and administrators ⇐314(12).

Legatees *held* not foreclosed from claiming interest on legacies on their appeal from final distribution decree because of failure to urge claim in court below (Probate Code, § 162).

The petition for distribution did not indicate persons to whom or proportion in which estate should be distributed.

7. Executors and administrators ⇐314(12).

"Final account and petition for distribution" and "decree of final distribution" in clerk's transcript on appeal *held* sufficient to warrant consideration of error in not allowing appellants interest on their legacies (Code Civ. Proc. § 670).

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

In the matter of the estate of Russell H. Hubbell, deceased. From a final decree of distribution, the Bank of Italy National Trust & Savings Association, guardian of the estate of Mary Jane Flint, a minor, and Maud A. Roop, guardian of the person and estate of Florence Gertrude Roop, a minor, appeal.

Motion of Frank H. Evers and another, individually and as executors of the last will and testament of decedent, to dismiss the appeal, denied, and decree reversed, with directions.

For prior opinion, see 8 P.(2d) 173, to which rehearing was denied 9 P.(2d) 230.

Thomas E. O'Donnell, of Hollister, and Peter A. Breen, of San Francisco, for appellants.

Lee M. Olds, Hartley F. Peart, and Gus L. Baraty, all of San Francisco (Russel Shearer, of San Francisco, of counsel), for respondents.

WASTE, C. J.

Two appeals are here presented from the final decree of distribution entered in the

above-entitled estate. The appeals have been consolidated by stipulation of the parties, and are presented upon a single transcript and set of briefs.

Russell H. Hubbell, the decedent, died November 4, 1928. His last will and testament, together with a codicil thereto, were admitted to probate on November 26, 1928. Decedent bequeathed $30,000 to each of the appellants herein. During the course of administration of the estate, a decree of partial distribution was duly entered, under the terms of which there was distributed to each appellant the sum of $15,000 to apply on account of their respective legacies. Subsequently and by way of final decree of distribution there was distributed to each appellant an additional sum of $15,000. Both the partial and final decrees of distribution were entered more than one year after the testator's death. Section 162 of the Probate Code (formerly sections 1368 and 1369 of the Civil Code) provides in part that "legacies are due and deliverable one year after the testator's death, and bear interest from that time. * * *" Relying upon the foregoing statutory pronouncement, the appellants "appeal from the decree of final distribution upon the single ground that the decree fails to provide for the payment of interest upon their legacies for the period between one year after testator's decease and the payment of the legacies."

[1] Respondents do not deny that legacies bear interest on and after the expiration of one year from the testator's death, but contend that the appellants for various assigned reasons have lost or waived their right to such interest. Respondents' first contention, presented by way of motion to dismiss, which motion was heretofore continued to be heard with the cause on its merits, is that the appellants, by accepting payment of a sum equal to the principal of their respective legacies, have lost or forfeited their right to appeal. In support thereof, the respondents rely on the rule which declares that "the right to accept the fruits of a judgment or order and the right to appeal therefrom are not concurrent, but are wholly inconsistent, and an election of either is a waiver and renunciation of the other." County of San Bernardino v. County of Riverside, 135 Cal. 618, 620, 67 P. 1047, 1048; Estate of Shaver, 131 Cal. 219, 221, 63 P. 340; Storke v. Storke, 132 Cal. 349, 64 P. 578; Estate of Baby, 87 Cal. 200, 25 P. 405, 22 Am. St. Rep. 239. Examination of the authorities discloses, however, that a limitation is placed upon this rule in those cases where a reversal of the judgment or order cannot affect the right of the party to the benefit which he has secured thereby, as when the only controversy relates to a greater sum; that is to say, where there is no controversy as to a party's right to the amount for which the judgment is given, his acceptance thereof will not preclude an appeal based upon a claim that he was entitled to a greater amount. Estate of Clark, 190 Cal. 354, 358, 359, 212 P. 622; Estate of Ayers, 175 Cal. 187–190, 165 P. 528; Walnut Irr. Dist. v. Burke, 158 Cal. 165, 167, 110 P. 517; County of San Bernardino v. County of Riverside, supra.

[2] The present case falls squarely within the limitation to the rule. There can be no doubt as to the right of the appellants to receive the $30,000 distributed to each of them. Each was entitled as matter of right to this sum under the terms and provisions of the testator's will. This being so, their respective acceptance of this sum should not, under the exception to the general rule, preclude them from attacking the decree so far as it fails to allow them a further and additional sum by way of interest.

[3, 4] Nor do we think section 3290 of the Civil Code militates against appellants' claim for interest. That section reads: "Accepting payment of the whole principal, as such, waives all claim to interest." The foregoing Code section appears in that part of the Civil Code entitled "Interest as Damages." We are inclined to the view that interest is due on a legacy, not as a penalty for nonpayment or default in payment, but as a part of or an accretion to the legacy itself. Kent v. Dunham, 106 Mass. 586, 590; In re Payne's Will, 171 Wis. 608, 177 N. W. 858, 859, 10 A. L. R. 993; Esmond v. Brown, 18 R. I. 48, 25 A. 652, 653. In the case last above cited, an action in assumpsit to recover interest due on a legacy was allowed, even though the legacy had theretofore been paid. From what has been said, it follows that any payment less than the aggregate of the legacy and interest constitutes nothing more than a payment on account, and should not serve to extinguish the right to interest on the legacy.

[5, 6] There is no merit in the respondents' further contention that the appellants by failing to appeal from the decree of partial distribution can recover interest only on the sum distributed to them under the final decree of distribution. Until the entry of the final decree of distribution, the appellants were not in a position to know that the interest to which they are rightly entitled was to be denied them. This being so, the appellants were not aggrieved until the entry of the final decree, and it must therefore be concluded that they have diligently prosecuted their claims. What has just been said is equally applicable to the contention that appellants are now foreclosed from claiming interest on their legacies by reason of their failure to first urge the point in the court below. The averments of the petition for distribution were not such as to definitely inform the appellants that they were to be denied interest on their legacies. The petition merely requested that the estate be distributed without indicating the persons to whom, or the proportions in which,

it was to be distributed. It was the duty of the probate court to distribute the estate among the persons entitled and in the proportions due them under the will and the law, and to order the payment of interest to the appellants on their legacies. It necessarily follows that, prior to the entry of the final decree of distribution, there was no occasion to urge the point in the court below. Under the circumstances, the point is timely presented. The decision in Estate of Schmierer, 168 Cal. 747, 749, 145 P. 99, intimates that a legatee, in order to protect his right to interest, must urge the point on an appeal from the decree of distribution. The appellants have here pursued the suggested course.

[7] This brings us to a consideration of the sufficiency of the record on appeal. The appeal is before us on what might be termed a "clerk's transcript." It is the respondents' contention that there are included therein certain papers not properly a part of the "judgment roll" on an appeal from a final decree of distribution, and that, when such papers are excluded from consideration, the record does not show any failure to allow the necessary interest. Respondents urge that the "judgment roll" on an appeal from a final decree of distribution consists only of "the petition for distribution, the opposition thereto, if any written opposition was filed, the counter petitions filed, if any there were, or any other papers in the nature of pleadings filed at or before the hearing purporting to set forth the claim of parties who appeared and claimed distribution, with the answers thereto, also the findings of the court, if any, upon the issues formed, any orders or other papers of like character to those mentioned in section 670 of the Code of Civil Procedure, and the decree of distribution itself." Estate of Broome, 169 Cal. 604, 605, 147 P. 270, 271; Estate of Gamble, 166 Cal. 253, 255, 256, 135 P. 970.

Disregarding as surplusage all portions of the transcript not properly a part of the "judgment roll," we are of the view that there remains sufficient to warrant a consideration of the point here urged by the appellants. There can be no question as to the propriety of the inclusion in the clerk's transcript of the "Final Account and Petition for Distribution" and the "Decree of Final Distribution." Examination of these papers alone, excluding from consideration all other portions of the record, readily discloses the error of the court below in not allowing interest to the appellants on their respective legacies.

For the foregoing reasons, the motion to dismiss is denied, and the final decree of distribution here appealed from is reversed, with directions to the court below to so amend the same as to provide for the payment of interest to the appellants on their respective legacies; interest at the legal rate to be allowed to the appellants on one-half of their respective legacies for the period elapsing between one year after the testator's death and the date of payment under the decree of partial distribution, and on the remaining half of the respective legacies for the period elapsing between one year after the testator's death and the date of payment under the final decree of distribution.

We concur: CURTIS, J.; PRESTON, J.; SHENK, J.; TYLER, Justice pro tem.; SEAWELL, J.

216 Cal. 564

WUTCHUMNA WATER CO. v. BAILEY.

L. A. 13644.

Supreme Court of California.

Oct. 24, 1932.

1. Attorney and client ⇐21.

Attorney may not do anything which will injuriously affect former client in matter in which attorney formerly represented him.

2. Attorney and client ⇐21.

Attorney may not use against former client information acquired by virtue of previous relationship with him.

3. Attorney and client ⇐21.

Water company could enjoin its former attorney from proceeding with litigation as attorney for adverse claimants, where attorney's present position required disclosure of confidential information gained from water company as client.

In Bank.

Appeal from Superior Court, Tulare County; Stanley Murray, Judge.

Action by the Wutchumna Water Company against W. R. Bailey. Judgment for defendant, and plaintiff appeals.

Reversed and remanded, with directions.

Walter M. Gleason, of Oakland, Humphrey, Searls, Doyle & MacMillan, and Morgan J. Doyle, all of San Francisco, and Denver S. Church and David E. Peckinpah, both of Fresno, for appellant.

Farnsworth, Burke & Maddox, of Visalia, H. Scott Jacobs, of Hanford, and Adolph Feierbach, of Visalia, for respondent.

PRESTON, J.

This action is an offshoot of two other actions now pending in the Tulare county su-

perior court, one No. 19876, styled Lakeside Ditch Co. et al. v. Wutchumna Water Company et al., and the other No. 19897, styled Jennings Ditch Water Company et al. v. Wutchumna Water Company. In these actions the present defendant and respondent appears as the leading attorney for all of the plaintiffs—some sixteen or seventeen concerns owning water rights on the Kaweah river and its branches, rights resting largely upon claims of appropriation and prescription. This plaintiff is a mutual water corporation owning two appropriative rights in the said stream, one on the main stream itself above McKay Point and the other on a branch called the St. Johns river, and is engaged in the distribution of its water so owned to its stockholders for beneficial uses on agricultural lands in that region, situate in Tulare and Kings counties, known as the Kaweah delta. Plaintiffs in the two above-mentioned actions are likewise engaged in the distribution of water for irrigation and other useful purposes in the same general area. Conflicting claims to the waters of said stream, affecting all the parties to said actions, either have arisen or have been threatened at various times over a great number of years, and in many aspects the issues still obtain. This water use has produced over the years a vast amount of litigation, not a small part of which has reached the files of this court.

Practically the sole assets of this plaintiff are its two water rights and the diversion works and distribution system necessary for their utilization. The larger right is known as the Upper Diversion and is taken from the main Kaweah river near the foothills of the Sierra Nevada Mountains some fifteen miles east of Visalia, and is conveyed some four miles to a storage reservoir known as Bravo lake. This right had its inception as early as 1856. The smaller, or lower, right is on the St. Johns river, and is taken out at a point commonly known as the Barton cut, which is some twelve miles down stream from McKay Point. This ditch connects with the main ditch about one mile below the point of diversion. The relations between all these water users are the more complex when it is realized that the several water rights claimed by them do not exist in single units of the same grade, but some are primary and some are secondary in their makeup, and some are split so that certain waters are received primarily and others are received after prior claimants have been supplied in whole or in part. The interrelation and interdependence of these rights make the subject of their relative adjustment a delicate question. Indeed, all the rights of this plaintiff itself are not primary, but are subject to certain priorities and contingencies, particularly as to the smaller or Barton cut right. There have been many agreements between certain of these users attempting to adjust their respective claims as between themselves, but in the main it may be said that as between this plaintiff and the other users above mentioned no definite adjudication or agreement has ever been made. Apparently it is the object of the said two suits to make an adjudication of this plaintiff's preferential and subordinate rights in the water of said river and its branches.

The question we are here to solve, however, is not the extent or priority of these rights, but it is whether or not W. R. Bailey, defendant here, and the attorney for the plaintiffs in said two actions, may lawfully and justly represent them in view of his former stewardship as attorney for this plaintiff. To bring this question to the foreground, plaintiff instituted this action against said attorney, praying that he be restrained from so appearing as attorney for plaintiffs in said actions, and also that he be permanently enjoined from directly or indirectly disclosing knowledge or information gained by him as such attorney concerning this subject-matter. Issue was joined upon the complaint and a trial conducted. A voluminous record was there made which is now before us, followed by briefs of abnormal size, disclosing a great deal of regrettable bitter feeling between the parties; in fact, so much animosity appears that it is difficult to get an unbiased view of the issues of the case from a perusal of the briefs. The court below, after hearing the evidence, made findings thereon and gave judgment refusing to disqualify the defendant. Plaintiff thereupon appealed. As our conclusions are to be predicated upon undisputed facts in the case, we see no reason for setting out at length the contents of the findings made by the court below. Hence sufficient facts for a determination of this appeal will now be recited.

For many years prior to 1913, Mr. E. O. Larkins, attorney at law residing at Visalia, was the sole attorney for appellant respecting these water rights which, as already stated, were practically its sole asset. During the latter part of this period, respondent Bailey was a clerk in the office of Mr. Larkins, and there he first became familiar with the business of appellant. About this time also he became the son-in-law of Mr. Larkins. In 1913, upon his admission to the bar in this state, he became the partner of Mr. Larkins, and remained with him, either as a partner or associate, until the year 1924, at which time the relation was terminated by Mr. Larkins' death. During all the period of respondent's incumbency at the bar, and until some time in the year 1927, he was either individually, or in connection with Mr. Larkins, the sole attorney for appellant or its alter ego, its receiver. His contract with

the corporation was for an annual retainer with special compensation for extra work. The retainer covered general advice, the drawing of papers, attendance upon meetings of the board of directors and of stockholders, when required, and even the drafting of the minutes of such meetings. Prior to the year 1913 several lawsuits in connection with these water rights were conducted on behalf of appellant by Mr. Larkins, and in some of them the nature and extent of appellant's water rights were averred. Wutchumna Water Co. v. Ragle, 148 Cal. 759, 84 P. 162; Wutchumna Water Co. v. Pogue, 151 Cal. 105, 90 P. 362. At least one action, begun in the year 1904, relating to the Barton cut appropriation, was pending and undetermined in 1913 upon the induction of respondent as one of appellant's attorneys. Indeed, the action is still pending, and it may be here further noted that it had as parties thereto some of the same parties as are now plaintiffs in action No. 19897 above mentioned. In other words, the early action concerned the exact subject-matter that is now involved in the later cause, to wit, priorities of appellant and said parties in the waters of the St. Johns river by reason of the diversion at Barton cut. The later complaint filed by respondent takes a position in conflict with that taken by E. O. Larkins in the old suit and to the detriment of appellant. These adverse claims of said parties as against appellant were on several occasions the subject of consideration by its board of directors during the time that respondent was acting as its attorney, and doubtless respondent, whether he recalls it or not, knew at the time of these conferences so had, and it was his duty to advise the board with respect thereto.

It should be here further noted, however, that the storm center of the conflict between appellant and these other water users is not so much the extent of the smaller right as the extent and priority of the main or upper water right. It is appellant's contention that it owns a primary water right of 10 per cent. of the stream flowing at the head of the Wutchumna ditch up to 140 c. f. s. It is the claim of the other users that this right is 10 per cent. of the body of the stream up to 1,000 c. f. s. and 100 c. f. s. when the volume of the stream is between 1,000 and 2,000 c. f. s. and 10 per cent. extra when the flow of the stream is from 2,000 c. f. s. up to 2,400 c. f. s. In other words, appellant asserts its primary right to be 140 c. f. of water per second when there are 1,400 feet flowing in the stream at the head of its diversion works, whereas the adverse contention is that this maximum amount may not be reached unless and until there are 2,400 c. f. s. flowing in the stream. The complaint in case No. 19876 sets up this issue, and it is of the gravamen of said complaint.

In fact, the main and specific cause of the animosity between appellant and respondent, as its attorney, arose over this issue, as we shall now show. For it appears that in 1921, in the cause entitled Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, appellant was impleaded and required, under section 534 of the Code of Civil Procedure, to make a declaration of the extent of its water right. Respondent, as its attorney, set forth its right to be as now claimed by it and not as claimed by the above-mentioned adverse users. There is also proof that in the cause just mentioned evidence was received under the guidance of respondent which tended to substantiate the primary claim of appellant to be 140 c. f. s. of water when there are 1,400 c. f. s. of water flowing in the stream. Respondent, as attorney for appellant, also conducted two or more other causes for the protection of these water rights, one at least respecting the reservoir and another or more to prevent interference with this main ditch, which causes could not but have revealed to him the nature and extent of appellant's title, together with the grounds upon which it rested and the defects, if any, that existed therein.

Finally, in 1926, when a vacancy occurred on the board of directors of appellant and a deadlock existed as a result thereof, and pending the filling of the vacancy on the board, respondent, as appellant's attorney, recommended that a friendly receiver be sought for the company. This was recommended so that adequate steps might be taken to "protect" and "defend" and "preserve" these identical water rights against adverse claimants, although these particular adverse claimants are not mentioned. The program for appointment of a receiver was carried out, and a man by the name of Switzer was appointed receiver, respondent becoming his attorney and acting as such during the year 1926 and until some time in the year 1927. During this period respondent, as such attorney, on behalf of the receiver, prepared and filed a complaint in the Tulare county Superior Court entitled Switzer, as Receiver of Wutchumna Water Company, v. Foot Hill Ditch Co. et al., No. 17583, in which complaint it was attempted to allege a specific statement of the nature and extent of each of appellant's two said water rights, and in that action the right of appellant as to the said upper diversion was defined to be not as contended for by it in the proceeding under section 534 of the Code of Civil Procedure, but it was defined and set forth as now contended for by the adverse users on said stream, to wit, the parties plaintiff in said action No. 19876. No final adjudication, however, was made in said action. Later the receivership was closed, and, upon the incoming of a final report prepared by respondent and upon payment to him of a sub-

stantial attorney's fee, his career as appellant's attorney was ended by his discharge. The basis of such discharge was that, in minimizing and compromising appellant's water rights in said litigation, respondent had not acted with frankness and candor nor upon the advice nor with the consent of any of the officers or directors of appellant.

It is not necessary for us to express any views upon the question of whether respondent acted prudently and in good faith in the filing of said suit. But we prefer to think that he acted in good faith, and there are grounds at least for the belief that some of appellant's responsible officers claimed its water rights to be no more than as alleged in the complaint filed by respondent for the said receiver. At any rate, from this incident arose all the bitterness which marks the instant litigation. Respondent, within a few months after his discharge, set about bringing the two actions first above described and raised on behalf of the adverse claimants on the stream the identical issues which lay at the foundation of his discharge by appellant. The situation suggests that respondent by these actions intends in part to justify the position taken by him as attorney for the said receiver. It may be here added also that we have not recited much of the evidence which tends clearly to show that respondent, not only is to be presumed to have gained much confidential information and knowledge that will be useful to the plaintiffs in said actions as instituted, and to that extent detrimental to the rights of appellant, but there is specific evidence of certain papers concerning which he admits knowledge which, in our judgment, constitute confidential information that he may not lawfully use against his former client.

[1-3] This brings us to a statement of some of the principles of law that must guide us in pronouncing a result in this case. We shall first state that, in setting forth the principles here involved, the good faith of respondent in this matter is not the issue. We are here declaring the policy of the law in promoting the administration of justice. The relation of attorney and client is one of highest confidence, and, as to professional information gained while this relation exists, the attorney's lips are forever sealed, and this is true, notwithstanding his subsequent discharge by his client and notwithstanding the lack of any justification for such action.

"The obligation to represent the client with undivided fidelity does not end with the matter in which the lawyer may have been employed. Thenceforth the lawyer must refrain not only from divulging the client's secrets or confidences, but also from acting for others in any matters where such secrets or confidences or knowledge of the client's affairs acquired in the course of the earlier employment can be used to the former client's disadvantage." Costigan on Cases on Legal Ethics, p. 376.

Mr. Thornton on Attorneys at Law, volume 1, § 176, pp. 314, 315, sets forth the moral obligation, saying: "It may prove to be a very difficult matter to determine, as concrete questions arise, whether lawyers can or cannot safely act for a new client; whether in doing so they may not unintentionally, and perhaps unconsciously, put at his service confidential information obtained from the old client by reason of the professional relationship. Ordinarily the court will assume that counsel will decide that question for themselves in scrupulous conformity to their professional obligations. The path of unquestionable safety, however, would be found in abstention from participation, active or merely as advisers, in any business which may, even by unkind critics, be considered adverse to their clients' interests. For if they become actively engaged for an interest hostile to that of a former client, they will be likely to find their progress impeded by pitfalls or quagmires into which they may stumble, or by which they may be besmirched."

An early case on this subject is In re Boone (C. C.) 83 F. 944, 952, a case arising in the Northern District of California and decided by former Circuit Judge Morrow. It is strikingly similar in principle to the case at bar. There the attorney had acted as such for nine years for a certain party in the protection of certain patent rights. After severing the relationship, the attorney sought employment by the opposite side in a case affecting one or more of these patents, a case, however, in which he had not appeared as counsel for his former client. Thereafter charges were filed against him for his disbarment. The court said: "It is the general and well-settled rule that an attorney who has acted as such for one side cannot render services professionally in the same case to the other side, nor, in any event, whether it be in the same case or not, can he assume a position hostile to his client, and one inimical to the very interests he was engaged to protect; and it makes no difference, in this respect, whether the relation itself has been terminated, for the obligation of fidelity and loyalty still continues. * * * The test of inconsistency is not whether the attorney has ever appeared for the party against whom he now proposes to appear, but it is whether his accepting the new retainer will require him, in forwarding the interests of his new client, to do anything which will injuriously affect his former client in any matter in which he formerly represented him, and also whether he will be called upon, in his new relation, to use against his former client any knowledge or information acquired through their for-

mer connection. [Citing cases.] An attorney cannot use the knowledge acquired confidentially from his client in trafficking with his client's interests. Hatch v. Fogerty, 40 How. Prac. [N. Y.] 492. This general and well-settled rule is not found in any positive enactment. Indeed, none is necessary; it springs from the very nature and necessities of the relation of attorney and client, and finds its highest sanction in the confidential character of that relation. No rule in the ethics of the legal profession is better established nor more rigorously enforced than this one. The relation of attorney and client is one of mutual trust, confidence, and good will. Arrington v. Sneed, 18 Tex. 135. The attorney must use all the care, skill, and diligence at his command on behalf of his client. The relation being, in the highest degree, a confidential one, he is bound to the strictest secrecy and the most scrupulous good faith. * * * This brief statement of the duties and obligations which an attorney owes to his client demonstrates of itself, if, indeed, any demonstration is necessary, how utterly inconsistent with the proper and faithful discharge of them, and, in fact, totally subversive of them, would be any rule permitting the attorney to occupy a position hostile to his client, or to use against him the knowledge he has confidentially acquired. The authorities are all of one accord on this proposition, and disbarment has invariably been inflicted on the attorney who has violated, or attempted to violate, this rule of professional conduct. * * *"

From the above cases the text-writers have condensed the rule into the following language: "The fact that an attorney has once acted in a professional capacity for a person does not preclude him from thereafter accepting a retainer to act adversely to his former client in a matter which has no reference to his previous employment, nor is he precluded from acting for another in the same general matter where his employment is not adverse to his former client. The test of inconsistency is not whether the attorney has ever appeared for the party against whom he now proposes to appear, but it is whether his accepting the new retainer will require him, in forwarding the interests of his new client, to do anything which will injuriously affect his former client in any matter in which he formerly represented him, and also whether he will be called upon, in his new relation, to use against his former client any knowledge or information acquired through their former connection." 2 R. C. L. p. 974, § 52. "The rule does not mean, however, that an attorney having once been employed by a client shall never thereafter appear in any matter against him; it merely forbids his appearance or acting against him where he can use, to the detriment of such client, the information and confidences acquired during the existence of their relation as attorney and client." 6 C. J. p. 620.

From these pronouncements it appears that an attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any matter in which he formerly represented him, nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship. We think from the record in this case it is too clear for controversy that to allow respondent to proceed as the attorney in the pending cases would be to offend the rule in both particulars: First, he will be appearing practically on the opposite side of a controversy in which he formerly represented the appellant for a great many years, and, second, he cannot but use therein confidential knowledge and information gained by virtue of that relationship of attorney and client. We are not by this holding intending to reflect upon counsel, but merely to declare these salutary rules of public policy. It is no defense to urge that respondent, during the period of his attorneyship, was also attorney for some of the present plaintiffs in the new action. The disqualification exists in that case to the same, if not a greater, degree.

The judgment of the court below is therefore reversed, and the cause is remanded to that court, with directions to prepare findings upon the record as made and enter a judgment not inconsistent with the views set forth in this opinion.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; TYLER, Justice pro tem.; SHENK, J.; SEAWELL, J.

216 Cal. 616

SNYDER v. SNYDER.

L. A. 13651.

Supreme Court of California.

Oct. 28, 1932.

1. Appeal and error ⇐608(1).

Record on appeal from order, made after final judgment, and properly certified by clerk and by trial judge as containing the only record considered on hearing *held* sufficient (Code Civ. Proc. §§ 953, 953a et seq.).

2. Appeal and error ⇐612(4).

In so far as document of certification of record by trial judge setting forth what took place at hearing of order to show cause, purported to be bill of exceptions, it was not binding on respondent; hence fact that he received no notice of certification was immaterial (Code Civ. Proc. §§ 953, 953a et seq.).

In Bank.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action for divorce by Eva M. Snyder against Guy Snyder. From an order modifying the judgment by reducing the amount required to be paid by defendant to plaintiff, plaintiff appeals, and in advance of the filing of his brief, defendant files a motion to affirm the order.

Motion denied.

William Ellis Lady, of Los Angeles, for appellant.

W. H. Abrams, of Los Angeles, for respondent.

SHENK, J.

Motion by the defendant, in advance of the filing of his brief as the respondent, to affirm an order of the trial court reducing the amount required to be paid by him to the plaintiff in a divorce action.

The plaintiff sued the defendant for a divorce on the grounds of cruelty and nonsupport. An interlocutory decree was granted wherein the defendant was required to pay to the plaintiff monthly the sum of $50 as alimony and for the support of a minor child. In due time a final decree was entered. Thereafter the defendant applied for an order reducing the required payments to $20 per month. The application was denied. Later on he renewed the application, which was granted, and the judgment was modified so as to require the defendant to pay $30 per month to the plaintiff for the support of the child, but no payment was required on account of alimony.

The plaintiff filed a notice of appeal from the modified order and at the same time filed with the clerk a request to prepare a transcript of the record, including a copy of the judgment-roll in the divorce action and a copy of all papers and orders of the court relating to the presentation, hearing, and making of the order appealed from. The record was prepared as requested. The judgment roll was certified as correct by the clerk. By a separate document the clerk certified to the correctness of the copies of the other matter of record requested to be included by the plaintiff. The judge who heard the motion and made the order appealed from, certified "that the papers contained in the foregoing transcript are full, true and correct copies of the originals on file in the office of the county clerk of Los Angeles county, and that all thereof, and no others, were considered by the court upon the hearing of the order to show cause mentioned above," being the order to show cause why the payment required of the defendant should not be reduced.

The order to show cause was made and heard on affidavits and the record in the divorce action. No stenographic reporter was present at the hearing. The defendant insists that the record so prepared and certified is not a bill of exceptions, nor is it a transcript prepared pursuant to the provisions of sections 953a et seq. of the Code of Civil Procedure. The document of certification by the trial judge is headed "Proceedings had on the hearing of the order to show cause dated February 2, 1932," and purports to set forth at length what took place at the hearing. This certification is broader than necesary, and, in so far as it purports to be a bill of exceptions, it is not binding on the defendant and is not prejudicial to his cause on appeal.

[1] Assuming that the record is not one prepared strictly in conformity with the requirements of section 953a of the Code of Civil Procedure and is somewhat unusual in form, it is enough to say that it is a record on an appeal from an order, made after final judgment, and is certified by the clerk as provided in section 953 of the Code of Civil Procedure; and is also certified by the trial judge as containing the only record considered on the hearing and that the whole was so considered. As such it is deemed a sufficient record on the appeal.

[2] The defendant contends that he received no notice of the settlement or certification of this record. He states that, if he had received such notice, he would have objected to the "form" thereof. It may be conceded that the form is somewhat irregular, and that, upon his objection, a portion thereof should have been omitted. But the inclusion of the objectionable part will, as indicated, create no prejudice to his cause on the appeal. As it contains all of the matter prop-

erly to be considered on the appeal, the motion to affirm should be denied. The appellant's brief raises questions of substance to be considered on the appeal on its merits.

The motion is denied.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.; TYLER, Justice pro tem.

216 Cal. 608

NEWMAN v. BURWELL et al.

S. F. 14422.

Supreme Court of California.

Oct. 28, 1932.

1. **Executors and administrators** ⇨202(1).

Decedent's obligation to pay for support of minor child during decedent's life, arising out of property settlement and divorce decree, became charge on his estate.

2. **Executors and administrators** ⇨438(7).

Child's mother properly sued as "necessary party" to establish claim for support of child under property settlement confirmed by divorce decree (Probate Code, § 712).

Though the sum claimed was to be used for support and maintenance of minor child, it was payable to mother of child under the terms of property settlement agreement and divorce decree, and mother was therefore "proper and necessary party" in action to establish claim.

[Ed. Note.—For other definitions of "Necessary Parties" and "Proper Party," see Words and Phrases.]

3. **Executors and administrators** ⇨435.

Superior court had jurisdiction of action to enforce claim against deceased's estate for support of minor child under property settlement approved by divorce decree.

4. **Pleading** ⇨205(1).

Complaint sufficiently alleging facts warranting any form of relief is good against general demurrer.

5. **Executors and administrators** ⇨202(1).

Father's obligation to support minor child fixed by property settlement confirmed by divorce decree became charge against father's estate for sums accruing during child's minority even after father's death.

Father's obligation to support minor child placed in custody of mother by divorce decree, which directed payments to continue "until the further order of the court," was not discharged by father's death as respects payments accruing after such death, notwithstanding decree imposed no lien on father's property or required other security to discharge liability, and though result of such holding might be to destroy father's power of testamentary disposition.

6. **Executors and administrators** ⇨202(1).

That child might die before reaching majority *held* not to affect right to payment out of deceased father's estate of support money during child's minority (Probate Code, § 953).

In Bank.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Hedwig E. Newman against Helen Burwell and another, as executrices of the last will and testament of John Newman, deceased. Judgment for defendants, and plaintiff appeals.

Reversed with directions.

Roscoe D. Jones, of Oakland, for appellant.

James M. Koford, of Oakland, for respondents.

WASTE, C. J.

This is an appeal from a judgment entered in favor of the defendants upon the plaintiff's refusal to amend her complaint within ten days after the entry of an order sustaining a demurrer thereto.

The action is one in equity brought by the plaintiff against the executrices of the will of her deceased husband to establish a claim against the estate and to have impounded funds of the estate sufficient to pay and discharge said claim. The asserted claim is based on a decree of divorce wherein the custody of the minor child of the parties was awarded to the plaintiff, and, pursuant to a property settlement agreement therein approved and confirmed, the decedent was directed "until the further order of court" to pay $50 a month to the plaintiff for the support and maintenance of such minor child. As presented to the defendant executrices, and by them rejected by failure to pass upon the same within the ten-day period prescribed in section 712 of the Probate Code, and as here sought to be established, plaintiff's claim is for an unpaid installment of such support money accruing prior to the decedent's demise and for $7,400, representing the alleged maximum amount necessary to pay and discharge the monthly installments accruing since the decedent's death and which will hereafter accrue until such time as the child reaches her majority. To a complaint alleging the foregoing facts, along with certain other detailed matters, the defendants demurred generally and on the further grounds that the plaintiff is without capaci-

ty to prosecute such claim and the trial court without jurisdiction to hear and determine the cause. The trial court sustained the demurrer with leave to the plaintiff to amend within ten days. Electing to stand upon her complaint, the plaintiff failed to amend within the period allowed therefor, whereupon judgment was entered for the defendants. This appeal followed.

Defendants' principal contention in support of their demurrer is that the obligation of the decedent to pay the award of support money constituted a purely personal obligation which ceased and terminated upon his death, thus precluding any claim against his estate.

[1-4] It should be said, preliminarily, that the complaint is good against demurrer at least in so far as it attempts to establish as a valid and subsisting claim against the estate that portion of plaintiff's demand which accrued during the lifetime of the decedent. Decedent's obligation to pay this particular sum during his lifetime arose out of the written contract with the plaintiff and the decree of divorce confirming the same. Upon the death of decedent this portion of plaintiff's claim when duly presented or filed became a charge upon the estate payable out of the assets thereof. Upon the failure of the defendant executrices to allow the same within the ten-day period prescribed in section 712 of the Probate Code, plaintiff, in order to protect her rights in the premises, was not only authorized but required to institute an action, which she did, to establish the same as a valid and subsisting claim. Though the sum so claimed was to be used for the support and maintenance of the minor child, it was payable to the mother of such child, the plaintiff here, both under the terms of the property settlement agreement and the provisions of the decree of divorce. This being so, the mother is the proper and necessary party plaintiff in an action to establish such claim. Estate of Smith, 200 Cal. 654, 657, 254 P. 567; Murphy v. Moyle, 17 Utah, 113 53 P. 1010, 70 Am. St. Rep. 767; Stone v. Bayley, 75 Wash. 184, 134 P. 820, 48 L. R. A. (N. S.) 429; Gainsburg v. Garbarsky, 157 Wash. 537, 289 P. 1000. Nor can there be any doubt as to the trial court's jurisdiction of causes instituted to establish such claims. It is our opinion, therefore, that the court below erred in sustaining the demurrer to the complaint at least in so far as it sought to establish that portion of the claim accruing prior to the decedent's death. For this reason alone the judgment must be reversed, for it is elementary that a complaint is good against general demurrer if it sufficiently alleges facts warranting any form of relief. Cal. Trust Co. v. Cohn (Cal. Sup.) 7 P.(2d) 297.

[5] However, the appeal presents a more interesting and intricate problem which, despite the necessity for a reversal of the judgment on the ground just mentioned, must be considered and determined for the guidance of the court below. Generally stated, the question is whether a decree entered in a divorce action requiring a father to pay a certain monthly sum toward the support of a minor child placed in the custody of the mother, which payment is to continue "until the further order of court," is discharged by the father's death? Stated differently, the question is whether the liability of a father for the support of his minor child is extinguished by his death or passes on to his estate.

It is the respondents' contention that such liability ceases with the death of the father in the absence of a contract or decree expressly continuing such liability "during the minority" of the child or some other equally definite period postdating the father's demise, or in the absence of the creation and imposition of a lien on the father's property during his lifetime to secure the discharge of such liability. They therefore contend that the demurrer to the complaint was properly sustained.

The common-law rule that the liability of a father to support his child was terminated by his death, and no claim therefor survived against his estate, was applicable to a divorce a mensa et thoro which did not finally terminate the marriage relation, but merely effected a separation without disturbing the marital rights and obligations. 9 R. C. L. 484, § 300; 19 C. J. 360, § 822 (5); Murphy v. Moyle, supra; Stone v. Bayley, supra. However, under modern conditions, the weight of the adjudicated cases is to the effect that such liability of the father is not necessarily terminated by his death but may survive against his estate as to subsequently accruing payments. Estate of Smith, 200 Cal. 654, 659, 254 P. 567, 569; Myers v. Harrington, 70 Cal. App. 680, 234 P. 412; Miller v. Miller, 64 Me. 484; Stone v. Bayley, supra; Murphy v. Moyle, supra; Gainsburg v. Garbarsky, supra; 9 R. C. L. 301, § 300; 19 C. J. 360, § 822 (5).

Without narrating the facts and discussing the holdings in each of the several cases just above cited, suffice it to say that they indubitably establish that a father's obligation to support his minor child, which obligation is fixed by a property settlement agreement and confirmed by a divorce decree, survives his death and becomes a charge against his estate for all sums accruing thereunder during the child's minority, and that an action, similar to the one here instituted, may be brought to establish the same as a valid and subsisting claim against the father's estate. It is true that in certain of the cited cases the father's obligation was to pay a designated sum monthly *during the minority* of the child, thus tending to irrefutably indi-

cate that it was to survive the father, whereas the obligation here imposed was to continue "until further order of court." However, these same authorities recognize that in the absence of an expressed intention to limit such obligation to the lifetime of the father, the same will, and does, survive his death even under a decree imposing the same until "further order of the court." Stone v. Bayley, supra, page 822 of 134 P., 75 Wash. 184; Myers v. Harrington, supra, page 685 of 70 Cal. App., 234 P. 412; Miller v. Miller, supra. In the case last cited the decree merely provided, as here, for the father's payment of a specified sum quarterly "till the further order of court," and it was held that such obligation continued after his death and during the minority of the children. And rightfully so, for it is the solemn duty of every father to support his children during their minority, and if he fails to do so, every principle of justice demands that they be thus supported out of his estate.

It is also true that in certain of the cases above cited the divorce decree, in addition to fixing the father's obligation toward his minor children, imposed a lien upon his property to secure the payment of the sums due thereunder. However, the cases recognize that a distinction founded in the giving or requiring of security can rest on no sound basis, inasmuch as the provision for security is a difference merely in circumstance, and not in principle. As stated in Stone v. Bayley, supra, "it can hardly be contended that if there was no continuing debt there could have been a continuing lien." We conclude, therefore, both upon reason and authority, that the existence of security is neither a controlling circumstance nor an essential prerequisite to a determination of the continuing character of the decedent's obligation. Such a conclusion is in accord with our rather general discussion of this matter in the recent case of Estate of Smith, supra, where, though the decedent's obligation was therein secured by a lien on his property, thus slightly distinguishing the facts of that case from those of the present case, we stated that: "The purpose of the order was to maintain the child during her minority and to compel such maintenance by the father. The necessity for the support of the minor is the same, whether the father be alive or dead. Having made provision for the support of the minor, which is at least partially adequate for her maintenance during her minority, is there any reason whatever why this support should cease on the death of the father, leaving property properly applicable for the payment of said support? No reason has been suggested to us and we know of none. Surely no obligation can exceed in importance that which the father owes to his own offspring." The fact that the divorce was granted to the father, which point is stressed by defendants, does not lessen or defeat such obligation.

What we have said above as to the plaintiff's capacity to prosecute this action and the trial court's jurisdiction to hear and determine the same is, of course, equally applicable to that portion of the claim accruing after the decedent's death.

Respondents urge that the conclusion we have reached herein may in certain instances destroy the power of testamentary disposition. It is conceivable that in some cases the installments of support money accruing after the father's demise may aggregate sufficient to consume his entire estate, thus leaving nothing upon which a testamentary disposition might act. However, the same argument is equally applicable to a secured obligation for the payment of support money. We found no difficulty and expressed no hesitancy in holding the latter type of obligation to be a continuing one in the Estate of Smith, supra, recently decided. Moreover, it is equally conceivable that a conclusion contrary to the one herein announced might well result in certain cases in the minor child becoming a public charge. It would seem that the well-being of the child is at least as important as the father's power of testamentary disposition.

[6] It is next urged that it cannot now definitely be determined that the child will reach her majority. Citing Miller v. Miller, 171 Cal. 269, 152 P. 728, 729, respondents therefore contend that the claim here sought to be established is of such a contingent nature that the court below cannot by any possibility determine what it will be in amount if established or absolute. The cited case offers no obstacle to the conclusion above reached, for the decision therein recognizes "that the equity side of the court may be invoked to protect the owners of contingent claims which will mature after the period within which distribution may take place." The opinion points out that the complaint there before the court was one based solely "upon a rejected demand for moneys not yet due" and wherein "there is neither pleading nor prayer with reference to the condition of the estate, the ability of the defendants to provide for future payments, nor the desirability of creating a fund to meet the annual demands of the plaintiffs." The complaint in the present case, as already stated, is one in *equity* to establish the claim there asserted and to impound a fund with which to pay off the same as the installments thereof accrue. It contains all the necessary allegations referred to in the Miller Case, supra, and is therefore immune from demurrer on the ground therein considered. In this connection, see, also, Verdier v. Roach, 96 Cal. 467, 475–479, 31 P. 554.

It might also be added that the authorities

cited in the early part of this opinion to establish the continuing character of a father's obligation to support his minor child, experienced no difficulty in reaching such conclusion merely because the number of installments thereafter to accrue could not presently be determined. Assuming for present purposes that the plaintiff upon the trial of the cause establishes by competent evidence the allegations of her complaint, we perceive of no substantial objection to a decree directing the defendant executrices to pay into court a sum of money sufficient to meet the monthly installments of $50 each accruing between the time of decedent's death and the time when the child shall reach her majority, such sum to be paid over to the plaintiff in such amounts and at such times as the installments accrue. Section 953 of the Probate Code authorizes such a procedure and its provisions should be followed by the court below if upon the trial of the cause the plaintiff sufficiently establishes the allegations of her complaint. There should be credited as payments on said claims all sums paid to the plaintiff in the administration of the estate as family allowance for the support and maintenance of the minor child. In her complaint the plaintiff expresses a willingness that such amounts be so credited and that her claim be accordingly reduced.

We have examined all other contentions of the parties and find nothing suggesting a conclusion differing from that herein announced.

For the foregoing reasons the judgment is reversed, with directions to the court below to overrule the demurrer and to proceed as herein indicated.

We concur: CURTIS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; TYLER, Justice pro tem.

216 Cal. 604

STAPLES v. LEIDECKER.

S. F. 14373.

Supreme Court of California.

Oct. 28, 1932.

1. Appeal and error ⇐1011(1).

Trial court's conclusions on conflicting evidence are conclusive.

2. Joint adventures ⇐4(1).

Plaintiff failing to perform specifications imposed on him as condition precedent to defendant's performance of joint venture cannot charge defendant with breach thereof or secure an accounting.

Facts disclosed that plaintiff who was financing the enterprise for manufacturing and distributing paper dispensers under defendant's patent rights agreed to deliver to defendant 1,000 dispensers and to provide dies for manufacturing others as a condition precedent to defendant's organization of a manufacturing and distributing corporation and to defendant's transferring to plaintiff 49 per cent. of the stock therein, but that plaintiff had failed to perform such condition.

3. Licenses ⇐18½.

Oral preorganization agreement fixing percentage of stock to be received by each party on their respective performance of conditions of agreement *held* not void for failure to obtain commissioner's certificate (St. 1917, p. 685, § 25, as amended by St. 1921, p. 1114, and § 33, as added by St. 1931, p. 958).

Such preorganization agreement was not void under Corporate Securities Act (St. 1917, p. 685, § 25 as amended by St. 1921, p. 1114, and § 33, as added by St. 1931, p. 958), requiring a certificate of commissioner of corporations as prerequisite to a valid transfer of securities, where the corporation advanced no further than the organization stage, transacted no business, and issued no stock, so that it never became necessary to procure a permit from the commissioner of corporations.

In Bank.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Robert Staples against John F. Leidecker. From the judgment for defendant, plaintiff appeals.

Affirmed.

Carter, Peterson & McDonough, of Oakland, for appellant.

William T. Paullin, of Oakland, for respondent.

WASTE, C. J.

Plaintiff appeals from a judgment entered in favor of the defendant in an action to terminate and dissolve an alleged "joint venture" and for an accounting.

Among other things, the complaint alleges that the plaintiff and defendant, uncle and nephew, respectively, entered into an oral agreement by the terms of which "they associated themselves together in a joint venture" for the purpose of manufacturing and distributing certain paper dispensers for which the defendant held letters patent; that it was mutually understood and agreed that the defendant was to transfer and assign his patent rights to a corporation thereafter to be organized, and was to cause said

corporation to issue 49 per cent. of its authorized capital stock to the plaintiff in consideration of the latter's advancement of all funds necessary to finance the manufacture and distribution of such paper dispensers by such corporation; that plaintiff has advanced $4,820.48 for the purposes designated, and has otherwise fully and faithfully performed his part of the agreement; that the defendant at all times has neglected and refused to transfer his patent rights to the corporation as agreed, and has likewise neglected to organize such corporation and to cause it to issue 49 per cent. of its capital stock to the plaintiff. The complaint then prays that the oral agreement between the parties be rescinded, the "joint venture" terminated, and an accounting ordered.

The answer denies the material allegations of the complaint, and, by way of separate defense, alleges, in substance, that the parties entered into an oral agreement by the terms of which the plaintiff agreed to manufacture one thousand paper dispensers under defendant's letters patent and to procure and provide the dies necessary to manufacture other paper dispensers thereunder, and further agreed that he (plaintiff) would deliver both the dies and the one thousand paper dispensers to a corporation to be thereafter organized, whereupon the defendant was to transfer to the corporation his letters patent, and was to cause the corporate entity to issue 49 per cent. of its capital stock to the plaintiff. The answer then proceeds to allege that the corporation was organized but has never issued any stock or transacted any business by reason of the plaintiff's failure to perform the obligations imposed upon him as a condition precedent, viz. the delivery to the corporation of one thousand paper dispensers and the dies necessary to manufacture others. The trial court, upon competent evidence, found the material allegations of the complaint to be untrue and those of the answer to be true.

The pleadings and the briefs herein disclose that the parties are at wide variance as to the terms and effect of their oral understanding. It has been the plaintiff's theory throughout that, since the oral agreement looked to the formation of a corporation, and provided for a division of its stock, any failure to consummate the same must necessarily result in a quasi partnership or joint venture arrangement calling for an accounting at the suit of either party to the contract. In support thereof he cites many authorities announcing the settled principle that, when an agreement to form a corporation and divide its stock fails of consummation because of noncompliance with the statute, or otherwise, equity, in order to do justice, will look through the veil and treat the relationship between the parties as one in the nature of a quasi partnership or joint venture. We have no quarrel with the authorities stating this principle. They are inapplicable, however, to the facts of this case as found by the court below. The trial court found, in effect, that it was a condition precedent to the functioning of the proposed corporation or of any resulting joint venture that plaintiff procure and deliver one thousand completed paper dispensers and the dies necessary to manufacture others, and that plaintiff's failure to perform his part of the contract was the sole and only reason for the inability of the parties to proceed as originally agreed.

As already intimated, these findings are supported by substantial evidence. The witness Schroeder, a patent attorney, testified that the parties came to his office at various times, and that "the understanding as I got it, and what was mentioned thereafter, was, Mr. Staples [plaintiff] was to make not only the tools and dies, but 1000 of these paper dispensers. When that had been done, both parties were to assign their respective interests [the defendant's consisting of his patent rights] to the corporation and take stock for their respective interests." The witness also testified that each party had emphatically declared that he did not desire to enter into a partnership arrangement, with its consequent liability for the copartner's debts, but desired to be obligated only as a stockholder in the corporation. Defendant's testimony also supports the findings of the court below.

[1, 2] All conflicts in the evidence have been resolved against the plaintiff by the trial court. We cannot disturb its conclusions in this particular. Inasmuch as the plaintiff has failed, and through no fault of the defendant, to perform the obligations imposed upon him as a condition precedent to the defendant's performance under the contract, plaintiff is not in a position to charge the defendant with a breach thereof or to secure an accounting on the basis that the parties were engaged in a joint venture. In the absence of plaintiff's preliminary performance of the obligations imposed upon him, the relationship which he seeks to establish necessarily could not arise under the terms of the contract as found by the trial court. The agreement between the parties hereto never having been consummated, there are present no rights of third persons to complicate the solution of the problem here presented.

[3] There is no merit in plaintiff's further contention that the oral preorganization contract between the parties is void under the provisions of the Corporate Securities Act. St. 1917, p. 673, as amended. We are referred to those sections of the cited act requiring a certificate of the commissioner of corporations as a prerequisite to a valid sale or transfer of securities. The contract here

involved does no violence to any provision of the Corporate Securities Act. It was merely a preorganization agreement fixing the percentage of stock to be received by each party upon his full and faithful performance of the terms of the contract, which stock, impliedly at least, was to be thereafter issued only upon authorization of the commissioner of corporations. In other words, the contract is in the nature of a preorganization subscription agreement which is deemed to have been made and accepted upon the condition that the corporation, when incorporated, will with reasonable diligence apply for and secure a permit authorizing the issuance of the shares so subscribed for. Corporate Securities Act, St. 1921, p. 1114, § 25; St. 1931, p. 958, § 33; 6 Cal. Jur. 781, § 184. In the instant case, the plaintiff having failed to perform his part of the contract, the corporation advanced no further than the organization stage. It transacted no business and issued no stock. The necessity to procure a permit from the commissioner of corporations therefore never presented itself.

What has been said sufficiently disposes of this appeal.

The judgment is affirmed.

We concur: CURTIS, J.; PRESTON, J.; LANGDON, J.; SHENK, J.; TYLER, Justice pro tem.; SEAWELL, J.

127 Cal.App. 98

PEOPLE v. McGOWAN.

Cr. 1218.

District Court of Appeal, Third District, California.

Oct. 20, 1932.

1. Larceny ⇐55.

Evidence sustained conviction for petty larceny (Pen. Code, § 27, subd. 2, and § 497).

2. Criminal law ⇐829(3).

In prosecution for stealing property in Oregon and carrying it into California, instruction, requiring, for conviction, proof beyond reasonable doubt that accused stole or embezzled or received property in Oregon and brought it into California, *held* sufficiently covered by charge given (Pen. Code, § 497).

Charge given instructed jury that every element of the offense necessary to be proved must be proved beyond a reasonable doubt, that they must be convinced beyond a reasonable doubt that the theft alleged was committed in the state of Oregon by accused; that accused brought the property into California from Oregon.

3. Larceny ⇐77(4).

In larceny prosecution, instruction as to effect of possession of recently stolen property *held* proper (Pen. Code, § 497).

Instruction was that the mere possession of stolen property, unexplained by accused, however soon after taking, was merely a circumstance tending to show guilt, that there must be evidence outside of possession of property recently stolen to warrant conviction, but that, where the evidence establishes beyond a reasonable doubt that the person who had recent possession of stolen property gave false accounts of how he came by that possession, that was a circumstance that jury should consider, and that accused was bound to explain possession in order to remove the effect of possession as a circumstance to be considered.

4. Criminal law ⇐1172(1).

In prosecution on counts charging that accused stole property in Oregon and brought it into California, instruction authorizing conviction if accused was found within state with property he stole in another state *held* not reversible error (Pen. Code, § 27, subd. 2, and § 497; Const. art. 6, § 4½).

Appeal from Superior Court, Del Norte County; Warren V. Tryon, Judge.

Lyle Clyde McGowan was convicted of petty larceny with prior convictions, and he appeals.

Affirmed.

G. Fletcher Dodd, of Crescent City, and John F. Quinn, of Eureka, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant was tried upon an information containing a number of counts charging petty larceny, together with a count charging a previous conviction of a felony. The defendant pleaded guilty to the count charging a prior conviction, and was found guilty on counts Nos. 10 and 11, charging petty larceny. The appeal is from the judgment of conviction, and from the order denying the defendant a new trial.

Count 10 charges that the defendant, in the state of Oregon, stole and carried into the state of California certain personal property belonging to one James Le Clair, to wit: "One gill net of the reasonable market value of $80.00, more or less, lawful money of the United States, and said defendant did then and there bring and transport into the County of Del Norte, State of California, the said

personal property hereinabove described, contrary," etc.

Count 11 charges the commission of petty larceny by the defendant as follows: "Said Clyde McGowan, on or about the 1st day of August, 1931, at Wedderburn, Curry County, State of Oregon, wilfully, unlawfully and feloniously took, stole and carried away the following described personal property belonging to one Arthur Hanseth, to-wit: 2 chests of tools of the reasonable market value of $150.00." The count further charges that the defendant transported said property from the state of Oregon into the county of Del Norte, state of California.

[1] Upon this appeal two grounds are alleged for reversal: First, that there is no evidence, outside of the alleged possession in Del Norte county, Cal., to show that the defendant stole the articles mentioned in the state of Oregon, or that he transported the same into the state of California; second, that the court erred in its instructions to the jury.

Section 497 of the Penal Code reads as follows: "Every person who, in another state or country steals or embezzles the property of another, or receives such property knowing it to have been stolen or embezzled, and brings the same into this state, may be convicted and punished in the same manner as if such larceny, or embezzlement, or receiving, had been committed in this state."

Subdivision 2 of section 27 of the Penal Code specifies that: "All who commit any offense without this state which, if committed within this state, would be larceny, robbery, or embezzlement under the laws of this state, and bring the property stolen or embezzled, or any part of it, or are found with it, or any part of it, within this state," are liable to punishment.

The record in this case shows that on or about the 1st of August, 1931, a certain house at Wedderburn, in Curry county, Or., was broken into and two chests of tools taken therefrom. These tools belonged to a man by the name of Arthur Hanseth. Hanseth was a witness at the trial, and identified the property mentioned in the information as belonging to him, stating that they were taken from Curry county, Or., and also that a number of tools had his name thereon. James Le Clair, the witness who claimed to be the owner of the gill net, testified that the gill net was taken from his possession in Curry county, Or., on or about the 1st day of August, 1931. This witness was able to identify the gill net by certain knots that he had tied therein, and other identifying marks thereon. At about the same time the testimony shows that the defendant was in possession of the property just referred to, and took it to the barn belonging to, or under the control of, a witness named Kayle, and there stored the net and the chest of tools. This witness testified as follows:

"I have known the defendant 3 or 4 years. I have seen a net just like that one (referring to an exhibit). Clyde McGowan brought it up in his car; he brought it up and I helped him carry it into the barn; he wanted to put it in the barn. I said, 'Why don't you keep it at home?' He said, 'I am going away and somebody will steal it.' I said, 'If you bring it here, the rats might eat it up.' Mrs. McGowan said, 'Oh, let him put it in there; he's going away.'

"Q. Did you ever ask him where it came from? A. I asked him why didn't he leave it in the boat. He said, 'I had it on the boat; I got it off the boat.' He said he got the net with the boat; when he bought the boat he got the net with it.

"Q. Now, I show you these two chests of tools, and ask if you ever saw them before? A. Well, he brought those two boxes at the same time.

"Q. At the same time he brought the net? A. Yes sir.

"Q. Did you ask him where he got those? A. No sir."

The record shows that the net and the tools were found in the barn described by the witness Kayle. The witness Kayle fixed the time as the latter part of July, 1931; did not think it was so late as the 1st of August. The witness left his home on or about the 8th or 10th of August, and it was some time before that date that the net and the tools were brought to the barn by the defendant. The defendant's testimony as to where he got the net and the tools is as follows:

"Q. How did you come by that net? A. I bought that net.

"Q. From whom? A. Fellow by the name of Lindsay on the Klamath River.

"Q. Does he live on the Klamath? A. I suppose he does.

"Q. Have you seen him there many times? A. I don't know; he and I were just mere acquaintances. I don't know if he lives there or stays there once in a while during the fishing season.

"Q. About when was it you bought that net from him? A. Well, I think just about the time the fishing season opened in Smith River.

"Q. That would be sometime in September? A. Round that time.

"Q. Now, where did you get these tools that have Art Hanseth's name on them? A. I got them from a camper over on the beach —Ocean Drive.

"Q. Do you know his name? A. No.

"Q. Anybody you ever saw before? A. Yes, I seen him up there.

"Was he in an automobile or afoot? A. Automobile.

"Q. What kind of a car? A. Old Ford.

"Q. Touring car? A. Kind of truck—delivery truck.

"Q. Have you seen him since? A. Yes, seen him once or twice afterwards.

"Q. Is he still around here? A. I don't know.

"Q. Have you seen him lately? A. Well, no I have not.

"Q. Where did you get these four lengths of rope? A. Well, I found a cache down by the dump.

"Q. Was there anything else besides those four ropes in the cache? A. Yes, there was.

"Q. What else was there? A. Some paint; some brushes.

"Q. Those brushes the man from the Oregon State Highway Commission testified about this morning? A. They looked like them.

"Q. How about all that Japan drier? A. Well, I guess that was in with it. Quite a number of stuff there.

"Q. What about these wrenches there along with the rope and so on, were those in the same cache? A. Yes."

The defendant was then questioned in regard to a number of articles which were taken from the same house from which the two chests of tools were taken, were missed at the same time, and found in possession of the defendant, but are not included within count 11, upon which defendant was convicted, save and except as to the tools. The testimony shows conclusively that the defendant had possession of the net at least a month before the time he stated he got it from a man by the name of Lindsay on Klamath river. The testimony as to where the defendant obtained the chest of tools is, of course, an apparent fabrication. The testimony of the defendant from which we have quoted is the testimony given by him upon his preliminary examination and read into the record by the district attorney. There was also introduced in evidence a statement made by the defendant, from which we quote the following:

"Q. All those tools at the house; did they belong to you? A. Yes.

"Q. Where did you get all those tools? A. Well, sir, they came to me pretty honest; I worked for them; I worked for a fellow on Ocean Drive.

"Q. Those two that had marks on them—didn't you know they did not belong to you? A. I don't see why; I worked and paid for them.

"Q. They were marked; they had somebody's else name on them. Didn't you know they did not belong to you? A. Well, I got them honest enough; done the work; took the tools for work.

"Q. Where did you get the first-aid kit? A. Well, I had that a long time up there. I told you I bought it. I had it before I was sent away that time. Been there 7 or 8 years.

"Q. Where did you buy that paint? A. What paint is it?

"Q. That red paint. A. Well, I don't know where any red paint came from; I never had any, I don't believe."

The statement of the defendant then proceeds to account for property alleged to have been stolen, but not included in either count 10 or 11.

It is unnecessary to review the testimony of the officers who searched the premises occupied by the defendant and who recovered the property alleged to have been stolen and brought into the county of Del Norte by the defendant, as a good portion of the testimony refers to the recovery of stolen property mentioned in the other counts. It is sufficient to state that the testimony of the witnesses shows, as exhibited by the excerpts set forth herein, that no reasonable explanation was given of the possession of the stolen property, and it is also shown that it was in the possession of the defendant very shortly after the commission of the larceny in Curry county, Or. As contended for by the plaintiff, there is no direct testimony that the defendant committed the larceny in Curry county, Or., nor is there any direct testimony that the defendant brought the stolen property into the county of Del Norte, but the circumstances connected with the obtaining of the property, together with the possession immediately after the larceny, and the inherent improbability of the account given by the defendant, furnished a basis upon which the jury was warranted in concluding that the defendant was guilty of larceny.

[2] The appellant insists that the court committed prejudicial error in refusing defendant's requested instruction No. 14, which instruction, after quoting section 497 of the Penal Code, is as follows: "In this connection the court instructs the jury that before the defendant can be convicted under said Section 497 of the Penal Code, it must be proven that the property was actually stolen or embezzled or received by the defendant in the State of Oregon, and if it is not established beyond a reasonable doubt and to a moral certainty that the property was stolen or embezzled or received by the defendant in said State of Oregon, then the defendant, under such circumstances, cannot be found guilty as to any charge involving the stealing or receiving stolen property in the State of Oregon. In addition, it must also be established that the defendant brought the property into the State of California, and

if it is not established beyond a reasonable doubt and to a moral certainty that he did bring such property into the State of California, then he cannot be convicted on any of the counts involving the taking or stealing or receiving of property in the State of Oregon." A reference to the instructions given by the court, however, leads to the conclusion that the defendant's requested instruction was sufficiently covered. The jury was instructed that every element of the offense necessary to be proven must be proven beyond a reasonable doubt; that they must be convinced beyond a reasonable doubt that the theft alleged in the two counts was committed in the state of Oregon by the defendant; that the defendant brought the property into this state from the state of Oregon. The court then gave to the jury the following instructions:

[3, 4] "You are instructed that the mere possession of stolen property, unexplained by the defendant, however soon after the taking, is not sufficient to justify a conviction. It is merely a circumstance tending to show guilt which, taken in connection with other testimony, is to determine the question of guilt. There must be evidence outside of, beyond or independent of the fact of possession of property recently stolen, if such be the fact, in order to warrant a jury in convicting a defendant of burglary. But where the evidence establishes the fact beyond a reasonable doubt that the person who had the recent possession of stolen property gives false, contradictory, or inconsistent accounts of how he came by that possession, that is a circumstance that the jury should consider in arriving at a verdict, and they can and should consider the fact that the person has possession of property recently stolen, in connection with all the other circumstances in the case, in arriving at their verdict.

"If you believe from the evidence that the personal property mentioned in evidence was stolen from the premises described in evidence, and received into possession of the defendant shortly after being stolen, the failure of the defendant to account for such possession, or to show that such possession of the property was honestly obtained, is a circumstance tending to show his guilt, and the accused is bound to explain the possession in order to remove the effect of the possession as a circumstance to be considered, in connection with other suspicious facts, if the evidence disclose any such.

"You are instructed that every person who, in another State, steals the property of another, and brings it into this State, or who, in another state commits an offense which, if committed within this State would be theft, and brings the property stolen, or any part of it, within this State, or is found with it, or any part of it, within this State, is punishable within this State in the same manner as if the crime had been committed wholly within this State.

"If you find from the evidence, beyond a reasonable doubt, that the defendant Lyle Clyde McGowan committed any or all of the crimes of theft charged in counts IX, X and XI of the information, within the State of Oregon, and that he brought the proceeds of such theft into this State and this county, or that he was found with such proceeds of any such theft, or with any part of such proceeds, within this State and County, it will be your duty to find him guilty of the offense or offenses so charged and proven."

The giving of these instructions is assigned as reversible error.

The instruction as to the possession of stolen property given by the court is in substance the instruction which was given in the case of People v. King, 8 Cal. App. 329, 96 P. 916, and approved by this court in the case of People v. Haack, 86 Cal. App. 390, 398, 399, 260 P. 913. As to the other instructions given by the court, the objection urged is that they go further than the counts referred to in the information. Both counts upon which the defendant was convicted charge only the larceny and the bringing of the property into the county of Del Norte. The instructions cover section 497 of the Penal Code, and include that portion of section 27 of the Penal Code which we have heretofore quoted, where it refers to stolen property, or any part of it, being found in possession of the defendant.

It is apparent, however, that no miscarriage of justice resulted from this alleged error, and therefore that section 4½ of article 6 of the Constitution applies. The possession of the property was not denied by the defendant; he claimed ownership, and the account which he gave as to the manner in which he acquired title and obtained possession, and the circumstances connected therewith were the facts upon which the jury were instructed to act.

Two facts are set forth in the statute giving the court jurisdiction in cases of larceny where the theft takes place without the state, to wit: (1) Bringing the stolen property into the state; and (2) being found in possession of the stolen property within the state. The offense for which one is convicted is the offense of larceny, and not the offense of having or receiving stolen property. The possession having been admitted by the defendant, no prejudicial error was committed by the court in referring to the possession in its instructions.

The judgment and order are affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

DAVIS v. MITCHELL.*

Civ. 914.

District Court of Appeal, Fourth District, California.

Oct. 24, 1932.

Rehearing Denied Nov. 22, 1932.

Hearing Granted by Supreme Court Dec. 23, 1932.

1. Appeal and error ⇐1195(1).

Appellate court's decision on former appeal as to plaintiff's right to testify in action against executrix became law of case.

2. Limitation of actions ⇐49(2).

Implied agreement to pay for legal services, rendered at client's request, *held* to authorize recovery on book account, in which charges were entered after limitations ran against action for value thereof (Code Civ. Proc. § 337, subd. 2, and § 1021).

3. Evidence ⇐376(1).

Court may examine into correctness of items of book account and receive evidence in relation thereto.

4. Executors and administrators ⇐221(3).

Court properly considered what part of services, charged for on attorney's books after time covered by claim against deceased client's estate, were rendered during such time, in determining correctness of account.

5. Appeal and error ⇐1050(1).

Receipt of evidence of actual value of items charged for in determining correctness of book account is not prejudicial error.

6. Evidence ⇐376(1).

Evidence *held* to justify admission of attorney's journal and ledger sheets and support finding that they constituted book account in his action for services rendered.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by W. Jefferson Davis against Adina Mitchell, as executrix of the last will and testament of John W. Mitchell, deceased. Judgment for plaintiff, and defendant appeals.

Affirmed.

Rehearing denied; V. N. THOMPSON, Justice pro tem., dissenting.

Stearns, Luce & Forward, of San Diego, for appellant.

Wright & McKee and C. M. Monroe, all of San Diego, for respondent.

V. N. THOMPSON, Justice pro tem.

An appeal was taken by the plaintiff from a judgment of the trial court which was made and entered in favor of defendant and against the plaintiff upon a first trial of this cause. The judgment of the trial court was reversed by this court, with direction for retrial of the cause. 108 Cal. App. 43, 290 P. 887. A rehearing in that appeal was denied by this court, as was a hearing by the Supreme Court.

Pursuant to the decision of this court upon the first appeal, the cause was again tried. The trial court at the conclusion of the second trial entered judgment in favor of the plaintiff and against the defendant estate for $1,750, together with interest thereon at the rate of 7 per cent. per annum from April 25, 1926, making an aggregate sum of $2,354, costs of the last trial and for the further sum of $265.46, costs of the former appeal.

The present appeal was instituted by Adina Mitchell as executrix of the estate of John W. Mitchell. She died after this appeal was taken, and Douglas L. Edmunds, as administrator with the will annexed, has by proper order been substituted in her place and stead.

Among other things, the trial court found that the plaintiff is an attorney at law; that from October, 1921, to and including February 28, 1922, the plaintiff was employed and rendered professional services as an attorney at the special instance and request of John W. Mitchell, for which Mitchell agreed to pay the reasonable value; that the plaintiff kept, in the usual course of his business, a set of books in which charges and credits were duly made at or about the time of the transactions covered thereby; that upon these books, which were introduced in evidence, there were duly entered in the regular course of business certain charges and credits for services performed by the plaintiff at the special instance and request of Mitchell; that these included a charge for retainer in the sum of $1,000, entered on January 26, 1922, a credit for $250 on the same day, and a charge for $1,500 entered on April 15, 1922; that these entries were made for charges for services rendered in connection with a certain estate; that work was performed in connection with said matter during said times up to and including February 28, 1922, with certain other work upon the same matter up to and including April 15, 1922; that said matter was completed on April 15, 1922, and that the reasonable value of the services rendered in said matter up to and including February 28, 1922, was the sum of $2,000 and the reasonable value of the work done thereafter on said matter up to April 15, 1922, was $500; that no part of the $2,000 has been paid except the $250; and that a claim had been duly and regularly filed against the estate of Mitchell.

As conclusions of law, the court found that all services rendered by the plaintiff at the instance and request of the decedent were completed and the relationship of attorney and client terminated more than two years

*For subsequent opinion see 23 P.2d 289.

prior to the death of Mitchell, and that any action based upon quantum meruit was barred by the statute of limitations; that the books of account and entries therein constitute a book account between the plaintiff and the said decedent; that as to items entered therein the services were performed and the entries were made less than four years prior to the death of the decedent and the same are not barred by the period of limitations set forth in subdivision 2, section 337 of the Code of Civil Procedure; and that the plaintiff is entitled to recover upon his amended complaint for the services rendered. The court then found that the plaintiff was entitled to recover the sum of $1,750, with interest.

[1] The first contention of appellant that should be considered is that the respondent should not have been allowed to testify notwithstanding the fact that the matter of his incompetency had been waived at the former trial. This matter has been settled by the decision upon the former appeal (Davis v. Mitchell, supra), and the decision upon that point has become the law of the case. Deacon v. Bryans, 212 Cal. 87, 298 P. 30.

[2] The next points urged are that the charges for services made by an attorney without an express agreement fixing their amount, cannot become proper items of a book account in the absence of a legal determination of their correctness or consent thereto by the client, and that the entry in a book account of an item for such services pursuant to an implied agreement to pay the reasonable value thereof, cannot have the effect of permitting a recovery thereon after the statute of limitations has run against an action for the recovery of the reasonable value of the services alone. In effect, it is argued that there can be no recovery on such a book account in the absence of an express agreement to pay the amount charged, and that in the absence of such an agreement the statute of limitations, in relation to recovery for the reasonable value of the services, applies. Reliance is placed upon section 1021 of the Code of Civil Procedure. It will be noted that the agreement therein referred to may be either express or implied. The court found upon ample evidence that these services were rendered at the special instance and request of the deceased, there was ample evidence that he expected to pay for them, and we think this implied agreement is sufficient in so far as this statute is concerned. We think the findings and the evidence bring this case within the principles applied in the case of Gould v. Wood, 205 Cal. 141, 270 P. 183. While that case involved a mutual account, so far as the points now being considered are concerned, the principles are the same.

[3-5] It is next urged that since the court found that one cause of action based upon the reasonable value of the services rendered was barred, the court could not enter judgment upon a book account for an amount different from that entered therein and based on a determination of the reasonable value thereof. In this connection it appears that two charges were made in the book account, one of $1,000 and one of $1,500, with a credit of $250. It further appears in regard to the $1,500 entry that it was apparently originally entered as $1,000 and changed to $1,500. Without question, a court can examine into the correctness of items of a book account and receive evidence in relation thereto. Colburn v. Parrett, 27 Cal. App. 541, 150 P. 786. The record shows that the court went into this account thoroughly and much evidence was received as to when the entries were made, what they were for, their correctness, and also considerable evidence was received as to the reasonable value of the services actually rendered, which evidence fully supports the correctness of the charges made. In connection with this point it should be pointed out that the claim, as originally filed in the estate, covered only services up to February 28, 1922, and that the respondent was limited, therefore, in his recovery to payment for services up to that date. The final charge of $1,500 was entered in the books on April 15, 1922, at which time the services were completed. In examining into the correctness of the account and in determining what part of the services charged for had been performed prior to February 28, 1922, to the recovery of which the respondent was limited by the claim filed in the estate, the trial court necessarily had to take into account what part of these services charged for on April 15, 1922, were actually rendered prior to February 28, 1922. This the court did, making findings accordingly. We see nothing wrong with this procedure and we know of no rule of law making it prejudicial error for a trial court, in examining into the correctness of the items of a book account, to receive evidence as to the actual value of the items charged for.

[6] The only other point raised is that the journal and ledger sheets relied upon as constituting the book account were not sufficient therefor, and that no proper foundation was laid for their introduction. The evidence in this regard is too voluminous to review in detail; however, it appears that the respondent was practicing law alone and that his accounts were kept by his secretary. At the end of each day, or sometimes the following morning, he would dictate to his secretary the various items of work done by him during the day, for which charges were eventually to be made. These items were entered upon "charge sheets." These fur-

nished guides for the making of charges when a particular matter had been completed. Final charges were made in two books of account: A journal, in which matters were entered from day to day in the usual course of business; and in a ledger, in which accounts were posted from the journal. Entries were made in the journal from day to day and also posted in the ledger from day to day. The method of keeping the books was testified to by the respondent and also by his secretary. The respondent testified as to the correctness of the charges made in the matter here involved. Charges were made for services from time to time as those services were completed. The trial court went fully into these matters, and we think the evidence received was sufficient to justify the admission in evidence of these books, and to support the finding and conclusion of the trial court to the effect that they constituted a book of account. Even if technical error could be found in the admission of this evidence, no miscarriage of justice appears. Const. art. 6, § 4½.

For the reasons given the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

127 Cal.App. 202

SLY v. AMERICAN INDEMNITY CO. OF GALVESTON, TEX.

Civ. 959.

District Court of Appeal, Fourth District, California.

Oct. 27, 1932.

1. Insurance ⇐665(3).

Evidence in action against automobile liability insurer to collect judgment against insured *held* to support court's finding that insured did not transfer interest in automobile before injury to plaintiff, especially in absence of new registration certificate (St. 1923, p. 524, § 45(e), as amended by St. 1929, p. 514).

2. Insurance ⇐146(3).

Person obtaining judgment against insured for injuries in automobile accident may insist on strict construction of liability policy against insurer.

3. Insurance ⇐311(1).

Insured's violation of conditions in automobile liability policy is defense in action against insurer to collect judgment against insured only if insurer was substantially prejudiced thereby.

4. Insurance ⇐328(1).

Insured's violation of condition in automobile liability policy against change of interest in automobile *held* no defense to action against insurer to collect judgment against insured; being immaterial to risk.

Appeal from Superior Court, San Diego County; Benjamin F. Warmer, Judge.

Action by M. L. Sly against the American Indemnity Company of Galveston, Tex. Judgment for plaintiff, and defendant appeals.

Affirmed.

Knight & Reynolds, of Los Angeles, for appellant.

Alfred T. Roark, of San Diego, for respondent.

JENNINGS, J.

Plaintiff instituted an action to recover damages for personal injuries sustained by her in an automobile accident. In this action she secured a judgment against E. A. Krause, the insured in a policy of insurance issued by defendant. The defendant conducted the defense of its insured in the action. Upon the return of the writ of execution unsatisfied, plaintiff brought this suit against the insurer to enforce collection of the judgment theretofore obtained by her. Upon the conclusion of the trial the court rendered judgment in plaintiff's favor. From the judgment thus rendered defendant prosecutes this appeal.

It is the contention of appellant that it is not liable under the terms of the insurance policy by virtue of which respondent was permitted to recover for the reason that, prior to the happening of the accident in which respondent suffered the injuries of which she complains, the insured had transferred whatever interest he had in the insured automobile and had surrendered possession of the automobile to his vendee who at the time of the accident was operating it.

Facts material to the appeal as disclosed by the record are as follows: On December 20, 1929, E. A. Krause executed a conditional sales contract with the J. R. Townsend Company, Inc., of San Diego, whereby he agreed to purchase from said company a certain automobile and to pay therefor the sum of $833.78. Of this amount the sum of $160 was paid on execution of the contract and the balance of $633.78 was to be paid in monthly installments. It was agreed that legal title should remain in the seller pending payment of the entire purchase price. The buyer was given possession of the automobile. On this same date appellant issued a policy of insurance whereby it insured J. R. Townsend Com-

pany, Inc., and E. A. Krause for the term of one year against loss from certain enumerated perils. One of these perils is legal liability imposed by law upon the assured for damages on account of bodily injuries caused by the ownership, maintenance, or operation of the auto, accidentally suffered or alleged to have been suffered during the life of the policy by any person. On January 7, 1930, E. A. Krause secured from the Department of Public Works, Division of Motor Vehicles of California, a certificate of registration showing J. R. Townsend Company, Inc., to be the legal owner and E. A. Krause the registered owner of said automobile. In the month of January, 1930, certain negotiations were had between E. A. Krause and one Floyd J. Mills regarding the exchange by Krause of his equity in the automobile for a motorcycle which was the property of Mills. During the progress of these negotiations the matter of having the automobile reregistered in Mills' name was discussed, but inquiry in regard to this matter at the office of the Townsend Company developed the information that such action would require the payment of an additional fee and it was therefore abandoned. However, on January 30, 1930, Krause and Mills met at the place of business of a dealer in motorcycles in the city of San Diego and informed the dealer that they proposed to make the exchange and at the same time Krause turned over to the motorcycle dealer the Mills motorcycle, as initial payment on another motorcycle and signed a conditional sale agreement whereby he agreed to purchase the second motorcycle for a specified price. Upon the conclusion of this transaction, Mills drove away in the automobile and thereafter retained possession of it. The accident in which respondent was injured occurred on February 9, 1930, at which time Mills was operating the automobile.

The provision in the insurance policy upon which appellant particularly relies is the following: "Title and Ownership. Except as to any lien, mortgage, or other encumbrance specifically set forth and described in paragraph D-6 of this policy, this entire policy shall be void, unless otherwise provided by agreement in writing, added hereto, if the interest of the Assured in the subject of this insurance be or become other than unconditional and sole lawful ownership, or if the subject of this insurance has ever been stolen or unlawfully taken prior to the issuance of this policy and not returned to the lawful owner prior to the issuance of this policy, or in case of transfer or termination of the interest of the Assured other than by death of the Assured, or in case of any change in the nature of the insurable interest of the Assured in the property described herein either by sale or otherwise, or if this policy or any part thereof shall be assigned before loss."

[1] It is urged that the evidence presented to the trial court established that, prior to the occurrence of the accident, Krause, the insured had transferred whatever interest he had in the automobile, and thereby, in accordance with the terms of the above quoted provision, the policy had become void and the insurance was not in effect at the time of the accident.

In analyzing the evidence upon which appellant relies as establishing its contention that its insured had, prior to the accident, transferred to another person whatever interest he had in the insured automobile, it must, first of all, be observed that it is not free from conflict upon the point as to whether Krause and Mills had actually agreed upon an exchange. During the trial Krause was called as a witness by both respondent and appellant. He was first called by respondent, and, upon being asked whether he had transferred or sold the automobile subsequent to his execution of the conditional sale agreement with the Townsend Company, replied that he had not sold or transferred it to any one, and that, so far as he knew, he had possession of it on the date of the accident. This witness also testified that two days prior to the date of the accident he told Mills that, since the Townsend Company would not cancel the contract he had entered into with them, he would take the car back and would lend it to Mills to make the trip to Corona, during which trip the accident occurred. However, this witness also testified that he and Mills talked of making the exchange during the early part of January, 1930; that for some time prior to January 30, 1930, he used the motorcycle and Mills drove the automobile; that on January 30, 1930, he met Mills at the place of business of the motorcycle dealer and told the dealer and another person who was there present that he had made a trade and that he was to take the motorcycle and Mills the automobile; that he then signed an agreement to purchase another motorcycle for an agreed price and as initial payment thereon turned over to the dealer the Mills motorcycle; that, after this transaction was concluded, Mills drove away in the automobile. From the above résumé of the testimony of this witness it appears that there was some evidence that the insured had not, prior to the date of the accident, made a transfer of his interest in the automobile, and that, therefore, the court's finding that the insured had not sold and delivered the automobile to Mills is not entirely lacking in evidentiary support. This statement is made without taking into consideration the effect of noncompliance with the provisions of section 45, subdivision (e) of the California Vehicle Act (as amended by St. 1929, p. 514). The language of this section is as follows: "Until said division shall have issued said new certificate of registration and certificate

of ownership as hereinbefore in subdivision (d) provided, delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose."

This section appears to furnish an additional reason for sustaining the court's finding that no transfer of interest took place since it is undisputed that no new certificate of registration was applied for or issued prior to the date of the accident, and, therefore, under the plain language of the section, the intended transfer must be deemed to be incomplete and not valid or effective for any purpose. Appellant contends, however, that the exchange actually took place, possession of the automobile was surrendered to Mills, Krause not only took possession of the motorcycle but dealt with it as his own, and with the full consent and permission of Mills turned it over to the motorcycle dealer as the initial payment on the purchase price of another motorcycle. It is then urged by appellant that, although the hereinabove quoted section of the California Vehicle Act rendered transfer of the legal title impossible by reason of noncompliance therewith, nevertheless, transfer of an equitable interest was consummated and Mills became the equitable owner of whatever interest Krause, the insured, had in the insured automobile. To sustain the argument thus advanced, appellant cites a number of decisions wherein purchasers of motor vehicles in possession of such vehicles have been permitted to recover in actions of conversion or claim and delivery although such purchasers had not complied with statutory provisions requiring reregistration and the issuance of a new certificate of registration. It is to be observed that the decisions thus relied upon are cases wherein possessory actions were instituted by persons rightfully in possession and entitled to possession. Nevertheless, it must be conceded that their effect is to modify appreciably the very broad and plain language, hereinabove quoted, of section 45 of the California Vehicle Act. However, the question of whether there was a transfer of interest in the insured automobile was, in the final analysis, a pure question of fact, and, considering the equivocal circumstances presented by the testimony, we cannot say that the inference drawn by the court, that it was not the intention to transfer the interest of the insured in the automobile, was not reasonably supported. Kinneberg v. Firemen's Ins. Co., 65 Cal. App. 107, 223 P. 81; Bennett v. Northwestern Nat. Ins. Co., 84 Cal. App. 130, 257 P. 586.

[2-4] Finally, even if it be conceded that the evidence showed that Krause, the insured, did intend to transfer his interest in the automobile to Mills in exchange for the motorcycle owned by Mills and that therefore the court's finding that no transfer of interest occurred entirely lacks evidentiary support, it does not follow that the judgment should be reversed. Appellant stands upon the language of its contract of insurance and insists upon a strict construction of such language. The reasoning underlying appellant's position may be summarized as follows: The contract of insurance expressly provides that all rights thereunder are strictly personal to the assured named in the policy and the policy shall immediately terminate if any change of interest of the assured takes place. Change of interest increases the risk. Therefore, the insurer who has contracted to indemnify a certain individual against loss occurring through the operation of the automobile by this individual is entitled to stand strictly upon the language of its contract and to insist that any change of interest by its assured shall render the policy void. The essential and important factor of this reasoning rests in the contention that change of interest increases the risk. Increase in risk is produced by the operation of the automobile by some person other than the assured whom the insurer has contracted to protect against loss. With respect to injuries sustained by some third person through the negligent operation of the automobile the insurer and insured have contracted having in mind the possibility that such third person may sustain injuries. In this respect therefore the contract of insurance is for the benefit of such third person. This third person, when he has sustained injuries although, after he has obtained a judgment against the assured, he stands in the position of the assured and can recover from the insurer only if the terms of the policy permit recovery, is entitled to insist upon having the policy construed most strictly against the insurer. In an action by such person against the insurer violation by the assured of some condition in the policy is a valid defense only when it appears that by reason of such violation the insurer was substantially prejudiced. Hynding v. Home Accident Ins. Co. (Cal. Sup.) 7 P.(2d) 999. In the present action the insurer was not prejudiced by the attempted transfer of interest in the automobile by the insured. It is true that possession of the automobile was transferred to Mills, who was operating the machine at the time respondent was injured. But it is expressly stated in the policy of insurance that insurance provided by the liability peril clause is so extended as to be available to any person lawfully operating the insured automobile provided such operation is with the permission of the assured named in the policy. There can be no doubt that the operation of the automobile at the time respondent was injured was with the permission of the assured. It is therefore apparent that no increase in risk to appellant

occurred by reason of the attempted transfer of interest in the automobile by its insured. Under the circumstances herein appearing the condition providing that the policy should become void upon any change of interest of the assured in the automobile was not material to the risk and a violation by the assured of such condition does not constitute a valid defense to the action. Kuntz v. Spence (Tex. Civ. App.) 48 S.W.(2d) 413.

For the reasons stated, the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

127 Cal.App. 146

LA PLANTE v. HOPPER et al.

Civ. 987.

District Court of Appeal, Fourth District, California.

Oct. 24, 1932.

Corporations ⊂=175.

Amended article of incorporation, authorizing corporation to levy and collect stock assessments, authorized exercise of such power by its board of directors (Civ. Code, § 290, subd. 8 (b), as amended by St. 1929, p. 1261, § 3; §§ 331–336, as amended by St. 1929, pp. 1268, 1269, §§ 17–22).

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by William La Plante against William T. Hopper and others. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Bradner W. Lee, Jr., and Kenyon F. Lee, both of Los Angeles, for appellant.

Lawler & Degnan, of Los Angeles, for respondents.

BARNARD, P. J.

This action was brought for the purpose of annulling an assessment upon, and restraining the defendants from selling, the plaintiff's stock in the defendant corporation. A demurrer to the second amended complaint was sustained without leave to amend and judgment of dismissal entered, from which judgment this appeal is taken.

It appears from the second amended complaint that a portion of the articles of incorporation of the respondent corporation had been amended to read as follows: "Eighth: The corporation shall have power and authority to levy and collect assessments upon all of its subscribed, issued and outstanding capital stock, in accordance with the provisions of sections 332, 333, 334, 335 and 336 of the Civil Code of the State of California, as amended by chapter 711 [pages 1268, 1269] of the Statutes of 1929."

The only point raised by the appellant is that under sections 290 and 331 of the Civil Code, these articles of incorporation, as so amended, conferred no power to levy an assessment for the reason that the quoted amendment purports to give such power to the corporation itself, and not to the board of directors.

The portion of section 290 of the Civil Code relied upon, at that time (as amended by St. 1929, p. 1261, § 3) read as follows:

"8. The articles of incorporation may also contain provisions: * * *

"(b) Granting or denying to the directors the power to levy assessments upon the shares or any class thereof, or restricting such power. * * *"

The pertinent part of section 331 of this Code then (as amended by St. 1929, p. 1268, § 17) read as follows: "Shares are not assessable except as provided in this article. If the articles expressly confer such authority, and subject to any limitations therein contained the directors of any corporation may in their discretion, levy and collect assessments upon all shares of any or all classes made subject to assessment by the articles."

Section 331 was amended to read as above in 1929, and these articles of incorporation were later amended as above indicated. We are unable to agree with the appellant's contention that it clearly appears from section 331 that unless the articles expressly confer "such authority" upon the directors, as distinct from the corporation, no power exists to levy assessments. While the authority referred to must be expressly conferred, section 331 did not expressly state to whom the authority should be given, and we think the granting of such authority by the articles, either to the corporation or to its directors, shows a sufficient conferring of authority under this Code section. Such a power as the one in question could be exercised by a corporation only through its board of directors. Civ. Code, §§ 305, 308; Alta Silver Mining Co. v. Mining Co., 78 Cal. 629, 21 P. 373; In re La Solidarite M. B. Ass'n, 68 Cal. 392, 9 P. 453. Reasonably interpreted, section 331 as it then stood provides that where articles of incorporation authorize the levying of an assessment, the same may be done by and at the discretion of the directors. We think it is equally true that the amendment here in question in giving such authority to the corporation, thereby authorized the exercise thereof by the board of directors.

⊂=For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Not only must these amended articles be construed as impliedly conferring authority upon the board of directors to levy and collect assessments, but this amendment itself specifically shows that the authority purported to be given to the corporation was intended to be exercised by the board of directors. The amendment not only states that the corporation shall have power and authority to levy and collect assessments, but it provides that this shall be done "in accordance with the provisions of" sections 332 to 336 of the Civil Code, as amended in 1929. As so amended, section 332 of this Code sets forth what a resolution levying an assessment (in accordance with section 331) must contain. The resolution referred to could only be a resolution of the board of directors. Section 333 provides the form of notice of the resolution that must be given, which must state that the assessment was levied at a meeting of the board of directors. Section 335 refers to the resolution levying an assessment and provides that the directors may extend the time. Section 336 provides what the secretary must do at the time of the sale "unless otherwise ordered by the directors." In our opinion these articles of incorporation, as so amended, have expressly provided that the authority thereby given to the corporation is to be exercised by the board of directors. The amended articles having thus expressly conferred the authority upon them, these directors were authorized by section 331 of the Civil Code to levy the assessment complained of.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

126 Cal.App. 171

HILL v. HESSE et al.

Civ. 7411.

District Court of Appeal, Second District, Division 1, California.

Oct. 21, 1932.

Mechanics' liens ⇐260(1).

Statute of limitations for foreclosing materialman's lien is not directed to extinguishment of lien, but is only provision with reference to remedy (Code Civ. Proc. § 1190).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

On petition for rehearing.

Petition denied, and original opinion in 14 P.(2d) 338, modified.

Porter C. Blackburn, of Los Angeles, for appellant.

Irl D. Brett, of Los Angeles, for respondent.

PER CURIAM.

The petition is denied. In making this order, we hereby add to the opinion a citation of Hughes Brothers v. Hoover, 3 Cal. App. 145, 150, 84 P. 681, where it was held by this court that, for reasons there stated, section 1190 of the Code of Civil Procedure is not directed to the extinguishment of the lien itself, but is only a legislative provision with reference to the remedy. This being so, we see no reason why the general rule concerning the right of waiver of the limitation of time for commencement of the action may not apply.

127 Cal.App. 122

ANDERSON v. OTT et al.

Civ. 800.

District Court of Appeal, Fourth District, California.

Oct. 21, 1932.

1. Automobiles ⇐245(24).

Gross negligence, in collision at intersection, of driver of automobile in which guest was riding, *held* for jury (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

> Term "gross negligence" means want of slight diligence; an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others; that want of care which would raise a presumption of the conscious indifference to consequences.
>
> [Ed. Note.—For other definitions of "Gross Negligence," see Words and Phrases.]

2. Constitutional law ⇐190.

Legislature cannot annul by statute any legal ground on which previous action is founded or create new bar by which action may be defeated.

3. Constitutional law ⇐105.

Vested right of action is "property," and is equally protected against arbitrary interference.

[Ed. Note.—For other definitions of "Property," see Words and Phrases.]

4. Statutes ⇐263.

Statute should not have retroactive operation unless its words are so clear, strong, and imperative that no other meaning can be annexed to them.

5. Automobiles ⇐6.

Guest's action against automobile driver was grounded on common-law liability continued by statute respecting gross negligence and was not affected by repeal of statute (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580; St. 1931, p. 1693).

6. Automobiles ⇐6.

1931 amendment placing upon guest burden of proving willful misconduct or intoxication of automobile driver *held* inapplicable where accident occurred prior to amendment (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580; St. 1931, p. 1693).

7. Automobiles ⇐245(44).

Whether automobile striking automobile in which plaintiff was riding at intersection was being driven at sufficient speed to constitute negligence *held* for jury.

8. Appeal and error ⇐901.

Appellant claiming error must produce necessary record to show it.

9. Appeal and error ⇐880(2).

Excluding complaints in action by plaintiff's witnesses offered by plaintiff to impeach their testimony on objection of codefendant of party complaining *held* not error which could be charged to plaintiff.

10. Appeal and error ⇐1056(1).

Excluding complaints of plaintiff's witnesses in their own actions containing statements contradicting their testimony regarding speed of codefendant's automobile at time of collision *held* harmless, where evidence clearly showed appellant's negligence.

11. Appeal and error ⇐1048(6).

Refusal to permit cross-examination of plaintiff regarding his net income *held* harmless, where such cross-examination was subsequently made without objection.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by George K. Anderson against W. F. Ott, W. M. Stokes, and A. M. McDearmid. From a judgment for plaintiff, defendants Stokes and McDearmid appeal and defendant Ott takes a separate appeal.

Affirmed.

Christian Hoeppner and Wakefield & Hansen, all of Fresno, for appellant Ott.

B. M. Benson, of Fresno, for appellants Stokes and McDearmid.

Theodore M. Stuart, of Fresno, for respondent.

BARNARD, P. J.

This is an action for damages for injuries received on September 5, 1930, in a collision between two automobiles at the intersection of two public highways. The plaintiff was riding in the rear seat of an automobile driven by the defendant Ott, which was proceeding easterly on Washington avenue, in Fresno county. Another machine, owned by the defendant Stokes and in which he was riding, but driven by defendant McDearmid, was proceeding south on Cherry avenue. The two machines met near the center of the intersection of these highways, the Stokes car hitting the Ott car nearly opposite the rear seat thereof. This action was tried on January 7, 1932, and resulted in a verdict in favor of the plaintiff against all of the defendants as joint tort-feasors; the liability of Stokes for any negligence on the part of McDearmid having been expressly admitted. From the ensuing judgment one appeal has been taken by the defendants Stokes and McDearmid and a separate appeal by the defendant Ott.

[1] We will first consider the appeal of Ott. The case was tried upon the theory that the respondent was the guest of this appellant and that under section 141¾ of the California Vehicle Act, as adopted in 1929 (St. 1929, p. 1580), gross negligence upon his part must be proven. His first contention is that the evidence is not sufficient in this respect to support the verdict. He relies upon the respondent's testimony that Ott was driving along about forty miles an hour; that there was nothing about his driving that frightened the respondent; that the respondent continued his conversation with two ladies in the rear seat of the automobile; that he did not see the other car until they were within sixty feet of the center of the intersection; and that the first time he realized there was any danger was when one of the ladies screamed. He also relies upon his own testimony that he was about seventy feet from the center of the intersection when he first saw the other car; that this other car was then about one hundred or one hundred and twenty feet from the center of the intersection; that the other car was about fifty feet further from the center of the intersection than he was; that he was proceeding at twenty or twenty-five or thirty miles an hour; and that he accelerated his speed and thought he could cross the intersection ahead of the other car. It is argued that there was nothing about the operation of this automobile which caused the respondent any apprehension or anxiety; that this appellant had a right to assume that the driver of the other car would slacken his speed and permit him to pass; and that "in an abundance of caution he increased his speed to thirty-five miles an hour so as to make the passing that much safer." These facts, it is urged, establish, as a matter of law, that this appellant may not

be held to have been indifferent to the safety and welfare of his passengers.

On the other hand, the evidence shows without contradiction that the intersection in question is what is known as a "blind corner," due to the presence of a Thompson vineyard. Ott himself testified: "I knew I was coming to an intersection. Until I reached the seventy-foot mark I did not see any vehicle at all. The vineyard obstructed my view, and this obstruction was so great I could not see the McDearmid car until I did see it." He further testified that when he first saw the other car he was about seventy feet from the center of the intersection and the other car was about fifty feet further away; that he had been proceeding at from twenty to thirty miles per hour, but accelerated his speed and picked up to possibly thirty-five miles an hour; that when he first saw the other car it was approaching at about forty miles an hour; that when he saw the other car he immediately speeded up; that "I figured that he would slow up when he saw—when I was in the intersection"; that "I figured I could beat him across"; and that "he was going at least forty miles an hour when he hit me."

In Krause v. Rarity, 210 Cal. 644, 293 P. 62, 66, 77 A. L. R. 1327, the court said: "Where liability attaches only for gross negligence, it is for the jury, under proper instructions by the court, to pass upon the question whether such negligence exists. Merrill v. Pacific Transfer Co., 131 Cal. 582, 63 P. 915; 19 Cal. Jur. p. 728."

In defining "gross negligence," the court in that case further said: "The term 'gross negligence' has been defined as 'the want of slight diligence,' as 'an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others,' and as 'that want of care which would raise a presumption of the conscious indifference to consequences.'"

In Malone v. Clemow, 111 Cal. App. 13, 295 P. 70, 72, we find the following: "Appellants argue that some act of wilfulness or wantonness must be shown to constitute gross negligence; or, in other words, that *either wilfulness or wantonness is a necessary element of gross negligence.* It is clear from the foregoing authorities that this is not correct, for whenever the element of *knowledge and wilfulness* enters into the act, *it ceases to be negligence,* and becomes at least, 'willful misconduct,' and this is true no matter what degree of negligence is being considered."

While there is much other evidence in the record tending to show a high degree of negligence on the part of this appellant, the portion referred to is sufficient to support the verdict of the jury. Meighan v. Baker, (Cal. App.) 6 P.(2d) 1015; Kastel v. Stieber (Cal. Sup.) 8 P.(2d) 474.

It is next argued in behalf of appellant Ott that the respondent, as his guest, could not recover as against him on proof of gross negligence. The contention is that the amendment of section 141¾ of the California Vehicle Act which went into effect August 14, 1931, omitting the words "or gross negligence" from the act, applied to this case and placed upon the respondent guest the burden of proving either wilful misconduct or intoxication, since the action was not tried until after that amendment went into effect, although the accident occurred and the suit was filed prior to that time.

[2] It is first insisted that the 1931 amendment to this act (St. 1931, p. 1693) created merely a change in the rules of evidence, and is therefore applicable to all trials occurring after its adoption, regardless of when the cause of action arose. In support of this contention this appellant relies upon the following cases: James v. Oakland Traction Co., 10 Cal. App. 785, 103 P. 1082, 1087; Estate of Patterson, 155 Cal. 626, 102 P. 941, 26 L. R. A. (N. S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625, and Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A. L. R. 1327. The cases relied on, however, point out the distinction between mere changes in rules of evidence and changes affecting the substantive rights of litigants. In James v. Oakland Traction Co., the court said: "No one will question the right of the Legislature to change or modify the remedy and prescribe rules of evidence, if such legislation does not have the effect of creating a new obligation, or of attaching a new disability, retrospectively; but, as is well said in Hope Mutual Ins. Co. v. Flynn, 38 Mo. 483, 90 Am. Dec. 440: 'It is not within the constitutional competency of the Legislature to annul by statute any legal ground on which a previous action is founded, or to create a new bar by which said action may be defeated.'"

[3, 4] In discussing an amendment affecting the particular question of negligence before it, the court in that case further said:

"Clearly, we think, the provision of section 501 of the Civil Code fixing the maximum rate of speed of street cars when traveling over the streets of a city is more than a rule of evidence. It is a rule of property, for a vested right is property whatever may be the nature or condition of the object of such right; that is to say, that 'a vested right of action is "property" in the same sense in which tangible things are property, and is equally protected against arbitrary interference.' Cooley's Const. Lim. (4th Ed.) p. 449. Of course, a distinction is to be observed between the right of action and the remedy, for the right to a particular remedy is not a

vested right, unless the destruction of the remedy necessarily operates to destroy the right of action, in which case an act abrogating the remedy could not, obviously, have a retroactive effect.

"All the judicial law to which our attention has been directed very clearly points out the distinction between those cases in which the repeal involved only some rule of procedure in no way materially affecting contractual rights or the essential remedy for the enforcement of such rights and those cases where the repeal or the amendment either necessarily destroyed the only possible remedy by which rights could be restored or wrongs redressed or had the effect of directly impairing the obligations of a contract. As is said in Williams v. Johnson, 30 Md. 500, 96 Am. Dec. 616, in passing upon a proposition analogous to the one under discussion here:

" 'It would be extending this opinion to an unnecessary length to review in detail the many authorities relied upon by the counsel for the appellee. It is sufficient to say that upon examination they will be found to be cases arising upon penal statutes, where it was held that the action was defeated by the repeal of the law; or where a statute conferring an executory right was repealed before the right became executed; or where it was held that the remedy, procedure, and even the statute of limitation, may be changed or modified without impairing the right of action or the obligation of the contract. But no case can be found in which it has been held that a right of action, founded upon the municipal law of a country, is defeated by change or abrogation of the law.

" 'Apart from this view, it is a sound rule of construction, founded in the wisdom of the common law, that whenever a statute is susceptible, without doing violence to its express terms, of being understood, either prospectively or retrospectively, courts of justice invariably adopted the former construction. A statute ought not to have a retroactive operation, unless its words are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature could not be otherwise satisfied; and especially ought this rule to be adhered to when such a construction would alter the pre-existing situation of parties, or would affect or interfere with their antecedent rights.'

"As we have declared, and as is plainly obvious, the action here is not one the authority for which is to be found in the section of the Code under consideration, for, as seen, the moment the accident occurred and the plaintiff thereby injured, there vested in her, eo instante, a right of action against the defendant which it was not within the power of the Legislature to destroy. Nor is the action upon an executory right yet uncrystallized into an executed one, and neither is the proposition one involving merely the modification or a change in the remedy or procedure."

In Estate of Patterson it was held that the amendment there in question was one which related wholly to what should be done upon the trial and, therefore, the amendment applied to all trials held after its adoption. In the case before us, which was tried upon the theory of gross negligence upon the part of this appellant, the 1931 amendment to the act in question, if applicable, would work not merely a change in the rule of evidence but would result in a destruction of this portion of the respondent's right of action, which is exactly what this appellant contends has occurred. We find nothing in the case of Krause v. Rarity which upholds the view thus contended for.

[5] As a second proposition in this regard, this appellant contends that in the case of Krause v. Rarity, supra, it was held that the cause of action would have been wiped out by the 1929 amendment to section 141¾ of the California Vehicle Act except for the inclusion in that amendment of the proviso that a guest might recover upon proof of gross negligence, among other things, and since the question of gross negligence was eliminated by the amendment of 1931, the respondent's cause of action, based upon gross negligence, has been wiped out by the repeal of that portion of section 141¾ on which it was founded. The respondent's cause of action was not founded upon section 141¾, as adopted in 1929, but was grounded on a common-law liability, long existing, and preserved and continued by that section. While the cause of action of Krause v. Rarity was one not existing at common law, the court, in referring to such a situation as the one now before us, there said:

"If the present action were one brought by Krause, during his lifetime, for damages for personal injuries inflicted upon him while a guest of the defendant Rarity, such a cause of action would be one grounded on the common-law liability and the right of action would be a vested right and survive a repeal of the statute. Callet v. Alioto, 210 Cal. 65, 290 P. 438. The case of James v. Oakland Traction Co., supra, relied upon by the plaintiff, was one for damages for personal injuries inflicted upon the plaintiff therein.

"That case is illustrative of the numerous decisions holding that upon the wrongful infliction of the injury a vested right accrued to the party injured freed from any disturbance by subsequent legislative enactment."

In Callet v. Alioto, 210 Cal. 65, 290 P. 438, 440, in speaking of the rule that a cause of action or remedy dependent on a statute falls with the repeal of the statute, even after an action thereon is pending, in the absence of

a saving clause in the repealing statute, the court said: "This rule only applies when the right in question is a statutory right and does not apply to an existing right of action which has accrued to a person under the rules of the common law. * * * In such a case, it is generally stated that the cause of action is a vested property right which may not be impaired by legislation. In other words, the repeal of such a statute or of such a right should not be construed to affect existing causes of action."

[6] We think the authorities referred to sufficiently distinguish this case from those cases in which the rule now contended for by this appellant is to be applied, and that the 1931 amendment to this statute had no effect upon this case.

[7] Taking up the appeal of Stokes and McDearmid, their first contention is that there is no evidence to support a verdict as against them, because the physical facts prove to a point of absolute demonstration that the car occupied by them was not being driven at a negligent rate of speed. While it is conceded that a number of witnesses testified that this car was traveling at an illegal and excessive rate of speed at the time of the collision, it is urged that this testimony must be utterly disregarded because two photographs appearing in the record and picturing the condition after the accident of the two cars involved therein furnish an absolute demonstration that the car occupied by these appellants could not have been driven even at ten miles an hour at the time of the impact. The frailty of reliance upon physical facts as overcoming other evidence and conclusively establishing what has occurred in an automobile collision has been frequently pointed out, Fishman v. Silva, 116 Cal. App. 1, 2 P.(2d) 473; Johnston v. Peairs, 117 Cal. App. 208, 3 P.(2d) 617; Holt v. Yellow Cab Co. (Cal. App.) 12 P.(2d) 472; Hawthorne v. Gunn (Cal. App.) 11 P.(2d) 411, 412. In the last case cited this court said: "Perhaps there is nothing more certain about an automobile accident than the fact that the visible results afterward are not an infallible guide in determining what occurred." A further consideration in this case is that, after a careful inspection of the photographs referred to, we regard them as not even conflicting with, much less overcoming, the testimony we are asked to disregard. In addition, there is evidence of other physical facts having an important bearing. There is evidence that the McDearmid car continued after the impact for a distance of some sixty feet, running off the road into the dirt, and that the force of the impact was sufficient to swing the Ott car in a complete circle within the intersection, throwing Mrs. Ott from the front seat to the ground. The force of the impact is further indicated by the fact that, although not thrown from his seat, the respondent received five distinct fractures of the bones in the pelvic region of his body, a broken collar bone, and a broken rib, and that each of the two ladies seated with him on the rear seat also suffered broken bones. It cannot be held, as a matter of law, that the car occupied by these appellants was not being driven at a rate of speed sufficient to constitute negligence.

[8-10] It is urged that the court erred in refusing to permit these appellants to impeach the testimony of two witnesses for the respondent. These witnesses were the two ladies who, with the respondent, occupied the rear seat of the automobile and who had been injured in the same accident. It appears that each of these ladies had filed suit against these appellants for damages for injuries received in this same collision. Having been called as witnesses by the respondent, they testified that Ott was going somewhere between twenty-five and thirty miles an hour. The record shows that the respondent then attempted to impeach this portion of their testimony by offering in evidence the complaints filed by these witnesses in their actions against these appellants, upon the theory that these complaints contained statements inconsistent with their testimony concerning Ott's speed. It appeared that these complaints were neither signed nor verified by the respective plaintiffs and upon that ground the court sustained an objection by Ott and refused to admit either the complaints or the judgment-rolls in evidence. These appellants joined in the efforts made by the respondent to have these complaints introduced in evidence, and also made other efforts to have the same introduced, without success. Assuming, but by no means deciding, that these rulings of the court were erroneous, it does not follow that the judgment must be reversed. The only argument made is that the complaints were verified by the attorney for the respective parties; that each witness had testified that she had discussed with her attorney the circumstances of the accident and told him what had happened; that it will be presumed that the attorney incorporated in the complaints such statements of facts as had been made to him; and that these appellants were entitled to impeach each of these witnesses by showing that her complaint contained statements contrary to her present testimony. It is encumbent upon an appellant claiming error to produce the necessary record to show the same. Our attention is not called to these complaints in the record and we are unable to find them there. Nothing appears as to what statements were contained in the complaints, and we are unable to determine whether or not they vary from the statements made by the witnesses on the stand. It would appear from reading this portion of the transcript that the respondent considered the state-

ments made on the witness stand as more favorable to the appellant Ott than the statements made in these complaints. Even if the testimony as given on the stand was more favorable to Ott than the statements made in the complaints, that testimony still showed negligence on the part of Ott, the jury brought in a verdict against him upon ample evidence, the evidence excluded was sought to be introduced by the respondent, the same was kept out only by objection of a codefendant, and we do not see how the error, if any, can be charged to the respondent. In Crabbe v. Rhoades, 101 Cal. App. 503, 282 P. 10, 18, it was said: "* * * It is clear that the liability of appellant * * * depended entirely upon the answer to the questions whether he himself was or was not negligent, and whether or not such negligence, if it existed, proximately caused or contributed to the injuries complained of. These questions are wholly independent of the question as to whether or not his codefendant * * * was also liable."

In Johnston v. Peairs, 117 Cal. App. 208, 3 P.(2d) 617, 619, this court said: "It is well settled that an appellant may not complain of errors as between himself and such a joint defendant, if they are not such as to affect in an important manner his relations to the plaintiff." There is ample evidence in the record of negligence upon the part of these appellants, and although the exact nature of the statements contained in these complaints does not appear, a reading of the transcript does not indicate any possibility that the exclusion of this evidence could have affected the result, so far as the respondent is concerned.

[11] The last point raised is that after the respondent had been permitted to testify as to his income during the various years, the court refused to permit these appellants to cross-examine him as to what part of this income was gross and what part was net. An objection to this line of questioning was sustained on the ground that any recovery on account of lost earnings is to be measured by lost earning capacity rather than lost net profit. However, it appears that these appellants later recalled the respondent for further cross-examination and went fully into these matters without objection, at which time the respondent testified as to his net earnings during the years in question. No question is raised as to the verdict being excessive, and no showing is made that the entire verdict could not be amply sustained by the evidence in reference to other elements included therein. Upon the showing made we are unable to hold that any prejudicial error appears.

The judgment is affirmed.

We concur: JENNINGS, J.; MARKS, J.

127 Cal.App. 186

In re ANTHONY'S ESTATE.

PEARCE et al. v. HAINES.

Civ. 1039.

District Court of Appeal, Fourth District, California.

Oct. 26, 1932.

1. Wills ⇐281.

Petition alleging that probated will was revoked by testatrix and that contestants were her only surviving heirs, sufficiently stated ground for will contest (Code Civ. Proc. § 1327, as amended by St. 1929, p. 860).

2. Wills ⇐221.

Decedent's heirs are not necessarily entitled to petition for revocation of will as "interested persons" (Code Civ. Proc. § 1327, as amended by St. 1929, p. 860).

[Ed. Note.—For other definitions of "Interest," see Words and Phrases.]

3. Wills ⇐221.

Proceedings for probate and contest of will are special statutory proceedings unknown to common law, and contestant has only rights given him by statute (Code Civ. Proc. § 1327, as amended by St. 1929, p. 860).

4. Wills ⇐246.

Ground of will contest, alleging testatrix' execution of holographic will, not naming contestants as beneficiaries, *held* sufficient as against contention that it did not show that contestants were "interested persons" (Code Civ. Proc. § 1327, as amended by St. 1929, p. 860; § 1875, as amended by St. 1927, p. 110; Mo. St. Ann. §§ 254, 519, 552).

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

In the matter of the Estate of Kate Anthony, deceased. From a judgment dismissing the petition of Bradley Pearce and another to set aside an order probating the will of decedent on the petition of John L. Haines, executor, contestants appeal.

Reversed with directions.

F. L. Richardson, of San Diego, for appellants.

Titus & Macomber, of San Diego, for respondent.

AMES, Justice pro tem.

It appears from the record in this case that Kate Anthony died in the county of San Diego on the 1st day of January, 1930. Thereafter John L. Haines filed a petition in the superior court praying that letters testamentary be issued to him. Thereafter a hearing upon said petition was had and a certain document purporting to be the last will and testament

of Kate Anthony, deceased, was duly admitted to probate in said court and the petitioner was appointed executor thereof. By the terms of the will decedent bequeathed to Mollie Lyon of San Diego, Cal., the sum of $5 and the rest, residue, and remainder thereof to her sister-in-law Mrs. Sallie B. Means, of St. Louis, Mo. The will was executed in due form and attested by two subscribing witnesses. Thereafter Bradley Pearce and Lizzie Pearce filed a petition under the provisions of section 1327 of the Code of Civil Procedure, which was then in effect, praying that the probate of the will theretofore granted be vacated and set aside. The second amended contest and petition to revoke the probate of the will contains two grounds of contest. To this petition proponent demurred, both to the petition in its entirety and to each several ground of contest therein contained. The demurrer to the contest and to each of its several grounds is general.

In the first ground of contest it is alleged that the will theretofore admitted to probate had been destroyed and revoked by decedent prior to her death, and that, on or about the 20th day of November, 1928, deceased wrote across the bottom of said paper purporting to be her last will and testament the following: "This will I am going to destroy. November 20, 1928," and that thereafter she did mutilate and tear the same to pieces and deposited the pieces in a wastebasket with the intention of revoking the same. It further appears from suitable allegations in the first ground of contest that deceased left her surviving no husband, child or children, and no surviving father or mother, brothers or sisters, nor any child or children of any deceased brother or sister, but that she left her surviving as her heirs at law, contestants who, it is alleged, are the children of a deceased sister of the deceased mother of decedent and her next of kin and heirs at law.

The second ground of contest alleges the execution on the 25th day of November, 1929, of another instrument in writing as her last will and testament. A copy of said instrument is incorporated in the second ground of contest and it is therein alleged that the same is a holographic will, being in the handwriting of said decedent, and is unwitnessed, in which she bequeathed unto Sallie B. Means and Mary Lyon each the sum of $5. The instrument then contains the following clause: "When all the bills are paid up, all of my personal property, my home and Near house in Springfield, Mo. is to be given to Mrs. Evelyn Smith of San Diego. All household goods, my clothes, everything to Evelyn Smith." Under the signature of the testatrix, and as a part of the same writing, appears the following: "I am sick but in my right mind. I leave check $831.47 D. J. Houres of Coronado for my last expense funeral expense. What is left goes to Evelyn Smith. Kate Anthony." It is further alleged in said second ground of contest that, at the time of her death, deceased was the owner of certain real estate in the city of Springfield, state of Missouri, which is therein described. The holographic will, being inconsistent in its terms with those contained in the former will, is pleaded as a revocation. The demurrer to the second amended petition was sustained, and, petitioners declining to amend, a judgment of dismissal of the contest was entered, and from that judgment contestants appeal.

[1] We think that the first ground of contest states facts sufficient to constitute a ground of contest of the will. The jurisdictional facts are therein set forth, together with sufficient allegations of the relationship of contestants to the testatrix and further allegations of a revocation. Nor does the respondent seriously contend that the first ground of contest, standing by itself, is defective. Respondent, in support of his demurrer, contends that the second ground of contest does not show upon its face that contestants are "interested persons" as that phrase was used in section 1327 of the Code of Civil Procedure prior to its repeal in 1931 (St. 1931, pp. 587, 687), because, contends the respondent, the contestants are not named as beneficiaries in the holographic will of November 25, 1929, and in the event that the contestants should prevail in this proceeding the entire estate of the decedent would ultimately be distributed to the beneficiaries named in the latter will, to the exclusion of contestants.

Appellants, on the contrary, contend that a holographic will is not valid under the laws of the state of Missouri and that the will of November 25, 1929, may be pleaded by them for the purpose of showing a revocation of the former will, and, such revocation having been established, the real estate in the state of Missouri would devolve upon them under the statutes of succession of that state.

Before pursuing our inquiry into the question of the effect of the holographic will as an instrument for a transfer of the title to the real estate in Missouri, we will first examine the decisions of the courts of California which have on numerous occasions construed the provisions of section 1327 of the Code of Civil Procedure. That section contained the following provision: "When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same or the validity of the will." The period of one year was reduced to six months by the amendment of 1929 [St. 1929, p. 860].

In the case of Estate of Land, 166 Cal. 538, 137 P. 246, 248, the Supreme Court said: "It may freely be conceded that if it is made to appear that a person has such an interest as

may be impaired or defeated by the probate of the will, or benefited by setting it aside, he is a person interested. This would appear to be the common sense meaning of the term, and no good reason can be made to appear for giving it a broader or different meaning."

[2] The mere fact that the petitioners are heirs at law of the decedent does not necessarily give them the right to petition for a revocation of the will, because an heir at law may be without such right by reason of other facts. Estate of Land, supra; Estate of Edelman, 148 Cal. 233, 82 P. 962, 113 Am. St. Rep. 231; Estate of Wickersham, 153 Cal. 603, 96 P. 311. In the case of Bloor v. Platt, 78 Ohio St. 46, 84 N. E. 604, 605, 14 Ann. Cas. 333, which is cited with approval in Estate of Land, supra, the Supreme Court of Ohio said: "Any person who has such a direct, immediate, and legally ascertained pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of the will, or be benefited by setting aside the will, is 'a person interested.'" In the case of Selden v. Illinois Trust & Savings Bank, 239 Ill. 67, 87 N. E. 860, 130 Am. St. Rep. 180, which is also cited in Estate of Land, supra, the supreme court of Illinois held that the words in the statute "any person interested" meant those having a direct pecuniary interest affected by the probate of the will and that such interest must exist at the time of the admission of the will to probate.

[3] Proceedings for the probate of wills, and the right to contest the same, are special proceedings unknown to the common law. The right thus created by statute is the creature of statute, being unknown to the common law, and a contestant has such rights and only such rights as the law gives him. It was so held in Estate of Baker, 170 Cal. 578, 150 P. 989, 992. In that case the court further says: "Specifically our law provides (Code Civ. Proc. § 1327) that 'any person interested' may contest a will which has been admitted to probate within one year thereafter. Upon what is the right of an heir or other person in interest to contest a will fundamentally based? Manifestly, upon the illegal deprivation occasioned to him, the illegal loss to him of property or property rights, by giving recognition to an instrument depriving him of those rights, which instrument for one or another cause, is illegal, invalid and void." In 28 Ruling Case Law, 386, it is said: "In order that a person may contest a will it is necessary that such person shall have some interest which may be affected by the probate of the proposed will. Furthermore, such interest must be pecuniary and one detrimentally affected by the will."

[4] Since the amendment to section 1875 of the Code of Civil Procedure in 1927, the courts of California will take judicial notice of the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states (St. 1927, p. 110). This court, therefore, in taking notice of the provisions of the Missouri statute, finds that section 253 of the Revised Statutes of Missouri 1919 (Mo. Ann. St. § 254) contains the following provision: "*Estates of Non-residents, How Administered.* When administration shall be taken in this state on the estate of any person, who at the time of his decease was an inhabitant of any other state or country, his real estate found here, after the payment of his debts, shall be disposed of according to his last will, if he left any, duly executed according to the laws of this state, and his personal estate according to his last will, if he left any, duly executed according to the laws of his domicile. * * *"

Section 507 of the Revised Statutes of Missouri 1919 (Mo. Ann. St. § 519) is as follows: "*Will to be in Writing, How Signed and How Attested.* Every will shall be in writing, signed by the testator, or by some person, by his direction, in his presence; and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator."

Section 540 of the Revised Statutes of Missouri 1919 (Mo. St. Ann. § 552) is as follows: "*Wills Probated in Any County, When.* Any will admitted to probate in any state, territory or district of the United States, together with the order admitting the same to probate therein, certified according to act of Congress, shall be admitted to probate in this state in any county where real estate is affected thereby, or filed in the office of the recorder of deeds in such county."

A situation similar to that which exists in the instant case was presented to the Supreme Court of Missouri in the case of White v. Greenway, 303 Mo. 691, 263 S. W. 104. In that case a testatrix, who died in the state of Kentucky, leaving real property in the state of Missouri, executed a holographic will, which appeared to be valid under the laws of the state of Kentucky, in which the same was executed. The court presumed that the holographic will which was admitted to probate in the state of Kentucky was executed according to the laws of that state, but further holds, in construing those sections of the Revised Statutes of Missouri which are hereinbefore quoted, together with other statutory provisions of that state, that the will, not having been executed according to the provisions of section 507 of the Revised Statutes of Missouri, was sufficient to pass the title to personalty located within that state, but that it was invalid for the purpose of passing title to realty unless executed in writing, attested and probated in the county

wherein the realty is situated according to the provisions of the statutes in Missouri.

The question then presented is whether or not the operation of the statutes of Missouri upon the holographic will, which is pleaded in the second cause of contest of the contestants, is such that contestants would become interested persons, within the meaning of section 1327 of the Code of Civil Procedure prior to its repeal in 1931.

In White v. Greenway, supra, it is further said: "The rule is universal that title to land can be acquired only according to lex rei sitæ, and a will by a nonresident testator devising land in this state must take effect and be interpreted according to the laws of this state. * * * The will under consideration might be sufficient to pass title to personal property situate here, and yet not be valid as affecting real estate in Missouri."

In the case of Hines v. Hines, 243 Mo. 480, 147 S. W. 774, 775, the court says:

"* * * We think our General Assembly was acting within its proper sphere when it enacted section 569, supra, which provides that wills executed and proven in other states, attempting to convey land in this state, may be contested in the courts of this state when an attempt is made to put such wills in force here by placing them on the land records of our state.

"This must necessarily be true for the reason that every state has full and exclusive power to determine by what methods real estate situated within its borders shall be conveyed or devised, and how the same shall pass by inheritance."

In Keith v. Keith (Keith v. Johnson), 97 Mo. 223, 10 S. W. 597, 599, the Supreme Court of Missouri says: "No principle of law is better established in the United States than this: that the transfer of title to real estate must be in accordance with the law of the state where the property is situate. So a will, to be of any validity as a transfer of title to land, must be executed, attested, and probated in the manner prescribed by the law of the state where the land is located."

And again the court says: "When the Kentucky court admitted this will to probate it adjudged it to be executed according to the laws of that state, and we accept that adjudication as conclusive upon that subject; but it did not undertake to say that the will transmitted the title to the Missouri land. That court did not assume to make any such adjudication. The probate of the will, then, does not have the credit in that state of affecting the title to land in this state, and hence we are not called upon to give it a credit here that it does not have in the courts of the state where the probate is declared. The force and effect which we must give to this Kentucky probate does not depend upon the said act of congress, nor our statute relating to the same object, so far as real property located in this state is concerned, but it depends wholly upon the statute before quoted, dispensing with proof anew, and declaring what force and effect shall be given to a will properly executed, probated in another state, and recorded here. Moreover, the courts of that state are without jurisdiction over the titles to land located in this state."

In Nelson v. Potter, 50 N. J. Law, 324, 15 A. 375, 376, cited with approval in Keith v. Johnson, supra, the Supreme Court of New Jersey, in speaking of the full faith and credit clause of the Federal Constitution, says: "Hence the probate of a will in one state, though conclusive as to title to personalty, if probate be made at the domicile of the testator, is of no force in establishing the sufficiency or validity of a devise of land in another state. It can obtain such force only in virtue of some law of the state in which the lands are situate."

The case of Thomas v. McGhee, 320 Mo. 519, 8 S.W.(2d) 71, 73, was a case involving a holographic will executed under the laws of another state and the Supreme Court of Missouri, in construing the sections of the revised statutes of that state which are hereinbefore quoted, holds that such a will is ineffective to devise real estate in the state of Missouri. The court says: "Under statutes like section 540 it would seem, technically, that the instrument derives its validity from the foreign adjudication, and that the ancillary proceeding in the local jurisdiction merely gives binding notice thereof or adopts the same, subject to the limitations interposed by the lex rei sitæ so far as real estate may be affected or the right to contest involved."

It seems to have been the theory of the trial judge and respondent that, while the first ground of contest was a good and sufficient pleading, by the allegations of their second separate contest they alleged themselves out of court by introducing the holographic will under which they could not take property in California. The fallacy of this position is apparent when we consider the position of the trial court and the parties if the order sustaining the demurrer should be sustained.

First, the probate court is engaged in probating one will which it would seem might have been revoked by a subsequent holographic will.

Second, the first will which is being probated was executed with all the formalities of law of both California and Missouri, and, if probate be concluded here, an exemplified copy could be recorded or filed in Missouri and the title to real estate passed if it were not contested there within three years. The Supreme Court of Missouri has held that a will which had been actually revoked according to the laws of the states of New York

and Missouri, but which had been probated in New York was sufficient to pass title to real estate in Missouri when an exemplified copy of the New York probate proceeding had been regularly filed in Missouri and no contest instituted during the period allowed by the laws of that state. Cohen v. Herbert, 205 Mo. 537, 104 S. W. 84, 120 Am. St. Rep. 772.

Third, if the first will be revoked by the holographic will and the latter be probated, it will pass title to all personal property belonging to the estate and to all real estate in California, but not in Missouri. The deceased will become an intestate in so far as the Missouri realty is concerned. If this should happen, appellants will take estates in the Missouri real estate as heirs at law of the deceased.

It seems to us that this effectually disposes of the contention that appellants would have no direct pecuniary interest in the estate if the holographic will be proved and probated. If the first will has been revoked by destruction, appellants would be entitled to share in the entire estate if the holographic will is not entitled to probate for any reason.

The judgment is reversed, with directions to overrule the demurrer.

We concur: BARNARD, P. J.; MARKS, J.

127 Cal.App. 89

KERSHAW v. HOGAN et al.

SAME v. WARDEN et al.

Civ. 4558, 4559.

District Court of Appeal, Third District, California.

Oct. 18, 1932.

Rehearing Denied Nov. 17, 1932.

Dismissal and nonsuit ⊜19(1).

Granting plaintiff's motions for dismissal without prejudice, on ground of plaintiff's abandonment of actions, *held* erroneous, especially where answers sought affirmative relief (Code Civ. Proc. § 581, subds. 1, 4).

Appeals from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Joseph Kershaw against Hugh Hogan, Grace P. Warden, and others, and action by Joseph A. Kershaw against Grace P. Warden and others. From orders dismissing the cases without prejudice on plaintiff's motion, defendant Warden appeals.

Reversed and remanded.

For prior opinion, see 10 P.(2d) 472.

McKenna & McKenna, of Los Angeles, for appellants.

Charles T. Rippy, of Torrance, and Claire T. Van Etten, of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

These are actions brought by the same plaintiff to quiet title to identical parcels of real property, but against different defendants. The two cases were by stipulation tried together.

During the progress of the trial and before the submission of the cause for decision, the court, upon motion of plaintiff, ordered each case dismissed without prejudice, and it is from these orders of dismissal that defendants appeal.

Respondent contends that he is basing his right to dismiss upon subdivision 4 of section 581 of the Code of Civil Procedure, which provides that an action may be dismissed by the court when, upon the trial and before final submission of the cause, the plaintiff abandons the action.

It is obvious that plaintiff cannot prevail under the provisions of that subdivision, for he seeks to his own advantage and for his own shortcoming to move his own dismissal. It is also plain that he could not by so doing set at naught all of the conditions set forth in subdivision 1 of section 581, Code of Civil Procedure, which limits the right of a plaintiff to dismiss before trial when no affirmative relief is sought by the answer of appellant, and here an examination of the pleadings shows that defendants, in their respective answers, did set forth affirmative relief. Islais, etc., Water Co. v. Allen, 132 Cal. 432, 64 P. 713.

It therefore appears that the trial court erred in granting the motions to dismiss, and the judgments are reversed and the causes remanded for further proceedings.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

⊜For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

127 Cal.App. 170

CUMMINS v. YELLOW & CHECKER CAB CO. et al. (two cases).

Civ. 978.

District Court of Appeal, Fourth District, California.

Oct. 25, 1932.

1. Automobiles ⇐245(80).

In autoists' actions for injuries from collision at intersection, plaintiffs' contributory negligence *held* for jury.

2. Negligence ⇐136(26).

Ordinarily, contributory negligence is for jury, and is question of law only when evidence is not conflicting.

3. Automobiles ⇐246(47).

Evidence warranted instruction that if both automobiles approached intersection approximately simultaneously plaintiffs did not have right of way.

4. Automobiles ⇐246(25).

Instruction that plaintiffs could not recover for injuries in automobile collision if they were contributorily negligent "however slightly" *held* not erroneous.

Such instruction was not erroneous as against contention that it stated that any negligence would bar a recovery, where, in other portion of instruction not complained of, court stated the rule with relation to particular circumstances under which plaintiffs might be held contributorily negligent, and in such other portion of the instruction, the words "however slight" did not appear, and meaning of instruction being the same whether quoted words were included or omitted.

5. Trial ⇐253(4).

Instruction that plaintiffs injured in automobile collision, if contributorily negligent, could not recover, *held* not objectionable as depriving plaintiffs of benefit of last clear chance doctrine.

Such instruction was not objectionable as depriving plaintiffs of the benefit of the doctrine of last clear chance, where the evidence did not disclose defendants were negligent after discovering plaintiffs' perilous position and showed plaintiffs' contributory negligence continued till collision.

6. Appeal and error ⇐909(1).

Where defendant taxicab company sued for injuries prevailed, reviewing court could not assume that taxicab was at a considerable distance east of intersection at time plaintiff motorists undertook crossing.

7. Automobiles ⇐208.

One crossing in front of approaching vehicle cannot close eyes to threatening danger and rely upon presumption that other party will use reasonable care.

8. Automobiles ⇐208.

If speed and position of approaching taxicab were such that plaintiffs in ordinary care should have realized that attempted crossing of intersection would probably result in collision, plaintiffs proceeding across intersection were contributorily negligent.

9. Witnesses ⇐380(5).

Permitting defendants' counsel to ask defendants' witness if witness' recollection regarding automobile collision was same as witness had told defendants' counsel it was *held* not objectionable as permitting defendants' impeachment of own witness.

Such procedure on the part of defendants' counsel was not objectionable where counsel made no effort to impeach the witness, asked no impeaching questions, and indicated no intention to impeach the witness; the question being merely to refresh the recollection of the witness.

10. Witnesses ⇐254.

When witness gives testimony varying from that formerly given, party calling witness may refresh witness' recollection by directing attention to former statements.

Appeals from Superior Court, Los Angeles County; Daniel Beecher, Judge.

Two actions, one by Adeline Miriam Cummins, and the other by Oscar Richard Cummins, both against the Yellow & Checker Cab Company, consolidated, and others. From the judgments for defendants and from orders denying each plaintiff's motion for new trial, each plaintiff appeals.

Judgments affirmed, and appeals from orders denying new trial dismissed.

Louis P. Pink, of Los Angeles, for appellants.

Jennings & Belcher, of Los Angeles, for respondents.

HARDEN, Justice pro tem.

The plaintiffs, who are husband and wife, brought separate actions against defendants for damages on account of personal injuries received in an automobile accident. Said actions were consolidated for trial. A separate verdict was rendered in each case in favor of the defendants, upon which judgment was entered accordingly. The motion of each plaintiff for a new trial having been denied, separate appeals have been taken from the judgments and orders denying new trial.

At about 7:45 p. m. on August 24, 1926, plaintiffs were riding in a southerly direction on the westerly side of Berendo street, be-

tween Eighth and Ninth streets, in Los Angeles, in a Willys-Knight roadster driven by plaintiff Oscar Richard Cummins. The driver was seated upon the left side of the automobile, and his wife, Adeline Miriam Cummins, was upon his right side. At that time a taxicab of the defendant companies, operated by defendant James V. Morford, was traveling in a westerly direction on Ninth street toward the intersection of Ninth and Berendo streets. Said streets intersect at right angles. A collision occurred between said vehicles at a point slightly to the southwest of the center of the intersection. As a result thereof the roadster was turned around completely, so that it came to a stop against a brick retaining wall at the northwest corner of the intersection. The taxicab stopped near the southwest corner of the intersection. In the accident both plaintiffs received severe injuries.

The complaints alleged negligent driving of the taxicab in general terms. To the complaint of the wife, the defense of contributory negligence was interposed by appropriate allegations; and as a further defense it was alleged that her husband was negligent in the operation of his automobile, and that his negligence was imputed to her. By proper allegations the defense of contributory negligence was also interposed to the complaint of the husband.

The points raised by appellants upon the appeal are identical.

The first of several questions thus raised is that the evidence was insufficient to support the verdicts and judgments: It is contended that the evidence established that defendants were guilty of negligence in the operation of the taxicab. This may be conceded. The point is not seriously challenged by respondents. In this connection it is contended next that the husband was not guilty of contributory negligence. The arguments proceed upon the assumption by all parties that contributory negligence on the part of the husband, if established, would be imputed to the wife. McFadden v. Santa Ana, etc., Ry. Co., 87 Cal. 464, 25 P. 681, 11 L. R. A. 252.

It is conceded that at the place of the collision the speed limit was fifteen miles per hour. It is true that plaintiffs and several witnesses testified to the general effect that plaintiffs' automobile approached the intersection of said streets at a rate of speed not in excess of that allowed by law. Without going into detail as to such evidence, it may be conceded that the greater number of witnesses testified to a state of facts from which it would not be proper to infer negligence on the part of the driver of plaintiffs' automobile. However, in behalf of the defendants, substantial evidence was introduced which would warrant a contrary view of the situation.

Dave C. Jacob testified that he was in front of his house on the east side of Berendo street, a distance of about three hundred feet to the north of the intersection; that he had an unobstructed view; that he observed plaintiffs' automobile as it passed in front of his house; that it was then traveling at a speed which he estimated at around forty miles per hour; that by reason of its speed he continued to observe the automobile as it approached the intersection of Ninth street; that he did not notice any change in its speed until the time of the collision; that he observed the taxicab as it came into the intersection; that he closed his eyes the instant the cars collided; that immediately thereafter he went to the scene of the accident.

Mrs. A. J. Clancy resided on the northwest corner of the intersection of Ninth and Berendo streets. After having placed her car in her garage on Ninth street to the rear of her house, and a distance of about one hundred and fifty feet from the corner of Ninth and Berendo streets, she and her little daughter proceeded easterly along the north side of Ninth street toward the intersection of the streets in question. At the time of the accident she was within one or two feet of the place where plaintiffs' automobile came to rest against the brick retaining wall on the northwest corner. She testified that when plaintiffs' automobile was ten feet north of the north line of the street intersection the taxicab was the cab's length east of the east line thereof; that neither automobile slowed down; that both of said automobiles were going faster than twenty-five miles per hour.

Frank Price was a passenger in the taxicab. In some respects his testimony corroborated that of the witnesses Jacob and Mrs. Clancy. He testified that in his opinion the taxicab was at about the line of the sidewalk on the east side of Berendo street when he observed the approaching automobile on Ninth street; that he saw its headlights. He said: "I saw a car approaching from the right, and I could see the headlights. I hollered to the driver, and the next thing I knew we were over on the lawn. * * *"

James V. Morford, the driver of the taxicab, testified by deposition that the accident was his fault, and also that at the time of his approach to the intersection the passenger asked him a question and that he turned his head to the right and slightly to the rear to understand what the passenger said. (This evidence was denied by Price, who said the only conversation he had at that time was when he "hollered—probably told him to look out, or something like that. I don't remember what I said.") Said driver testified further that he did not see plaintiffs' automobile until it was directly in his path, as the taxicab was entering the intersection; that he applied the two-wheel brakes on his car immediately; that such application of brakes caused the taxicab to skid; that owing to the skidding, and to avoid the collision, he endeavored to turn to the left, parallel with plaintiffs'

car; that he did all he could to avoid the accident.

The plaintiff Oscar Richard Cummins testified that his automobile was traveling five, six, or seven miles per hour at the time he approached the intersection and saw the approaching taxicab; that he did not observe how fast the taxicab was traveling; that he could not judge its speed; that plaintiffs were traveling on the west side of Berendo street, possibly ten feet from the curb; that the taxicab was possibly one hundred feet, more or less, east of the east curb of Ninth street at that time—somewhere around one hundred and thirty feet east of plaintiffs, more or less—that he recognized that it was a taxicab; that his automobile had been in second gear, but at that time he shifted to high gear and proceeded ahead; that he did not look again at the taxicab until he had reached the center of the intersection, when he heard the groaning of the brakes on the taxicab. The testimony of Mrs. Cummins was substantially the same as that of her husband.

[1, 2] We have stated the testimony of said witnesses somewhat at length to show that the question of whether or not there was contributory negligence on the part of plaintiffs was essentially a question for the determination of the jury. Ordinarily, of course, the question of whether a plaintiff was guilty of contributory negligence is a question for the jury. It is a question of law for the court only where the facts are undisputed, and only then where on those facts reasonable minds can draw but one conclusion. Herbert v. Southern Pacific Co., 121 Cal. 227, 53 P. 651; Johnson v. Southern Pacific R. Co., 154 Cal. 285, 97 P. 520; Hoff v. L. A. Pac. Co., 158 Cal. 596, 112 P. 53; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513; Seller v. Market-St. R. Co., 139 Cal. 268, 72 P. 1006. We cannot hold as a matter of law that the evidence was insufficient to support the implied finding of the jury that the plaintiffs were guilty of contributory negligence.

[3] The second point raised is that the court committed reversible error in the giving of certain instructions to the jury. At defendants' request the court instructed the jury as to the general rules relative to the right of way at the street intersection. No objection to such instruction is made except that it is contended that there was no evidence to support the giving thereof. Contending that the question was not in issue under the evidence, particular objection is made to the following portion of said instruction: "If you should find that both vehicles approached the intersection at approximately the same time, and also that Mr. Cummins' automobile was traveling in excess of fifteen miles per hour in entering and crossing the intersection, then it did not have any right of way over the taxicab."

To agree with appellants in their contention that there was no evidence to support a finding that the automobiles were approaching the intersection *at approximately the same time*, would be to disregard a portion of the testimony already set forth. There was sufficient evidence to warrant the giving of said instruction.

[4] At the defendants' request the court also instructed as follows: "Even if you should find that the defendants were negligent, yet, if you also find that the plaintiffs were negligent, or that the plaintiff Mr. Cummins alone was negligent, and that such negligence, if any, on the part of plaintiffs, or on the part of the plaintiff, Mr. Cummins, proximately contributed in any degree, however slight, to the happening of the accident and injuries, then, in such event, neither of the plaintiffs can recover, and your verdict should be in favor of the defendants."

The vice of the instruction is said to be the inclusion therein of the words "however slight." Contrary to the contention of appellants, said instruction is not properly construed as stating that any negligence (even though not amounting to a want of ordinary care) would bar a recovery. In other portions of the instructions not complained of the court stated the rule with relation to particular circumstances under which the plaintiffs might be held guilty of contributory negligence, and in such other portions of the instructions the words "however slight" do not appear. The meaning of the instructions is the same, whether said words are included or omitted. Said instruction contained a correct statement of the law. Konig v. Lyon, 49 Cal. App. 113, 192 P. 875; Steinberger v. Calif. Elec. Garage Co., 176 Cal. 386, at page 394, 168 P. 570.

[5] Exception is also taken to the giving at defendants' request of the following instruction: "In this case, if you should find that the defendants' taxicab was being driven at a high rate of speed, but should also find that before the plaintiffs entered the intersection they looked in the direction from which the taxicab was coming, and observed that it was approaching, but negligently and carelessly failed to make reasonable use of their faculties for the purpose of ascertaining whether or not they could safely proceed upon the intersection, and they did thereafter negligently proceed upon the intersection without making any reasonable observation for the purpose of ascertaining whether or not they could safely do so, and they carelessly continued to proceed upon the intersection until they had gotten into the course along which the defendant's vehicle was going, and that the accident resulted proximately from

the negligence, if any, on the part of the plaintiffs in the foregoing particulars, then the plaintiffs cannot recover, and in such event your verdict must be in favor of the defendants. This is true under such circumstances, even though you find that the driver of the defendant's automobile was also negligent."

The first attack upon said instruction is that it denied to plaintiffs the benefit of the doctrine of the "last clear chance." There is no showing of negligence on the part of the driver of the taxicab after he became aware of the perilous position of the plaintiffs; and, assuming that plaintiffs were negligent at all, such negligence continued up to the time of the collision. Under such circumstances the doctrine had no proper place in the case. Mayer v. Anderson, 36 Cal. App. 740, 173 P. 174; Jansen v. Southern Pac. Co., 5 Cal. App. 12, 89 P. 616; Rowe v. Southern Cal. R. Co., 4 Cal. App. 1, 87 P. 220. Apparently that was the view of the parties at the trial. No instruction upon the doctrine was requested and none given. The instruction is not objectionable for the reason stated.

[6] The other points of attack upon said instruction require for their support the assumption that the taxicab was at a considerable distance east of the intersection at the time that plaintiffs undertook the crossing. This assumption we cannot make. Appellants rely upon the language of the court in the cases of Simonsen v. L. J. Christopher Co., 186 Cal. 786, 200 P. 615, 616; Gornstein v. Priver, 64 Cal. App. 249, at pages 259 and 260, 221 P. 396; and Robinson v. Clemons, 46 Cal. App. 661, 190 P. 203. Appellants contend that, under the authority of said cases and a proper application of the law, they were bound to prevail. In each of said cases the plaintiffs prevailed in the lower court; and upon the appeal the defendant endeavored to have the court hold as a matter of law that the plaintiff had been guilty of contributory negligence. Surely the language of the court in those cases, wherein the evidence which sustained the judgment of the lower court was pointed out, should not be regarded as any holding that such evidence would under all circumstances require judgment for a plaintiff.

[7, 8] The situation in each of the cases cited was altogether different from the one confronting us. It is not a question here of determining whether a verdict and judgment in favor of plaintiffs would have been sustainable, but whether we can say as a matter of law that the verdicts and judgment in favor of defendants are not. Said case of Simonsen v. L. J. Christopher Co., supra, states a rule of law, however, that is applicable here, as follows: "A person crossing a street in front of an approaching vehicle cannot close his eyes to threatening danger, relying upon the presumption that the other party will use reasonable care and prudence, and obey the traffic laws; but if there is nothing in the situation to warn him of impending danger he is not guilty of negligence in relying upon such assumption." "The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person." Swartz v. Feddershon, 92 Cal. App. 285, at page 290, 268 P. 430, 432. While a motorist may assume that others will exercise due care, he cannot for that reason omit any of the care which the law demands of him. Commonwealth Ins. Co. v. Riverside-P. C. Co., 69 Cal. App. 165, 168, 230 P. 995. We think it not open to question in our case that, if the speed and position of the taxicab were such that in the exercise of ordinary care the plaintiffs should have realized that an attempted crossing of the intersection would probably result in a collision, then the plaintiffs did not have the right to proceed across the intersection; and, if they did so under such circumstances, and their injuries proximately resulted therefrom, a finding of contributory negligence was proper. That was the effect of the instruction. Therein we find no error.

[9, 10] The remaining point raised by appellants is that the court erred in permitting counsel for defendant to ask a few questions of the witness Frank Price "more in the line of cross-examination." Permission to ask such questions was granted by the court without objection from plaintiffs. Defendants' counsel then inquired of the witness if he had not told counsel that at the time the taxicab entered the intersection he "felt pretty sure that the other car was not yet into the intersection, because it was far enough to your right, so that you could plainly see both headlights." Objection to such question was overruled and the witness answered in the affirmative. Upon being asked whether such was still his opinion, the witness answered in the affirmative and gave a reason therefor, but upon motion of plaintiffs the entire answer was stricken out. Defendants' counsel then asked the witness if he had not told counsel that it was his best recollection "that this other car coming down from the north, after you first saw it, went at least as far, if not farther, than the taxicab did before the collision occurred." Plaintiffs' objection being overruled, the witness answered in the affirmative. To a question then propounded, the witness stated he was still of the same opinion; but such answer was stricken out on motion of plaintiffs. To the question, "Isn't that still your best recollection?" the witness was permitted to answer, over plaintiffs' objection, "Yes, that is my best recollection." The objection of appellants is that by the

procedure followed the defendants were permitted improperly to impeach their own witness. The holdings of the court in such cases of People v. Creeks, 141 Cal. 529, 75 P. 101, and People v. Conkling, 111 Cal. 616, 624, 44 P. 314, are relied upon, in support of appellants' position, to the effect that a party is not permitted to impeach his own witness where the witness has not testified "against" such party but has merely failed to testify as expected. Such rule is not applicable here. Counsel for defendants made no effort to impeach said witness; he asked no impeaching question; nor did he indicate, by the asking of the usual questions as to time, place, and persons present, any intention to impeach the witness. The purpose of the questions was merely to refresh the recollection of the witness. The procedure followed was allowable. "Although a party may not, except under certain circumstances, impeach his own witness, yet when a witness fails to testify to matters previously within his recollection, or gives evidence in apparent variance with that formerly given, the party calling him may with propriety refresh his recollection by directing his attention to his former statements." 27 Cal. Jur. 86; People v. Duncan, 8 Cal. App. 186, 96 P. 414; People v. Deckert, 77 Cal. App. 146, 246 P. 157.

We find no reason to reverse the judgments. The judgments are therefore affirmed; and the appeals from the orders denying new trial are dismissed.

We concur: BARNARD, P. J.; MARKS, J.

126 Cal.App. 749

PEOPLE v. SCHNEIDER.

Cr. 2256.

District Court of Appeal, Second District, Division 1, California.

Oct. 25, 1932.

Hearing Denied by Supreme Court Nov. 10, 1932.

1. Criminal law ⇐1169(11).

In prosecution for issuing check without sufficient funds, prejudicial error resulting from admitting in evidence another check to prove "similar offense" *held* not cured by fact that in introducing another check for same purpose no error was committed (Pen. Code, § 476a).

2. False pretenses ⇐39.

In prosecution for issuing check without sufficient funds, burden was on people to show accused had neither funds nor credit with bank to meet check (Pen. Code, § 476a).

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

On petition for rehearing.

Petition denied.

For original opinion, see 14 P.(2d) 1018.

A. E. Schneider, in pro. per.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and William R. McKay, Deputy Dist. Atty., both of Los Angeles, for the People.

PER CURIAM.

[1] On petition for rehearing herein, notwithstanding the declaration by the bank officer that "on the day that these checks were written there was sufficient money in the bank to cover them," the attention of this court has been attracted to the statement of the bank account of defendant, from which it appears that, although at the time when defendant drew the first of the checks which were claimed to be the basis for the "similar offense" evidence, the balance then in defendant's said account was sufficient to pay said check—the amount owing to defendant was insufficient to meet the second check at the time when it was drawn, from which it is evident that at least as to one of the checks which was introduced in evidence against defendant no "similar offense" had been committed. The assumed fact that in the introduction in evidence of the second of such checks no error was committed would afford no excuse nor justification as to the first of such checks; nor would the damage done to defendant's substantial rights be thus repaired. Moreover, the evidence shows that defendant personally had not closed his account with the bank, but that at a time when defendant was in jail awaiting a hearing on the instant charge against him his account in the bank was closed by his wife.

[2] But another reason why a "similar offense" was not committed by defendant exists in the fact that, in the face of the statute of which the substance hereinbefore has been set forth, no evidence whatsoever was introduced by which the essential fact that defendant had no "credit with said bank" was presented to the jury. To the contrary, as tending to prove the opposite of that necessary element of the offense, to wit, that defendant did have "credit at the bank," by the testimony of one of the officers thereof the fact was disclosed that on a former occasion defendant had "an overdrawn balance of 51 cents." With reference to the necessity of establishing both that at the time the check was drawn defendant had neither "sufficient funds in (nor) credit with, said bank * * * for the payment of such check * * * in full upon its presentation," in 12 California

Jurisprudence, page 484, the rule is stated that "the burden is upon the People to show that the defendant had neither funds nor credit with the bank to meet the check, it being held that the rule as to negative allegations concerning matters peculiarly within the knowledge of the defendant has no application"; citing People v. Frey, 165 Cal. 140, 131 P. 127; People v. Owens, 57 Cal. App. 84, 206 P. 473.

The petition for rehearing is denied.

127 Cal.App. 149

THOMPSON v. BOYER.

Civ. 811.

District Court of Appeal, Fourth District, California.

Oct. 24, 1932.

Appeal and error ⇐801(1).

On motion to dismiss appeal, reviewing court should examine moving papers and appellant's opening brief and determine therefrom whether appeal is meritorious.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Evelyn Thompson against C. F. Boyer. Judgment for plaintiff, and defendant appeals. On motion to dismiss the appeal.

Motion denied.

Ray W. Hays, of Fresno, for appellant.

Ford & Johnson, of San Francisco, and Jesse E. Nichols, of Oakland (Fletcher A. Cutler, of San Francisco, of counsel), for respondent.

MARKS, J.

This is a motion to dismiss the appeal or affirm the judgment on the grounds that the appeal is taken for delay and that the questions presented for the decision of this court are so unsubstantial as not to require further argument. The motion is made under section 3 of rule V, Rules of the Supreme Court and District Courts of Appeal.

Respondent was injured in an automobile accident in Fresno county and recovered a substantial judgment. Appellant has presented two grounds upon which he urges a reversal: First, that the damages awarded are so excessive that they were obviously the result of sympathy for respondent and of passion and prejudice, and, second, that the trial court, at the request of respondent, gave certain prejudicially erroneous instructions which caused the jury to render the excessive verdict.

In the case of City of Los Angeles v. Los Angeles-Inyo Farms Co., 14 P.(2d) 339, 340, this court announced its understanding of the purpose and application of the rule in question as follows: "Until a different interpretation of the rule is given us, we have concluded that ordinarily we should examine and carefully consider all papers filed on the hearing of the motion and the appellants' opening brief. If, after so doing, in the ordinary case, we are satisfied that the appeal is without any merit, the motion should be granted; otherwise, it should be denied. The court may then put the case on the 'Ready for Submission Docket.' The following cases have been decided under this new rule: Dalton v. Los Angeles College of Chiropractic (Cal. App.) 13 P.(2d) 546; Thomas v. Caine (Cal. App.) 13 P.(2d) 548; Sumner v. Edmunds (Cal. App.) 13 P.(2d) 1046." See, also, Brown v. Gow (Cal. App.) 14 P.(2d) 322.

We have carefully examined the moving papers filed by respondent, including her authorities in support of her motion; the brief of appellant in reply to the motion; appellant's opening and respondent's reply briefs on the appeal. This has led us to the conclusion that a decision of the question of whether or not certain instructions given by the trial court at the request of respondent were erroneous, and prejudicially so, requires us to carefully review the entire record, including the reporter's transcript of the evidence. Therefore, the questions presented for our decision are not so unsubstantial as to justify us in dismissing the appeal.

Motion denied.

We concur: BARNARD, P. J.; JENNINGS, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

127 Cal.App. 133

HOOD et al. v. VERDUGO LUMBER CO. et al.

Civ. 981.

District Court of Appeal, Fourth District, California.

Oct. 21, 1932.

Rehearing Denied Nov. 14, 1932.

1. Appeal and error ⇐907(3).
Without reporter's transcript or bill of exceptions, appellate court must assume that evidence sustained finding.

2. Appeal and error ⇐544(1).
On appeal without reporter's transcript or bill of exceptions, only issue was whether findings were within issues and judgment supported by findings.

3. Interest ⇐19(1).
Interest on amount allowed as reasonable value of building materials furnished by materialmen could not be allowed before rendition of judgment.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by Van Lee Hood and another against the Verdugo Lumber Company, Emil F. Swanson, doing business under the fictitious firm name and style of the Eagle Rock Lumber Company, and another, in which defendants named filed a cross-complaint. From a judgment for cross-complainant, plaintiffs and cross-defendants appeal.

Reversed with directions.

Robert E. Austin and John N. Helmick, both of Los Angeles, for appellants.

Glen Behymer, of Los Angeles, for respondent Verdugo Lumber Co.

Edgar C. Smith, of Los Angeles, for respondent Swanson.

G. L. Boltinhouse, of Eagle Rock, for respondent Security First Nat. Bank of Los Angeles.

MORTON, Justice pro tem.

Plaintiffs brought this action for an injunction and accounting. Defendants all answered and cross-complaints were filed by Verdugo Lumber Company, a corporation, and Emil F. Swanson, doing business under the fictitious firm name and style of Eagle Rock Lumber Company. Judgment was for cross-complainants, and plaintiffs and cross-defendants appeal.

Plaintiffs executed and delivered to one Harold L. Shaw a promissory note for $5,000, together with a trust deed securing same, both dated November 3, 1928, for the purpose of enabling Shaw to purchase building materials of defendants Verdugo Lumber Company and Eagle Rock Lumber Company, with which to erect and construct for them certain improvements upon the real property described in the trust deed. The note and trust deed were placed in escrow with the Security First National Bank of Los Angeles, a national banking association, in accordance with escrow instructions which provided that if $4,200 was paid to the escrow holder by Van Lee Hood for the account of Verdugo Lumber Company and Eagle Rock Lumber Company within 35 days after the filing of notice of completion, then the note and trust deed were to be delivered to Van Lee Hood. If the money was not so paid, then the note and trust deed were to be delivered to the aforesaid lumber companies, together with an owner's offset statement dated January 5, 1921, by Van Lee Hood and Arnette McLean Hood. The credit of $4,200 was to be divided equally between the lumber companies, and the balance of the purchase price for materials used was to be paid in cash by Van Lee Hood and wife "as per building progresses." Certain discounts were to be allowed by the lumber companies if the materials used were paid for on or before 35 days after the filing of the notice of completion. An issue developed over the amount due for the building materials used and plaintiffs by this action asked an accounting. In their answer the defendant lumber companies alleged that Shaw was only the agent of and superintendent of construction for plaintiffs; the note and trust deed were executed and delivered by plaintiffs for the purpose of obtaining discounts on the price of the building materials if paid for within a specified time, and if not so paid for then the note and trust deed were to be used as security for the building materials furnished. In their cross-complaints it was alleged that plaintiffs failed to take advantage of the discount provisions and that the materials were furnished at the special instance and request of plaintiffs and that they promised to pay the reasonable value thereof. The trial court rendered judgment in favor of the lumber companies, and this appeal is on the judgment roll alone.

[1, 2] Without a reporter's transcript or bill of exceptions, we must assume that the evidence before the trial court sustained the findings. Siebenhaer v. Bank of California (Cal. App.) 290 P. 617; Brovelli v. Bianchi, 136 Cal. 612, 69 P. 416; 2 Cal. Jur. § 395, p. 689. Therefore the only question before us is whether the findings are within the issues and the judgment is supported by the findings. MacFarland v. Walker, 40 Cal. App. 508, 181 P. 248; Ivancovich v. Weilenman, 144 Cal. 757, 78 P. 268.

In findings IV, X, XIII, XIV, XV, and XVI the trial court distinctly finds upon the quan-

tum meruit issues questioned on this appeal by appellants. The issue of the agency of Harold L. Shaw was raised by the answers of defendant lumber companies and is covered in the court's finding XVII. These findings are conclusive on appeal and in our opinion support that portion of the judgment.

[3] Appellants contend that interest should not have been allowed on the amounts found due to the defendant lumber companies, as in their cross-complaint they sought the reasonable value of the building materials furnished. In findings X and XIV the court determines the reasonable value of the building materials furnished to be $1,852.39 as to the Verdugo Lumber Company and $3,938.39 as to Emil F. Swanson, doing business under the fictitious firm name and style of Eagle Rock Lumber Company. In view of these findings we feel interest could not be allowed prior to the rendition of judgment.

"It is undoubtedly true, as claimed by appellant, that when the action is based upon quantum meruit a lien claimant is limited in his recovery to the reasonable value of the work done or materials furnished, and, as that reasonable value requires determination, no interest can be charged until judgment is rendered." Hardwood Interior Co. v. Bull, 24 Cal. App. 129, at page 133, 140 P. 702, 703; Swinnerton v. Argonaut Land & Dev. Co., 112 Cal. 379, 44 P. 719; 27 Cal. Jur. § 45, p. 239.

We find no error in the record except the allowance of interest.

The judgment is reversed, with directions to the trial court to strike out the interest allowed prior to judgment and to enter judgment as before less this interest. Each party will pay his own costs on appeal.

We concur: BARNARD, P. J.; MARKS, J.

127 Cal.App. 195

PEOPLE v. McCOY.

Cr. 1683.

District Court of Appeal, First District, Division 2, California.

Oct. 27, 1932.

Rehearing Denied Nov. 10, 1932.

Hearing Denied by Supreme Court Nov. 25, 1932.

1. Criminal law ⇐1173(2).

Refusing alibi instruction *held* harmless, where jury were fully instructed on reasonable doubt, and there was abundant evidence showing guilt.

2. Criminal law ⇐1173(2).

Failure to instruct jury that possession of stolen property must be personal and exclusive *held* harmless, where defendant and wife admitted possession of property and claimed ownership.

3. Criminal law ⇐413(1).

Evidence that when defendant was pointed out as one who had committed robbery he denied implied accusation *held* inadmissible.

4. Criminal law ⇐407(1).

Evidence of defendant's silence when he was asked what he had to say about robbery, when complaining witness claimed articles found in his room, and when officer said missing medal was on table in defendant's room, *held* admissible.

5. Criminal law ⇐406(5).

Evidence that upon being told he was wanted for robbery of restaurant defendant stated that if he had anything to say it would be before jury, and that he did not know where restaurant was, *held* admissible, especially where there was evidence that he knew of restaurant.

6. Criminal law ⇐1186(4).

Admitting evidence that on occasion before trial defendant had been identified by two witnesses and promptly denied implied accusation that he was robber *held* harmless (Const. art. 6, § 4½).

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

William McCoy was convicted of robbery in the first degree, and he appeals.

Affirmed.

Alfred J. Hennessy and William F. Herron, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

SPENCE, J.

Defendant was tried and convicted of the crime of first degree robbery, and, from the judgment of conviction and the order denying his motion for a new trial, defendant has appealed.

The restaurant of the complaining witness was robbed on October 8, 1931. Two armed men entered and stated that it was a "stick up," and thereupon the persons present were forced into a lavatory and locked in. The robbers broke open an ice chest which had been kept under lock, and took therefrom a bag and a lady's purse containing money belonging to the owner of the restaurant. In addition the purse contained some other articles such as rouge, lipstick, a bobby pin, a compact, and a medal. The bag was stamped "Federal Reserve Bank of San Francisco C-1." Within a day or two after the robbery,

police entered the room of the defendant, and there found a loaded revolver similar to the one used in the robbery, and also the stolen articles other than the money which had been taken from the restaurant. The defendant was arrested and identified as one of the robbers by the proprietor, an employee and a patron of the restaurant. The evidence showed that one Bob Shiek, a friend of the defendant, was the other robber. Upon the trial, defendant and his wife sought to explain the possession of all of the articles found in defendant's room by claiming ownership thereof, and attempted to establish an alibi.

[1] Appellant contends that the trial court erred in refusing to give the following proposed instruction: "You are instructed that if upon the evidence before you there exists in your minds a reasonable doubt as to whether the defendant was present at the time of the alleged robbery, your verdict must be that he is not guilty." Appellant appears to treat the proposed instruction as a properly framed instruction upon the subject of alibi, and in support of his contention he cites and relies upon People v. Wilson, 100 Cal. App. 428, 280 P. 169; People v. Vasquez, 93 Cal. App. 448, 269 P. 549, 551; People v. Wong Loung, 159 Cal. 520, 114 P. 829. We are not prepared to concede that said proposed instruction is either a full or accurate instruction on that subject, but in any event we are of the opinion that the refusal to give an instruction on the subject of alibi would not constitute reversible error in the present case. The language of the cases cited by appellant indicates that while it may be reversible error to refuse an instruction on alibi under certain circumstances, such refusal will not require a reversal under all circumstances. See, also, People v. Gourdin, 108 Cal. App. 333, 291 P. 701; People v. Brooks, 79 Cal. App. 519, 250 P. 211.

In People v. Wong Loung, supra, the Supreme Court did not pass upon the question, saying, on page 534 of 159 Cal., 114 P. 829, 835: "As this case must be tried again because of errors heretofore discussed, we need not determine whether or not the court's failure to instruct on this subject of alibi is error requiring reversal of a case like the one at bar. Doubtless at the next trial the lower court will save all question on this matter by fully instructing the jury on the law respecting that defense."

In People v. Vasquez, supra, the cause was reversed because of the failure to give a proposed instruction on alibi, but the court points out that its conclusions are reached "in view of the circumstances of this particular case." On page 453 of 93 Cal. App., 269 P. 549, 551, it is said: "Especially as against the two defendants herein, Vasquez and Morales, the case as presented was so weak that it somewhat strains good judgment to declare that it was satisfactory in its sufficiency. As to defendant Melendez, while the case was much stronger, nevertheless the evidence was not of a character greatly to be desired either in quantity or quality."

The decision in the Vasquez Case was based largely upon People v. Visconti, 31 Cal. App. 169, 160 P. 410, in which case the assault occurred when "there was some light in the house—perhaps a lantern," but the complaining witness was not sure about that. She identified the defendant, but on the other hand defendant and two other witnesses gave testimony showing that he was some distance away when the crime was committed. In denying a hearing, the Supreme Court said, on page 172 of 31 Cal. App., 160 P. 411:

"In denying the application we deem it proper to say that we are not to be understood as intimating that the refusal to give such an instruction as was refused in this case would, in all cases, be deemed by us sufficient cause for reversal. Especially is this true in view of the provisions of section 4½, art. 6 of the Constitution.

"In denying the application for hearing in this court we assume that the District Court of Appeal concluded, in view of the circumstances of this particular case as shown by the record, that the refusal of the trial court to permit the requested instruction operated substantially to the prejudice of the defendant."

In People v. Wilson, supra, a reversal was had upon the authority of the two cases last mentioned. The court there pointed out that, "although on the trial of the action defendant was identified by the sole victim in each of the robberies as the person who committed the crime, by the testimony of each of several apparently reputable witnesses, it was made to appear that, at the time when such robbery was committed, defendant could not have been present thereat."

As above stated, we are of the opinion that the error, if any, in refusing the above-quoted proposed instruction in the present case does not require a reversal. The jury was fully and fairly instructed on reasonable doubt, and the proposed instruction appears to be no more than a slight amplification of that doctrine. In any event, even if the instruction had fully and accurately embodied the law relating to alibi, we do not believe that the failure to give would be sufficient ground for a reversal of the judgment. Here the appellant was positively identified by three witnesses to the robbery. His alibi rested solely upon his own testimony and that of his wife. An examination of the entire cause, including the evidence,

leads to the conclusion that there was abundant evidence satisfactorily showing the guilt of the appellant, and that the error, if any, in refusing said instruction has not resulted in a miscarriage of justice.

[2] Appellant further contends that the trial court erroneously charged the jury on the subject of possession of stolen property. Under this heading appellant complains that the instruction did not require that the possession be "personal and exclusive." He calls attention to the fact that the property was found on the premises occupied by appellant and his wife, and states: "This was not an exclusive possession of the defendant and was therefore no evidence of his guilt." It may be conceded that it would be error under certain circumstances to fail to instruct a jury that the possession of stolen property by the accused must be personal and exclusive. Cases do arise where the stolen property is found in a place open to many persons, including the accused, or on premises occupied jointly by the accused and persons other than his wife. In such cases possession by the accused may not be inferred solely from the fact that the accused had access to the stolen property. But here appellant and his wife admitted their possession of the property, denied that it was stolen, and each claimed ownership of some of the articles. Under these circumstances, failure of the trial court to instruct the jury that the possession must be personal and exclusive did not constitute prejudicial error.

[3-5] Appellant further contends that the trial court erred in admitting certain evidence in the nature of accusatory statements made by the complaining witness and Officer Meyer in the presence of appellant. The complaining witness testified that she and her employee went to the hall of justice and there pointed to the appellant and said: "This is the man." Whereupon appellant shook his head and replied: "Not me lady." Officer Meyer testified that he had conversations with appellant. In appellant's room at the time of the arrest the officer said to the appellant: "You are wanted for the robbery of a restaurant at 23rd and Bryant Streets. What have you to say about it?" Appellant replied: "If I have anything to say it will be before a jury. I do not even know where the place is at." The officer further testified, that at the hall of justice: "I asked him what he had to say about a robbery of the restaurant at 23rd and Bryant and he would not answer my question." There was further testimony regarding a conversation at the hall of justice between the complaining witness and the officers in the presence of appellant. At that conversation the complaining witness identified the articles recovered from appellant's room, claimed them as her own, and said that the little medal was missing. One of the officers said: "If you go to his room you will find that little medal on a table in that room." To these statements appellant said nothing. The complaining witness then accompanied the officers to appellant's room and found the medal on the table.

The rules regarding the admissibility of accusatory statements made in the presence of the accused are considered in People v. Teshara, 134 Cal. 542, 66 P. 798, and People v. Ayhens, 16 Cal. App. 618, 117 P. 789, 791. It is there pointed out that: "It is not the accusation, but the conduct of the accused, that is evidence in such cases, and that the only reason for admitting the accusation is to explain the conduct." Such conduct may consist of statements of the accused in reply or silence on the part of the accused in the face of statements indicating guilt. In other words, if it may be fairly said that the conduct of the accused is not the conduct of an innocent man under the circumstances, then the evidence is admissible.

Under the foregoing rules, evidence was inadmissible to show that when appellant was pointed out as "the man," he denied the implied accusation. His prompt, full, and unequivocal denial negatived any admission on the part of appellant by his conduct. On the other hand, evidence of the silence of appellant when he was asked what he had to say about the robbery, evidence of his silence when the complaining witness claimed the articles found in his room, and when the officer said that the missing medal was on the table in appellant's room, were properly admitted. Furthermore, we are of the opinion that evidence was admissible to show that, upon being told at his room that he was wanted for the robbery of the restaurant in question, he said no more than "If I have anything to say it will be before a jury. I do not even know where the place is at." This is more particularly true because there was evidence to show that he did know of the restaurant and had visited it prior to the robbery.

[6] We have said that evidence of the incident when appellant was identified and made his denial was inadmissible. It should have been stricken out on motion, but no such motion was made. In fact it is doubtful whether timely objection was made to all of the evidence concerning that incident. But assuming that timely objection had been made, and that a motion to strike had followed, we are nevertheless of the opinion that adverse rulings on the objection and motion would not have been prejudicial to appellant. The so-called accusatory statement in that instance consisted only of an identification of appellant "as the man," and he promptly denied that he was. The complaining witness who related that incident upon the trial

had also testified under oath upon the trial that appellant was "the man," and he was further identified by the testimony of one of the employees and one of the patrons. It follows that the admission of the evidence showing that on an occasion prior to the trial appellant had been identified by two of said witnesses and promptly denied the implied accusation was entirely harmless.

The record discloses that the alleged errors complained of are entirely insufficient to warrant a reversal in the light of the provision of section 4½ of article 6 of the Constitution.

The judgment and order denying a new trial are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

127 Cal.App. 153

CROXALL v. BROADWAY DEPARTMENT STORE, Inc., et al.

Civ. 6882.

District Court of Appeal, Second District, Division 2, California.

Oct. 25, 1932.

Hearing Denied by Supreme Court Dec. 23, 1932.

1. Automobiles ⇐220(7).

City ordinance *held* not to prohibit pedestrians from going from safety zone directly to nearest curb, though required to use ordinary care.

The ordinance prohibited pedestrians from standing or walking in roadway outside safety zone or crosswalk, if interfering with traffic, and from crossing roadway other than at right angles to curb or by shortest route to opposite curb, and authorized drivers of vehicles, overtaking street cars stopping to receive or discharge passengers where traffic is controlled by officer or signal, to pass car at not over 10 miles an hour, with due caution for pedestrians' safety.

2. Automobiles ⇐245(76).

Pedestrian's contributory negligence in starting from safety zone to nearest curb in front of automobile about 100 feet away *held* for jury.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by Franceska Croxall against the Broadway Department Store, Inc., and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

George L. Greer, of Los Angeles, for appellants.

Clyde C. Shoemaker, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

On August 12, 1927, at about 6 o'clock in the evening the plaintiff alighted from an eastbound street car on the west side of Seventh and Spring streets, in Los Angeles. At the time she started to alight she saw a truck just east of Broadway. She stepped off the car into a safety zone plainly marked with paint and large metal traffic buttons, which zone was 6 feet wide and 102 feet long, extending westerly along the street car track from just west of the pedestrian crosswalk connecting the west sidewalk of Spring street. From the safety zone to the sidewalk it was 15 feet, 8 inches. As the plaintiff started for the sidewalk she glanced over her shoulder and saw the truck at about the alley between the two thoroughfares or about 100 feet away. As she testified "she thought" she "had plenty of time to make the curb in safety." However, the truck, which was traveling about 30 miles an hour in the opinion of a witness just before the brakes were applied, and which after they were applied left skid marks about 25 or 35 feet long and brushed the loose material away from another 4 or 5 feet was unable to stop, but ran into and injured her. The corner is one of the busy corners in Los Angeles, particularly at 6 o'clock in the evening and the traffic is controlled by signals. When the truck was about opposite the westerly end of the safety zone the east and west signals changed from "Go" to "Stop." This is an appeal from the judgment entered upon the verdict of the jury in favor of the plaintiff.

The sole question presented is indicated by the affirmation of the appellants that "plaintiff was guilty of negligence directly contributing to her injury." The argument indulged in support of this position is founded upon the twofold contention that respondent was not only violating an ordinance as she crossed from the safety zone to the curb, but also neglectful of her own safety in attempting to pass in front of the approaching truck. The ordinance referred to is contained in section 4 of article II and section 10 of article III of the traffic ordinance of Los Angeles. They read as follows:

"Article II, Sec. 4. Obedience to Traffic Signs: It shall be unlawful for any person to disobey the instruction of any mechanical traffic signal, lettered traffic sign, or paint marks placed upon the surface of the roadway in accordance with the provisions of this ordinance, or any barrier or sign erected by any of the public departments or public utilities of the City of Los Angeles, provided the

form of such barrier has been approved by the Board of Police Commissioners."

"Article III, Sec. 10. Use of Roadways: It shall be unlawful for any person to stand or walk in the roadway other than in a safety zone or in a cross-walk, if such action interferes with the lawful movement of traffic; provided that no pedestrian shall cross a roadway other than by a route at right angles to the curb, or by the shortest route to the opposite curb, and provided, further, that in the Central Traffic District no pedestrian shall cross a roadway other than by a crosswalk."

The respondent directs our attention to the definition of a roadway as contained in the ordinance as follows: "That portion of a street between the regularly established curb lines," and also the following definition of a crosswalk: "That portion of the roadway included within the prolongation of sidewalk lines at street intersections and such other places as may be designated by boundary lines upon the surface of the roadway." Our notice is also directed to subdivision b of section 35 of article V, which reads as follows: "The driver of a vehicle overtaking any railway, interurban or street car stopped or about to stop for the purpose of receiving or discharging any passenger, shall bring such vehicle to a full stop at least ten feet in the rear of such street car and remain stationary until any such passenger has boarded such car or reached a place of safety, except that where traffic is controlled by an officer or a traffic stop-and-go signal, a vehicle need not be brought to a full stop before passing any such railway, interurban or street car, but may proceed past such car at a speed not greater than is reasonable or proper and in no event greater than ten miles an hour, and with due caution for the safety of pedestrians."

[1, 2] It is argued by respondent that the ordinance does not require one in a safety zone to travel its length and into the crosswalk, but that, inasmuch as he is not crossing the roadway, he may go from the safety zone directly to the nearest curb, and that such right is clearly recognized in that portion of the last-quoted section which says that the driver of the motor vehicle may "proceed past such car at a speed not greater than is reasonable or proper, and in no event greater than ten (10) miles an hour, and with due caution for the safety of pedestrians." In this contention the respondent must be upheld. In the first place the pedestrian crossing from the safety zone to the curb does not come within the strict letter of the ordinance relating to those who are crossing the roadway from curb to curb. In the second place it would seem to have been the legislative intent to exclude them from being so included by making provision that the drivers of motor vehicles should use care not to endanger them in the use of the strip between the safety zone and the curb. This does not mean that the pedestrian must not use ordinary care for his own safety, but that, in the exercise thereof, he is not excluded from the same right to use the strip as is enjoyed by the drivers of motor vehicles. Therefore, the only question remaining is whether, as a matter of law, it can be said that respondent was guilty of contributory negligence in starting to cross the space in front of an automobile 100 feet away or thereabouts. We have no hesitancy in declaring that such a question was for the jury. The case of Morgan v. Los Angeles R. & G. Corp., 105 Cal. App. 224, 287 P. 152, together with the authorities there cited concludes the argument in this particular

Judgment affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, Justice pro tem.

HOCKETT v. PACIFIC STATES AUXILIARY CORPORATION et al. *

Civ. 8649.

District Court of Appeal, First District, Division 2, California.

Oct. 25, 1932.

Hearing Granted by Supreme Court Dec. 23, 1932.

1. Bills and notes ⇨338, 452(1).
Mortgages ⇨415(1).

Payee of note is not holder in due course, and signer may plead nonexecution of note and trust deed securing it (Civ. Code, § 3097).

2. Bills and notes ⇨452(1).
Mortgages ⇨415(1).

Note and trust deed, forcibly taken from signer and falsely certified as acknowledged, did not constitute valid contract in payee's hands (Civ. Code, §§ 3096, 3097, 3266; Pen. Code, §§ 211, 470).

Civ. Code, § 3096, which is confined to incompleted instruments, while section 3097 is addressed to completed instruments, provides that incomplete, undelivered instrument, completed and negotiated without authority, is not valid contract in hands of any holder as against any person whose signature was placed thereon before delivery, and holder is defined by section 3266 as payee or indorsee.

3. Estoppel ⇨72.

Rule that, where one of two innocent persons must suffer by another's act, he whose negligence caused it must suffer, *held* inappli-

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 23 P.2d 512.

cable to signer of note and trust deed forcibly seized and falsely certified as acknowledged (Civ. Code, § 3543; Pen. Code, §§ 211, 470).

4. Contracts ⊂⊃34.

Execution of instrument, intended to be completed obligation, means to sign, seal, acknowledge, and deliver it.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Alice E. Hockett against the Pacific States Auxiliary Corporation, the Pacific States Savings & Loan Company, and others. From a judgment for defendant Loan Company, plaintiff appeals.

Reversed with directions.

C. F. Culver, of Los Angeles, for appellant.

Earl L. Banta, of Los Angeles, for respondents.

STURTEVANT, J.

The plaintiff commenced an action to cancel a promissory note and trust deed in the hands of Pacific States Savings & Loan Company. That company answered and also filed a cross-complaint in which it prayed judgment for the amount due on the note and that the trust deed was valid. The plaintiff answered the cross-complaint, and a trial was had before the court sitting without a jury. The court made findings in favor of the Pacific States Savings & Loan Company, and from the judgment entered thereon the plaintiff has appealed and has brought up a bill of exceptions.

The uncontroverted facts are that the plaintiff is the widow of William C. Hockett, deceased. The plaintiff and her deceased husband were the owners in joint tenancy of a part of lots 2 and 3 in block 7, town of Norwalk, in Los Angeles county. Willis E. Hockett is a stepgrandson. Prior to May 15, 1928, Willis E. Hockett presented to the plaintiff the note and trust deed, and stated to her that the effect of the papers was to transfer her existing indebtedness from the holder thereof to the Pacific States Savings & Loan Company. Relying on that statement, the plaintiff signed the note and signed the trust deed, and directed Willis E. Hockett to go to George R. Mayland, who would attend to taking her acknowledgment. Later Willis E. Hockett and Mr. Mayland came to her residence. Mr. Mayland informed her of the nature of the transaction, which was the creation of a new debt. The plaintiff refused to acknowledge the trust deed, and Mr. Mayland handed her the papers and left the house. After he left the house, Willis E. Hockett snatched the papers from his grandmother and took them with him. She did not know the name of the payee named in the note, but notified Mr. Mayland of the transaction. He undertook to inform her as to what was done with the papers. The land above mentioned is registered under the Torrens Land Title Act (St. 1915, p. 1932). Mr. Mayland called on the registrar and asked to be advised if said papers were presented for recordation. After the papers left the hands of the plaintiff, on the same day, May 15, 1928, Martha A. Hodges, as notary public, attached to the trust deed her certificate to the effect that on that date "personally appeared Alice E. Hockett and Willis E. Hockett" and acknowledged the trust deed. On May 16, 1928, an escrow was opened with Security Title & Guaranty Company. It was signed "Alice E. Hockett by son, Willis E. Hockett." Her signature is not in any way connected with that escrow. No written authority from the grandmother was offered. She testified that she never authorized the opening of any escrow; but, after the escrow was opened, the note and trust deed were delivered to the escrow holder, and the Pacific States Savings & Loan Company paid into the escrow $1,201.89. Thereafter those moneys were paid out, but this plaintiff testified that none of the moneys were paid to her nor on her order. The payments are evidenced by writings, but only one purported to contain her signature, and that one was an indorsement. The plaintiff testified that the indorsement was a forgery, and that she never signed the document. She also testified that she never at any time acknowledged her signature to the trust deed. No payments on the promissory note were made by the plaintiff, and she did not know that the Pacific States Savings & Loan Company held the note until the payment of interest falling due October 1, 1928, was demanded. The note recites that it "is secured by a deed of trust of even date herewith." The deed recites that it is executed to secure an indebtedness "according to the terms of a certain promissory note of even date herewith." There was no evidence that a relation of confidence existed between the grandmother and grandson. On the other hand, the evidence would indicate to the contrary, as she did not even know his residence. After Mr. Mayland informed the plaintiff as to the nature of the documents and handed them back to her, any employment or agency of Willis E. Hockett ceased, because there is no evidence whatever showing any continuance thereof. When the note and trust deed were delivered to the Pacific States Savings & Loan Company, that company had no notice of any infirmity therein or of any of the irregularities above mentioned.

[1-4] The plaintiff attacks many of the findings as not sustained by the evidence.

In this connection she makes the claim that there was no delivery of the note by her, that she received no consideration, and that the note and deed of trust were taken from her by duress. The defendant replies that it is a holder in due course and that a delivery is presumed. Civ. Code, § 3097. To that reply there are several answers. It has never been held in California that a payee is a holder in due course. There is the best of authority to the contrary. See Jones v. Waring & Gillow [1926] A. C. 670, 68 A. L. R. 944, and note. If defendant was not a holder in due course, the plaintiff was entitled to plead nonexecution of the instruments. 8 C. J. 717. Professor Brennan (Negotiable Instrument Law, pp. 123, 124) shows the other line of authority and the reasoning thereof. Again, section 3097 of the Civil Code is addressed to completed instruments, whereas section 3096 is expressly confined to incompleted instruments. It is worded as follows: "Incomplete instrument not delivered. Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery." It applies to "any holder," but a holder is defined to be "the payee or endorsee." Civ. Code, § 3266. It is therefore clear that the latter section controls this case. Linick v. A. J. Nutting & Co., 140 App. Div. 265, 125 N. Y. S. 93; American Express Co. v. City Nat. Bank (Tex. Civ. App.) 7 S.W.(2d) 886. In further reply, the defendant states that the trust deed was valid, even though it was not acknowledged, but the question is, Was it complete or incomplete? The note and deed are to be taken together. That they were incomplete as long as the trust deed was not acknowledged is perfectly clear. In ordinary business, no one would claim to the contrary. An acknowledged deed was wanted by the payee, and Willis E. Hockett went to the grandmother for her acknowledgment. The result of that conversation was that she refused to acknowledge the deed and took the papers into her possession. She never delivered them. They were taken from her by an act of robbery. Pen. Code, § 211. After they were so taken from her, a false certificate of acknowledgment was attached without her consent. That act was forgery. Pen. Code, § 470; Walsh v. Hunt, 120 Cal. 46, 50, 52 P. 115, 39 L. R. A. 697; Matter of Jackson's Estate, 127 Misc. 187, 215 N. Y. S. 230, 234. To avoid the contentions of the plaintiff, the defendant asserts that she is estopped from making such claims. In that connection it quotes Civil Code § 3543: "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." That rule has no application in this case. The plaintiff was not negligent merely because she held the papers in her hand. She was not bound to assume that they would be forcibly taken from her in an act of robbery. She was not negligent because she did not call the police after Willis E. Hockett left her house. She was not bound to assume that he would commit or permit forgery. Walsh v. Hunt, 120 Cal. 46, 52, 52 P. 115, 39 L. R. A. 697; 8 C. J. 731–736. The trial court made several findings that the plaintiff "executed and delivered" the note and trust deed. The evidence is that she signed them but that she did nothing else. When, as here, there is no evidence that anything less than a completed obligation was intended, then the rule is that an execution of an instrument means to sign, seal, acknowledge, and deliver it. 8 C. J. 278; Le Mesnager v. Hamilton, 101 Cal. 532, 35 P. 1054, 40 Am. St. Rep. 81. As the plaintiff did not acknowledge the deed and did not deliver the note or deed, the findings mentioned are not sustained by the evidence.

The judgment is reversed, and the trial court is directed to modify its findings and conclusions of law in accordance with this decision and to enter a judgment in favor of the plaintiff and against the defendant.

We concur: NOURSE, P. J.; SPENCE, J.

127 Cal.App. 30

PEOPLE v. GLENN-COLUSA IRR. DIST.

Civ. 4753.

District Court of Appeal, Third District, California.

Oct. 17, 1932.

Rehearing Denied Nov. 16, 1932.

Hearing Denied by Supreme Court Dec. 16, 1932.

1. Fish ⇐12.

Injunction against irrigation district's diversion of water from river until it constructed fish screen to prevent destruction of fish *held* proper remedy, even if mandamus was also available (Civ. Code, §§ 3479, 3480; Pen. Code, § 370).

2. Evidence ⇐10(5).

It is common knowledge that salmon, trout, shad, bass, and other fish are present in Sacramento river, and that river and its tributaries afford breeding ground for them.

3. Fish ⇐1.

Title to fish within state waters is vested in state in trust for people.

4. Nuisance ⇐65.

That irrigation district was formed under state laws and was by state and federal laws granted right to divert waters of river for irrigation purposes *held* not to establish

that its failure to maintain fish screen was not public nuisance (Civ. Code, §§ 3479, 3480; Pen. Code, § 370).

5. Constitutional law ⇐80(2).
Fish ⇐9.

Statute providing for fish screens, and giving game commission authority to take evidence and conduct hearings, and prescribing penalties, *held* not unconstitutional, as attempting to give commission judicial powers (Pen. Code, § 629; Const. art. 6, § 1).

6. Statutes ⇐110½(2).

Title to amendatory act relative to fish screens *held* sufficient (St. 1915, p. 696, amending Pen. Code, § 629).

> The title of St. 1915, p. 696, recited that it was "an act to amend section 629 of the Penal Code, relative to the placing and maintaining of screens over the inlets of pipes, flumes, ditches, canals and mill races, taking water from any river, creek, stream or lake in which fish have been placed or may exist."

7. Statutes ⇐105(1).

Constitutional provision requiring subject of action to be expressed in title must be liberally construed.

8. Statutes ⇐109.

Reasonably intelligent reference to subject of legislation is sufficient to meet constitutional requirement that subject of act be expressed in title.

9. Fish ⇐12.

Injunction action against irrigation district's diversion of water from river until it constructed fish screen *held* maintainable by people without proof district possessed financial ability to install screen (Civ. Code, §§ 3479, 3480; Pen. Code, § 370).

10. Fish ⇐12.

That federal government granted authority for irrigation district's diversion of water of river *held* not to deprive state courts of jurisdiction to enjoin diversion until district constructed fish screen (Civ. Code, §§ 3479, 3480; Pen. Code, § 370).

11. Nuisance ⇐65.

Independent of statute, facts disclosed that irrigation district's diversion of water of river without maintenance of fish screen resulting in destruction of fish constituted nuisance at common law, hence subject to abatement (Code Civ. Proc. § 731).

12. Fish ⇐12.

Attorney General *held* authorized to sue to enjoin diversion of water of river by irrigation district until it constructed fish screen (Civ. Code, §§ 3479, 3480; Pen. Code, § 370).

Appeal from Superior Court, Glenn County; H. S. Gans, Judge.

Action by the People against the Glenn-Colusa Irrigation District. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hankins & Hankins, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Eugene D. Bennett, and Ralph W. Scott, both of San Francisco, for the People.

JAMISON, Justice pro tem., delivered the opinion of the court.

This action was brought to enjoin defendant from diverting water from the Sacramento river, through its irrigation canal, until such time as a fish screen is constructed and maintained, by defendant, so as to prevent the destruction of fish in consequence of such diversion.

Defendant demurred to the complaint upon the grounds that the court had no jurisdiction of the person of the defendant, nor of the subject of the action, that it did not state facts sufficient to constitute a cause of action, and that several causes have been improperly united, also for nonjoinder of parties defendant and for uncertainty.

The demurrer was overruled, and defendant answered, and, a trial of said action being had, judgment was rendered for plaintiff, and from this judgment defendant appealed.

The facts are substantially as follows: Appellant was organized in 1920 as an irrigation district. Upon its organization it took over the properties and water rights of the Sacramento West Side Canal Company and has ever since then, and is now furnishing water to lands within the boundaries of the district.

The amount of water diverted by appellant varies from 1,600 to 1,800 second feet, and is approximately one-half of the flow of the Sacramento river, and irrigates about 100,000 acres of land. Appellant diverts this water from the said river by means of a main canal located on the west side of the river. This diversion is accomplished by means of a battery of pumps located near the head of the canal and a short distance from the river. These pumps lift the water from the river to said canal, although during certain periods of high water diversion occurs by gravity. The lift varies according to the stage of the water in the river from a minimum to ten feet. Through this main canal the water is conveyed across Stony creek, and thence to the land in said district through the medium of subcanals, laterals, and ditches. From the fields all water, if any remains, drains into a main ditch known as reclamation district No. 2047, which in turn

empties into the Sacramento river at Knights Landing.

During the irrigation season a gravel dam is thrown across Stony creek, near its point of confluence with the Sacramento river, to prevent the diverted water returning to the river; the said dam being removed at the close of the irrigation season.

According to the evidence produced by plaintiff, large numbers of fish have been and will be drawn through the said pumps and destroyed. In 1929, from April 18th to August 20th, a series of seining operations were conducted below the pumps by the fish and game commission, and the result of these operations shows that during this period a total of 5,575 fish were caught in the nets, and of this number 4,502 were food and game fish, and of which 67 per cent. were dead or damaged, among which were a large number of salmon, bass, and shad fingerlings. This result was obtained from 17 per cent. of the cross channel area that was seined. Respondent claims that based upon this percentage, at least 50,000 fish were sucked through these pumps during the time said seining was done.

Following suggestions and requests from the fish and game commission that appellant install and maintain a fish screen above its said pumps in said canal, appellant signified its willingness to do so provided the commission would make an order therefor as provided by section 629 of the Penal Code. Thereupon, under date of June 26, 1920, the board of fish and game commissioners made an order to install and maintain a fish screen above the said pumping plant. A fish screen was constructed and placed above the said pumps by appellant, but same was never accepted or approved by the commission, and about one year thereafter it was washed away and destroyed, and since then no fish screen has been maintained in said canal.

[1] Appellant contends that injunction is not the proper remedy in this case; that the remedy given by law under the circumstances disclosed by the facts in this action is by a proceeding in mandamus against the district and the directors thereof to compel it and them to install and maintain a fish screen in said canal.

Assuming that a proceeding by mandamus would have attained the same result as that which was attained by this proceeding by injunction, still it does not follow that respondent must have had recourse to that proceeding alone, if the law authorized this proceeding by injunction.

Section 3479 of the Civil Code defines a nuisance as follows: "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

And section 3480 of said Code provides: "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

In the case of People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183, an injunction was upheld that prohibited the dumping into the Truckee river sawmill refuse that was destructive to fish. In the course of that opinion the court said: "Anything which is 'an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or any considerable number of persons,' is a public nuisance. Pen. Code, § 370; Civ. Code, §§ 3479, 3480. The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state (Ex parte Maier, 103 Cal. 476, 483, 37 P. 402 [42 Am. St. Rep. 129]), as in England it was in the king; and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law, and preserved and expressly provided for by the statutes of this and every other state of the Union. The complaint shows that by the repeated and continuing acts of defendant, this public property right is being and will continue to be greatly interfered with and impaired; and that such acts constitute a nuisance, both under our statute and at common law, is not open to serious question. People v. Elk River, etc., Co., 107 Cal. 219, 40 P. 486 [48 Am. St. Rep. 121])."

Injunctions to prevent the destruction of fish have also been upheld in the following cases: People v. Monterey Fish Products Co., 195 Cal. 548, 234 P. 398, 38 A. L. R. 1186; People v. Stafford Packing Co., 193 Cal. 719, 227 P. 485, 490; People v. K. Hovden Co., (Cal. Sup.) 8 P.(2d) 481.

[2] It appears from the evidence, and in fact is a matter of common knowledge, that salmon, trout, shad, bass, and other fish are present and exist in the Sacramento river, and that this river and its tributaries afford breeding ground for them. These fish constitute an important asset to the people

of this state, for commercial and food purposes, and have been deemed so important, both by the federal and state authorities, that by their united efforts, through their fish hatcheries, 124,000,000 salmon fish fry have been planted in this river since the year 1916. Yet, in spite of these efforts, there has been a steady decline in the number of salmon in this river. To such an extent has this decrease reached, that at present the run of salmon in said river amounts to only about one-fifth of what it was twenty years ago. One of the factors contributing to this decline, according to respondent's witnesses, who made a study of these matters, is the diversion of the waters of said river through irrigation canals and ditches that are not provided with means of preventing said fish from entering therein.

The fish that escape injury and destruction while being sucked through appellant's pumps have a long and precarious journey ahead of them before they can hope to reach the river again. The evidence of experts is that the salmon, bass, and shad fingerlings start down the river as soon as they are hatched or released from the hatcheries; that the salmon fingerlings cannot exist when the water reaches a higher temperature than about eighty degrees, and that the water in the irrigated fields, through which the salmon fingerlings that are carried into said canal must pass, is warmer than this and consequently these salmon fingerlings must perish, while many of the other fish will become stranded in passing through these irrigated fields and will die.

[3] The title to and property in the fish within the waters of the state are vested in the state of California, and held by it in trust for the people of the state. Geer v. Connecticut, 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793; People v. Monterey Fish Products Co., supra; People v. Stafford Packing Co., supra. In this last-named case, the court said: "Having determined that the acts complained of constituted a wrongful invasion of those property rights, and having further determined that the threatened continuance thereof would work irreparable injury for which there was no adequate remedy at law, there was a complete foundation for equitable interposition and equitable relief."

[4] Appellant contends that, as the irrigation district was formed under an act of the Legislature of this state, and was, by the laws of this state and by an act of Congress granted the right to divert water from the Sacramento river for the irrigation of the land lying within the district, by such diversion it was not guilty of creating a public nuisance, and in support of this contention cites section 3482 of the Civil Code, which is as follows: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

We find nothing either in the said act of Congress or in the statutes of this state which gives to appellant express authority to divert the waters of said river, regardless of its duty in so doing to protect the fish therein. The general rule upon this subject is thus expressed in Corpus Juris, volume 46, page 674: "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury."

In the case of Holyoke Water-Power Company v. Lyman, 15 Wall. (82 U. S.) 500, 513, 21 L. Ed. 133, the court held that the grant of the right to erect a dam, if made by the Legislature, was to be construed to be under the implied condition to keep open the fishways, unless such implication was excluded by an express provision exempting the grantees from such obligation.

[5] Appellant next contends that section 629 of the Penal Code is unconstitutional as being an attempt to give the fish and game commission judicial powers in violation of section 1, article 6 of the Constitution. The recent case of Globe Cotton Oil Mills v. Zellerbach, 200 Cal. 276, 252 P. 1038, 1039, appears to have settled this question adversely to this contention. In that case the court said: "This court is of the view, however, that, admitting that the fish and game commission cannot be granted any power which constitutionally belongs exclusively to the judicial department of the state government, the granting of power to hold hearings and determine facts incidental to the regulation of fish and game, and to the granting of permits to take and use fish, is valid as an administrative or regulatory power, and in no wise transgresses upon the exclusive functions of the judicial department." See, also, In re Potter, 164 Cal. 735, 130 P. 721.

[6-8] Appellant also claims that the title to the amendatory act of 1915 (Stats. 1915, p. 696), is insufficient. The title to this amendatory act is as follows: "An act to amend section six hundred twenty-nine of the Penal Code, relative to the placing and maintaining of screens over the inlets of pipes, flumes, ditches, canals and mill races, taking water from any river, creek, stream or lake in which fish have been placed or may exist."

It is well settled that the constitutional provision requiring the subject of the act to be expressed in the title must be liberally con-

strued, and that all that is required to be contained therein, in order to meet the constitutional requirement, is a reasonably intelligent reference to the subject to which the legislation of the act is to be addressed. It is not necessary that it should embrace an abstract or catalog of its contents. Estate of Wellings, 192 Cal. 506, 519, 221 P. 628; In re Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706; In re Weymann, 92 Cal. App. 646, 268 P. 971. The title to this amendment was sufficient.

[9] Appellant produced evidence to the effect that the assessed value of the land in its district was between four and five million dollars. There was evidence on the part of respondent that a screen that would prevent fish from being diverted from the river through said canal, and one that would be accepted and approved by the fish and game commission, would cost about $11,000. Appellant maintains that before this proceeding by this injunction can be sustained and enforced respondent must prove that the district possessed the financial ability to install the screen. The remedy sought in this proceeding is injunctive relief only, and in no wise mandatory. It merely enjoins the district from continuing a nuisance to the detriment of the people of this state, and points out how this nuisance can be prevented at a minimum cost to appellant.

[10] We see no merit in appellant's contention that, because its diversion of the waters of the Sacramento river was by grant from the federal government, the courts of this state have no jurisdiction of the present action. If this injunction interfered with the navigation of the river, the contention would be well taken; but there is no evidence that this injunction interferes with navigation in the slightest degree.

[11] Independent of the provisions of section 629 of the Penal Code the facts disclosed in this case constitute a nuisance at common law. (People v. Truckee Lumber Co., supra), and an action to restrain or abate said nuisance is authorized by section 731 of the Code of Civil Procedure.

[12] The Attorney General had authority to institute this action in the name of the people of this state. People v. Truckee Lumber Co., supra; 3 Cal. Jur. 566.

We are of the opinion that the complaint states a cause of action, that it is not subject to demurrer, and that the findings of the court are sustained by the evidence.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

127 Cal.App. 262

W. W. CHAPPELL, City Clerk of the City of Oakland, Petitioner, v. SUPERIOR COURT IN AND FOR THE COUNTY OF ALAMEDA, State of California, and the Honorable John J. Allen, Judge of said Court, Respondents.

Civ. 8829.

District Court of Appeal, First District, Division 2, California.

Oct. 31, 1932.

Application for writ of prohibition prayed to be directed to the Superior Court of Alameda County, John J. Allen, Judge, to restrain respondent Superior Court from entertaining, passing upon, hearing, trying, or deciding motions and proceedings based upon allegations and prayer of complaint of Rudolpf Wriedt et al., which said prayer of complaint prays that a peremptory writ of mandate issue commanding petitioner to accept the original and additional or amended petitions for recall of councilmen of the City of Oakland and to certify said petitions as sufficient and present said petitions to the council of the City of Oakland. Writ denied.

C. Stanley Wood, City Atty., Hilton J. Melby, Chief Deputy City Atty., both of Oakland, for petitioner.

PER CURIAM.

The petition for a writ of prohibition is denied. Such denial, however, should not be interpreted, as a ruling by this court upon the sufficiency of the petition for a writ of mandate filed in the Superior Court.

127 Cal.App. 136

CITY OF LOS ANGELES v. BLONDEAU et al.

Civ. 986.

District Court of Appeal, Fourth District, California.

Oct. 21, 1932.

1. Pleading ⇐53(2).

In action to recover amount paid by mistake, joinder of count for money had and received and count particularly pleading ultimate facts of case *held* proper.

2. Trial ⇐400(1).

Defendants could not complain because findings made did not follow copy of proposed findings served on them.

Defendants could not complain since trial judge may modify or change findings proposed or make new findings.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by the City of Los Angeles against Louis Blondeau and others. Judgment for plaintiff, and named defendant and a certain other defendant appeal.

Affirmed.

See, also (Cal. App.) 15 P.(2d) 554.

Dexter & Wendt, of Los Angeles, and Herbert Cutler Brown, of Hollywood, for appellants.

Erwin P. Werner, City Atty., and Sam H. Erwin, Deputy City Atty., both of Los Angeles, for respondent.

MARKS, J.

This is an appeal, on the judgment roll alone, from a judgment rendered in favor of respondent against appellants and R. H. Marshall, defendant, who has not appealed.

On November 28, 1928, findings of fact were made and an interlocutory judgment was rendered in a condemnation proceeding in Los Angeles. Louis Blondeau owned the fee to a parcel of the land sought to be condemned, and land from which it was to be severed, upon both of which the Security Trust & Savings Bank, now the Security-First National Bank, had a mortgage. The Louis K. Liggett Company had a lease on a portion of the property, as did the defendant R. H. Marshall. The Marshall lease, according to one of the briefs of appellants, had been assigned to Blondeau by an unrecorded assignment. The findings fixed the value of the property taken and the severance damage at $70,000. This was apportioned as follows: Blondeau, $14,000; Security Trust & Savings Bank, $50,000; Louis K. Liggett Company, $6,000. R. H. Marshall assigned any sum he might recover in the condemnation proceedings to Blondeau, who in turn assigned to the Security Trust & Savings Bank. By mistake the city of Los Angeles paid the $6,000 due the Louis K. Liggett Company under the judgment to Blondeau and the bank in addition to the amounts properly due them. Upon discovering the mistake the city paid the Louis K. Liggett Company $6,000 and demanded return of this sum from the defendants. They refused to repay the money and this suit was instituted to recover it.

[1] Respondent elected to employ two counts in its complaint in stating its cause of action. The first count was for money had and received, and the second particularly pleaded the ultimate facts of the case. Appellants complain of this manner of pleading, which has long been approved by the courts of California. 21 Cal. Jur. 64, § 39, and cases cited.

[2] In their answer appellants set forth a copy of a part of the proposed findings in the condemnation proceedings which were served upon them, wherein the Louis K. Liggett Company was given no damages and R. H. Marshall was awarded $6,000. These proposed findings were not signed by the trial judge, who modified them and gave the Louis K. Liggett Company the $6,000 and gave Marshall nothing. Appellants complain of this change, not because the evidence did not support the findings and judgment as finally made, but because the findings made did not follow the copy of the proposed findings served upon them. A trial judge can modify or change findings proposed by a party or make new findings of his own.

Appellants urge other errors upon which they rely for a reversal of the judgment. We have searched the record to ascertain whether or not any of them possess any more substantiality than the two mentioned. They do not. This appeal is without merit.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

127 Cal.App. 139

CITY OF LOS ANGELES v. BLONDEAU et al.

Civ. 985.

District Court of Appeal, Fourth District, California.

Oct. 21, 1932.

Eminent domain ⇐124.

Judgment in city's condemnation proceeding properly made award for leasehold interest, notwithstanding lease had expired before city actually took possession (St. 1903, p. 379, § 10, as amended by St. 1925, p. 242, § 4).

Under the circumstances, the owner of the fee was not entitled to the amount awarded to defendant tenants or any part thereof because defendants' lease had expired before city took actual possession of premises, since St. 1903, p. 379, § 10, as amended by St. 1925, p. 242, § 4, fixes date of issuance of summons as date for assessing damages, and court must follow statutory requirement.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by the City of Los Angeles against Louis Blondeau, R. H. Marshall, Security First National Bank and Louis K. Liggett Company. From a judgment following an order sustaining, without leave to amend, a

general and special demurrer of defendant Louis K. Liggett Company to a second amended cross-complaint of the three other defendants, the latter appeal.

Affirmed.

Dexter & Wendt, of Los Angeles, and Herbert Cutler Brown, of Hollywood, for appellants.

Gibson, Dunn & Crutcher, of Los Angeles (J. Stuart Neary, of Los Angeles, of counsel), for respondents.

MARKS, J.

This is an appeal from a judgment entered following an order sustaining, without leave to amend, a general and special demurrer of the Louis K. Liggett Company to a second amended cross-complaint. This is an appeal in the same action as that of the City of Los Angeles v. Blondeau et al. (Cal. App.) 15 P.(2d) 553, the opinion in which has this day been filed and in which the facts necessary to that appeal are set forth. They will not be repeated here.

The amended cross-complaint, in addition to the facts set forth in the opinion in the companion case, alleges that the Louis K. Liggett Company occupied the premises leased from Blondeau from the institution of the condemnation action on August 6, 1926, to the expiration of the term of its tenancy on January 31, 1930, and that its tenancy was not disturbed; that it suffered no actual damage or injury from the condemnation proceedings; and that it had no right in equity to receive and retain the $6,000 awarded to it in the condemnation proceedings and paid under the decree in that case. It is also alleged that the Louis K. Liggett Company paid Blondeau the $500 monthly rental specified in the lease for the full term. The cross-complainants sought the return of the $6,000 paid the Louis K. Liggett Company under the judgment in the condemnation proceedings, or its payment to the City of Los Angeles.

The condemnation proceedings were instituted by the city of Los Angeles under the provisions of the Street Opening Act of 1903 (Stats. 1903, p. 376, and amendments), and summons was issued on August 6, 1926. We are not informed when the case was set for trial. Section 10 of the act (as amended by St. 1925, p. 242, § 4) provided in part as follows: "For the purpose of assessing the compensation and damages, the right thereto shall be deemed to have accrued at the date of the issuance of summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed by the provisions of this act. * * * Findings: The referees, or court, or jury, as the case may be, shall find separately: First, the value of each parcel of property sought to be condemned, and all improvements thereon pertaining to the realty, and of each separate estate or interest therein."

The Legislature fixed a time when the taking of property for a public use is deemed to occur. It provided that the value of the property taken and the severance damage must be measured by the value at such time. These were questions for legislative determination, and the Legislature having acted, the courts must give force and effect to the law as enacted which governs proceedings under the Street Opening Act of 1903. City of Los Angeles v. Oliver, 102 Cal. App. 299, 283 P. 298; City of Pasadena v. Porter, 201 Cal. 381, 257 P. 526, 53 A. L. R. 679. As the Louis K. Liggett Company had a leasehold interest in the property at the time of the constructive taking for a public use, it was proper for the court to fix its damage for a disturbance of its leasehold interest. Under the language of the statute we fail to see how a considerable delay on the part of the city of Los Angeles in actually taking possession of the portion condemned can affect the rights of the parties. It is not disputed, nor can it be in this case, that both Blondeau and the Louis K. Liggett Company were awarded fair compensation for the property taken and their severance damages. Each possessed a separate interest in the condemned property and neither can claim any portion of the compensation awarded the other by a judgment which has become final, nor can one demand from the other any portion of the compensation awarded for the taking of such interest in the property condemned simply because the city of Los Angeles failed to take possession of the condemned property for some time after the date upon which damages were fixed.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

127 Cal.App. 231

WARREN v. WARREN.

Civ. 4576.

District Court of Appeal, Third District, California.

Oct. 28, 1932.

1. Divorce ⇐327.

In husband's divorce action against wife, evidence supported finding that wife, had not become bona fide resident of state in which she had obtained divorce.

2. Judgment ⇐818(1).

Full faith and credit clause does not apply where court pronouncing decree had no jurisdiction over defendant (Const. U. S., art. 4, § 1).

3. Divorce ⇐332.

Divorce decree, where court has no jurisdiction over defendant, has no effect over children not within court's jurisdiction.

4. Divorce ⇐327.

Full faith and credit clause does not apply where one goes from state of his residence to foreign state for sole purpose of obtaining divorce (Const. U. S. art. 4, § 1).

5. Divorce ⇐327.

Wife's residence in foreign state while domicile was in California did not give court of foreign state jurisdiction in divorce case over husband by substituted service.

6. Divorce ⇐332.

Court of foreign state not acquiring jurisdiction of defendant in divorce suit had no jurisdiction to award custody of minors residing in California to either parent.

7. Divorce ⇐303(1).

Court awarding divorce decree may change decree regarding custody of minor children to best serve their welfare.

8. Divorce ⇐124, 301.

Under evidence, court properly awarded husband decree of divorce, and custody of minor children.

Appeals from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Van Court Warren against E. Marjorie Warren, for a divorce. Judgment was rendered for plaintiff and defendant appeals, and from that portion of the judgment which permits defendant to have the custody of minor children during certain period of year, plaintiff appeals.

Affirmed.

Mitchell, Silberberg & Davis, of Los Angeles, for appellant.

Louis G. Campbell, John W. Maltman, and Alberta Belford, all of Los Angeles (Harold S. Morrison, of Glendale, of counsel), for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant appeals from the judgment of the superior court of Los Angeles county granting the plaintiff a divorce and awarding him the custody of two minor children. The plaintiff appeals from that portion of the judgment which permits the defendant to have the custody of said minor children for four weeks during the summer vacation period.

Two questions only are really presented upon this appeal for our consideration: First, the validity of divorce proceedings instituted by the defendant in the state of Nevada; second, the fitness of the defendant to have the custody and control of the two minor children, the issue of the marriage between plaintiff and defendant. The two minor children are at the present time named and aged as follows: Jean Marjorie Fay Warren, over the age of eleven years, and George Cameron Warren, over the age of eight years.

The record shows that the plaintiff and defendant had, for a number of years, been residents of the county of Los Angeles in the state of California; that the marital domicile had at all times been in the county of Los Angeles; that the defendant began a suit against the plaintiff to obtain a decree of divorce in the county of Los Angeles, and thereafter dismissed the action, went to Reno, filed a complaint praying for a divorce in the district court of the state of Nevada at Reno; that substituted service only was made of the summons in said action; that the plaintiff in this action never appeared therein; that the children of the marriage were not in the state of Nevada during the court proceedings there taken and had.

The findings of the trial court, relating to the action for divorce prosecuted by the defendant in the state of Nevada, are as follows:

"From the time of said marriage until the commencement of this action plaintiff was a resident of the City of Los Angeles, county of Los Angeles, State of California. Except for temporary visits to other places, and except during a separation of the parties for less than two months in the months of May and June, 1926, plaintiff and defendant resided together in said city of Los Angeles. The matrimonial domicile of the parties from the date of said marriage until their said separation on November 15, 1926, was in said city of Los Angeles. During said separation in May and June, 1926, both of said parties resided in said city of Los Angeles. On November 15, 1926, defendant instituted in this court an action for divorce against plaintiff.

In the complaint in such action she alleged her residence to be at Los Angeles, California. In said city she continued to live until June 22, 1927. On June 22, 1927, defendant dismissed her said action begun as aforesaid on November 15, 1926, and journeyed to the city of Reno, State of Nevada. To such city, and without the knowledge and against the will of plaintiff, defendant took with her the minor children of the parties. Shortly before such departure for Reno, defendant caused to be issued to her a United States passport for herself and said minor children to England and Austria. Her application for such passport was filed April 4, 1927. Therein under oath, defendant alleged her residence to be in said city of Los Angeles. Defendant remained in said city of Reno, except for trips made to San Francisco, or Los Angeles, and to New York, until about March 1, 1928. On or about said date she returned to the State of California. Defendant did not go to the State of Nevada and did not remain in the State of Nevada for the purpose of there establishing her domicile or for the purpose of making said State her place of residence, but only for the purpose of commencing an action in said State against the plaintiff for a divorce and securing a judgment therein. Defendant did not intend when she went to said State of Nevada, and has not since intended to remain in the State of Nevada except for the time necessary to procure such decree of divorce. Neither the domicile nor the legal residence of defendant has at any time in the year 1927 or in the year 1928 been in the State of Nevada. Defendant during all of the year 1927 and during the year 1928 until the trial of this action has been a legal resident of and a citizen of the county of Los Angeles, State of California. * * *

"On November 11, 1927, said defendant instituted against the plaintiff herein, in the Second Judicial District Court of the State of Nevada, in and for the county of Washoe, an action for divorce in said court numbered 25226. On the 28th day of February, 1928, was signed, and on the 12th day of March, 1928, was filed and entered in said court a judgment purporting to dissolve the bonds of matrimony between plaintiff and defendant, to grant to E. Marjorie Warren a decree of divorce, and to award to her the custody of said minor children of the parties. Said judgment is in the form and words of the exhibit attached to the answer of defendant herein.

"Neither upon the day when said action was instituted in said court in the State of Nevada, nor at any time thereafter were said minor children in the State of Nevada, or within the jurisdiction of said court of the State of Nevada. Said children during all of said time were in the custody and care of the plaintiff herein. Plaintiff, Van Court Warren, was not at any time personally served with summons or other process in said action instituted in the State of Nevada. Said plaintiff did not at any time appear in said action and has not at any time submitted himself to the jurisdiction of the court wherein said action was instituted. Summons in said action was published in the State of Nevada. Said court of the State of Nevada did not at any time acquire jurisdiction of the marital status of the plaintiff and defendant or jurisdiction over the plaintiff herein, nor over said minor children or their custody, nor to make or enter the judgment signed and filed in said court as aforesaid. Said judgment is not entitled to any faith or credit, but is invalid and of none effect, and is not binding upon this court."

Upon the question of the fitness of the defendant to have the care, custody, and control of the two mentioned minor children, the trial court found as follows:

"Defendant in her relations with her husband has been untrustworthy and untruthful and has failed to keep various promises made by her. On or about April, 1925, in the course of an operation performed upon her, she unnecessarily, against the will, and without the knowledge of her husband, but to please another man and render safe her improper relations with him, caused herself to be made sterile and barren.

"During a period of several years prior to the separation of plaintiff and defendant, defendant sustained adulterous relations with one James Scripps Booth. During said period and since said separation practically until the time of the trial of this action defendant received from said Booth many and large sums of money. While plaintiff and defendant were living together, and after promises by defendant that she would cease all relations with said Booth, she continued to receive moneys from him and to correspond with him, and to conspire with him against her husband. By the use of moneys received from said Booth, defendant prosecuted her action in the State of Nevada, employed detectives and took other means against her husband for procuring a divorce from him and to secure for herself the custody of said children.

"In the month of March, 1926, and while plaintiff and defendant were residing together in the city of Los Angeles, defendant sustained an adulterous relation with a man other than said Booth.

"During the past two years, with wanton indifference to the welfare of said children, defendant stated to a number of people that one of her children was not the child of plaintiff but was the child of said Booth. Said statement was untrue. Both of said children are the natural children of plaintiff and defendant."

The defendant challenges the sufficiency of the facts to justify the foregoing findings of

the trial court. The facts concerning the character of the defendant, showing the manner, purpose, and intent of going to Reno, and there instituting an action for divorce, are so inextricably interwoven that we will consider both questions at the same time.

The testimony shows indubitably that the matrimonial domicile of the plaintiff and the defendant was at all times in the county of Los Angeles. On November 15, 1926, the defendant began an action for divorce against the plaintiff in the county of Los Angeles. To give the county of Los Angeles jurisdiction it was necessary to allege her domicile as being in that county. On the 29th day of March, 1927, the defendant made application for a passport to England and Austria, in which she declared that she was domiciled in the United States and that her permanent residence was at 302 South St. Andrews place, in the city and county of Los Angeles, state of California. The record shows the continued residence of the defendant in Los Angeles until she left for Reno.

The defendant testified that, before going to Reno, she and one James Scripps Booth had a conversation about intermarrying as soon as each of them could be divorced, Booth from his wife and the defendant from her husband. James Scripps Booth was one of the men with whom the defendant was having illicit relations. The defendant went to Reno in June, 1927. She had no acquaintance with any one living there.

After the defendant had gone to Reno, arrangements were made by a Los Angeles attorney named Pearce, for counsel at Reno, and Pearce followed the defendant to Reno in about a week after the defendant had gone there. The expenses of Pearce's trip to Reno were paid by James Scripps Booth. The defendant's residence in Reno was interrupted by visits to Los Angeles, San Francisco, and New York. The defendant and Booth, while having discussed marriage, never talked about living in Reno. Mr. Booth himself was a resident of Pasadena, in the county of Los Angeles. Upon going to Reno the defendant went first to the Golden Hotel and then to the Riverside Hotel. The defendant resided at the Riverside Hotel until October, 1928. In September or October she took a double bedroom, living with a Mrs. Nicholson and a Mrs. Sargent, Mrs. Sargent being in Reno for the purpose of obtaining a divorce. The associations of the defendant in Reno were with persons who were there for the purpose of obtaining divorce decrees. The defendant testified that before going to Reno she might have heard that Reno was a nice place to get a divorce. She knew that a final decree, and not an interlocutory decree could be had there. After going to Reno she made a trip to New York, and was gone from the 1st of January, 1928, until a short time before the hearing of her divorce case. On February 28, 1928, a divorce decree purporting to divorce the defendant from the plaintiff was entered in the district court of the second judicial district of the county of Washoe, state of Nevada. Summons in this action was served by publication. The defendant never appeared, and the children, the issue of the marriage, were in the state of California, as hereinbefore stated. There is also testimony in the record to the effect that the defendant stated she intended to return to the state of California.

At the time the defendant went to Reno she took with her only her clothing. She left in Los Angeles the contents of one safety deposit box. At Reno she occupied her time playing golf; did not engage in any employment for compensation. The defendant did testify that she was going to take a course at a business college, and started in December, quitting before she went to New York in January, but did not know with certainty the name of the school she attended, when she started, how long she studied, where the school was located, or how much she had paid as tuition. When the defendant was in Reno she depended for support on moneys received from Mr. Booth, and some from her parents.

The defendant first met James Scripps Booth in 1920, and became very fond of him. Mr. and Mrs. Booth had three children of their own, of which fact the defendant had knowledge. Subsequently the defendant and Booth had illicit relations. The defendant did not remember when the illicit relations began. The defendant claimed that one of the children hereinbefore mentioned was the child of Booth and herself. The defendant had no recollection of the number of times she had illicit relations with Booth. She said it began at Booth's studio in Pasadena; that her adulterous relations with Booth ceased in 1926. At about that time she testified that she met Booth at Hermosa Beach and went with him to Santa Ana and stayed over night; that she took a trip east in January, 1928, to see Booth; that she was in New York approximately six weeks; although she says Booth was there only two days. Mr. Booth was in Los Angeles in the early part of the year when the defendant went to Reno. That Booth went east and returned to California and conferred with her and her attorneys. The agreement between herself and Booth to marry if she got a divorce was admitted as heretofore stated.

The testimony shows that Booth and the defendant were found in a bedroom at Santa Ana with the defendant undressed. During all of the times mentioned herein Booth was paying the defendant large sums of money. The record shows that Booth paid counsel fees for the defendant in the sum of at least $7,000. The attorneys in Reno who acted for the defendant were paid by Booth. At times the defendant received money from Booth in

the form of greenbacks; just how much she received she did not know. We quote a portion of the testimony of the defendant as to the receipt of money:

"Q. In how many different sums did it come? A. I have no idea.

"Q. From whom did it come? A. Mr. Booth.

"Q. Can you approximate the total amount that you received from him? A. No.

"Q. When did you first begin to receive money from Mr. Booth? A. I don't remember.

"Q. Was it before or after you went to Reno? A. Before.

"Q. How much then? A. I don't remember.

"Q. You have no idea? A. No.

"Q. What did you do with the money? A. I spent it."

The testimony discloses that the defendant was receiving money from Mr. Booth for a considerable time before going to Reno. The testimony further shows that the defendant had meretricious relations with a young man by the name of Manning. The adulterous relations of the defendant with Booth, her going to Reno, the employment of counsel, the payment of counsel fees, and the payment of expenses by Booth were all admitted by the defendant upon the witness stand. It does not depend upon the testimony of any other person, save and except that counsel for the defendant admitted the payment by Booth of the sum of $7,000.

[1] The foregoing summary we think sufficiently shows that we need not set forth herein any further portions of the transcript, and that it is sufficient to say that the entire record presents simply a picture of a man and woman infatuated with each other, maintaining illicit relations, and one of them going to Nevada to obtain a speedy decree of divorce and the other furnishing the money. Upon the face of such a record we do not well see how it can be reasonably contended that the defendant went to the state of Nevada for the purpose of becoming a bona fide resident thereof, or that a married woman having such loose ideas of morality, and perfectly willing to give her person to two other men, can be said to be a fit and proper person to control, shape, or guide the destinies of minor children. True, the defendant testified that she went to Reno for the purpose of making Nevada her home. In view of the circumstances, however, the trial court was under no obligations to accept such a statement. The defendant's statement of her intent to make Nevada her home is well answered by a note appended to the case of Rex v. Board of Assessors, found in Ann. Cas. 1917B, page 728, as follows: "Evidence of expressed intent, however, has no controlling weight if such an intent is inconsistent with the acts and general conduct of the person. Acts showing intent will, in such a case, outweigh expressions of intent." Citing a number of cases. The acts of the defendant do not harmonize with any intent to make Reno or any place in Nevada her permanent residence. She went there wholly unacquainted; she had no means of support, save and except furnished as herein stated. True, she said she began to attend a business college, but her own answers as to when she began to attend, when she ceased, the name of the college, and the cost of tuition render the whole story incredible.

The evidence as we have epitomized it, and the findings of the trial court reciting additional facts, establish clearly that, had the court found that the defendant had gone to Nevada with the bona fide intention of making that state her home, such findings could not have been sustained.

[2-4] The defendant further relies upon the doctrine of full faith and credit being given to the judgments and decrees made and entered in a sister state when called in question in a local court. This is subject to the exception, however, that the court pronouncing the decree of divorce must have jurisdiction of both parties, and the full faith and credit clause of the Federal Constitution does not apply where it is evident that the court pronouncing the decree has no jurisdiction over the defendant against whom the action is being prosecuted. Nor does such a decree have any force or effect over the children of the marriage where the children were not within the jurisdiction of the court pronouncing the decree. Nor does the law recognize as valid a decree obtained by any one who goes from the state of his residence to a foreign state for the sole purpose of obtaining a decree of divorce. This rule is well stated in 19 C. J. 370, as follows: "It is a well established proposition that where one spouse goes to a state other than that of the matrimonial domicile and there obtains a divorce under a residence simulated for that purpose and not in good faith, the judgment is not binding upon the courts of other states. It is within the power of the state to forbid the enforcement of such a decree. The rule is especially true where the cause of divorce is not one recognized by the laws of the state of his domicile, and the full faith and credit clause of the federal Constitution is not violated by the refusal of a state court to give effect to a foreign decree of divorce obtained by one who had temporarily left the state for the purpose of obtaining the divorce for a cause which had occurred in the state while the parties resided there and which was not there a ground for divorce." At the same time the law recognizes that, where one in good faith

changes his domicile, the fact that a divorce may be more readily obtained in the place to which such a person goes is no objection to its validity.

[5] There is also a clear distinction between mere residence and domicile. In the case of the former, no jurisdiction would be acquired by substituted service where the defendant did not appear. In the latter case substituted service is now recognized as sufficient to give the trial court jurisdiction. Thus, the fact that the defendant in this case was a resident, or was a person abiding in the state of Nevada, for a period of at least three months as provided by the statutes of that state, did not give the court jurisdiction over the plaintiff in this action by substituted service where he did not appear, the domicile of the defendant, the plaintiff in that action, being as found by the trial court in this action, all the while in the state of California. The full faith and credit clause of the Federal Constitution is given effect in the cases of substituted service only where the action is begun in a state where the plaintiff has a bona fide domicile and is not merely in the state for the purpose of securing a decree of divorce. This is clearly stated in the text found in 19 C. J., p. 373: "The Supreme Court of the United States has now definitely decided that the courts of the state of the last matrimonial domicile may grant a decree of divorce without personal service of process upon, or the appearance of, defendant therein, where service of process is made in accordance with the laws of that state, and that such a decree is entitled to full faith and credit in the courts of all of the states of the Union." A bona fide residence, however, is essential to jurisdiction, and a valid divorce decree cannot be founded upon a simulated domicile or a residence undertaken for the purpose of securing such a decree. Bennett v. Bennett, 28 Cal. 599; Bruguiere v. Bruguiere, 172 Cal. 199, 155 P. 988, Ann. Cas. 1917E, 122; Kelsey v. Miller, 203 Cal. 61, 263 P. 200; Flynn v. Flynn, 171 Cal. 746, 154 P. 837; Bell v. Bell, 181 U. S. 175, 21 S. Ct. 551, 45 L. Ed. 804; Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1. Other cases might be cited, but the case of Haddock v. Haddock, supra, thoroughly considers every question involved in this action, and supports the rules which we have hereinbefore stated.

[6] So far as the Nevada decree assumed to award the custody of the minor children of the plaintiff and defendant to the defendant is concerned, we need only refer to the case of Anthony v. Tarpley, 45 Cal. App. 72, 187 P. 779, 782, where the court held, speaking through Mr. Presiding Justice Waste, as follows: "No judgment can be predicated upon an order of the court of another state contained in a decree of divorce, in relation to the custody of a child. Such order is not a finality in any sense of the word. It does not preclude the court granting the order, as long as the minor is within its jurisdiction, from varying or modifying its decree in that respect, from time to time, as circumstances change. It was therefore not in any sense a final judgment." This applies directly where the court pronouncing the decree has jurisdiction of the children. In the case at bar the facts show that the Nevada court had no jurisdiction to award the custody of the minors to either of the parents.

That judgments affecting custody of children, even where the court has jurisdiction, are not final, we may also refer to the case of In re Culp, 2 Cal. App. 70, 83 P. 89, where the law is fully set forth in a concurring opinion written by Justice McLaughlin, showing that such judgments are always subordinate to the welfare of the child, and any court having jurisdiction of the child may make other or further orders.

One question only remains for our consideration: The appeal by the plaintiff in this action from that portion of the judgment which permits the defendant to have the custody of the minor children for the period of four weeks during the summer vacation. In view of what we have stated relative to the power of the trial court to make further or other orders concerning the custody of the minor children, and that the welfare of the minor children is the paramount consideration at all times, we are not disposed, under the facts disclosed by the record in this case, as hereinbefore stated, to reverse that portion of the decree, even though we may be of the opinion that the testimony contained in the record shows that such limited custody of the children should not have been granted.

[7] An examination of the transcript shows that the decree in this cause was signed by the trial court on the 3d day of July, 1928; docketed and entered on July 6, 1928; that the transcript on appeal was settled in accordance with the stipulation of counsel dated the 3d day of June, 1930, almost two years after the entry of the interlocutory decree; that almost two and one-half years have elapsed since the settlement of the transcript on appeal. From the foregoing it appears that approximately four and one-half years have elapsed since the entry of the interlocutory decree. The children, of course, are that much older; the conditions may not be at all similar now to what they were on the date of the entry of the decree; if they have changed, or if circumstances as they now exist require a change of the decree relative to the custody of the minor children, the trial court, upon application therefor, has full power to make such change as will best serve the welfare of the children.

[8] Being of the opinion that the Nevada court had no jurisdiction to enter any decree dissolving the matrimonial relations existing between the plaintiff and the defendant, and also being of the opinion that the facts disclosed in this case justified the trial court in awarding the plaintiff a decree of divorce and the custody of the minor children, it follows that the judgment and decree of the trial court should be affirmed. And it is so ordered as to both appeals.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

127 Cal.App. 151

PEOPLE v. KNEILING.

Cr. 2193.

District Court of Appeal, Second District, Division 2, California.

Oct. 25, 1932.

1. Arson ⇐37(1).

Evidence *held* sufficient to support conviction of arson and burning of insured property.

2. Criminal law ⇐552(4).

Circumstantial evidence may be as conclusive as witnesses' testimony to overt act.

3. Arson ⇐37(1).

Arson may be proved by circumstantial evidence.

4. Criminal law ⇐552(3).

To justify conviction on circumstantial evidence, exculpatory facts need not be absolutely incompatible with accused's innocence, but must be not only consistent with his guilt, but inconsistent with any other rational conclusion.

5. Criminal law ⇐1159(2).

Appellate court cannot set aside verdict, unless there is clearly no sufficient substantial evidence supporting it on any hypothesis.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Chris L. Kneiling was convicted of arson, burning insured property, and previous conviction and service of sentence for a felony, and he appeals.

Affirmed.

Thomas Higgins, Jr., of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CRAIG, Acting P. J.

Upon charges of arson and burning insured property the appellant was found guilty by a jury. He was also charged with having previously been convicted of a felony and of having served a sentence therefor, which latter charge he admitted. He appealed from the judgments entered upon said verdicts and from an order denying a motion for a new trial.

[1] The sole ground assigned for a reversal consists of a criticism of the sufficiency of the evidence; it being earnestly contended that the evidence was entirely circumstantial. It appeared that the appellant resided upon the premises which were burned, but that he was absent therefrom at the time of the occurrence in controversy, and was manager thereof for a codefendant, who was charged with and found guilty of the same offenses. Bedding, clothing, or remnants thereof, and a large quantity of newspapers, saturated with gasoline, were burning in rooms, closets, and in the attic. A small opening through the ceiling to said attic would not permit a person the size of his codefendant to pass. The appellant was located, was returned to the building, and the keys to rooms and closets then burning were taken from his person. Plaster had been removed from lath in numerous places by a knife which he identified as his property, and fragments of plaster and lath were found upon his clothing when he was examined. This and much other evidence which need not be recited was before the jury, which rendered the verdicts of which complaint is made, tending to connect the appellant with the offenses.

[2-5] Circumstantial evidence may be convincing in its force and as conclusive as the testimony of witnesses to an overt act. People v. Nagy, 199 Cal. 235, 248 P. 906. "Arson, like other crimes, may and frequently must be proved by circumstantial evidence. * * * The law does not require, in order to justify the inference of legal guilt in cases of circumstantial evidence, that the existence of inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. The true rule is that the facts shall not only be consistent with the guilt of the accused, but inconsistent with any other rational conclusion." People v. Lepkojes, 48 Cal. App. 654, 192 P. 160, 161. An appellate court may not invade the province of the jury to say as a matter of law that any substantial evidence was insufficient to convince reasonable, fair, and impartial men of the existence or nonexistence of a fact. It has no power to set

aside a verdict, unless it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence in the record to support it. People v. Floris, 93 Cal. App. 334, 269 P. 726.

The judgments and order denying a new trial are affirmed.

We concur: IRA F. THOMPSON, J.; STEPHENS, Justice pro tem.

126 Cal.App. 654

FULLER v. HARWELL et al.

Civ. 1015.

District Court of Appeal, Fourth District, California.

Oct. 6, 1932.

Rehearing Denied Nov. 1, 1932.

Hearing Denied by Supreme Court Dec. 5, 1932.

Subrogation ⇐17.

Apparent lien created by levy on judgment debtor's apparent interest in mortgaged cattle *held* sufficient to support judgment creditor's right to subrogation to chattel mortgage paid by him in honest attempt to protect lien, though it subsequently was determined that judgment debtor had no actual interest in mortgaged property (Civ. Code, §§ 2903, 2904).

The facts disclosed that, after judgment creditor levied on certain cattle as property of judgment debtor, he paid chattel mortgage thereon executed by judgment debtor's wife to prevent release of property from the execution under the statute. In such situation judgment creditor was subrogated to mortgagee's rights against mortgaged property because debt paid by him was debt which mortgagee in good morals and equity should pay, notwithstanding it was subsequently determined that chattel mortgagor and not judgment debtor was owner of cattle, and in making such payment judgment creditor was not mere "volunteer."

[Ed. Note.—For other definitions of "Volunteer," see Words and Phrases.]

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by Arthur Fuller against Sue Harwell and another. From an adverse judgment, plaintiff appeals.

Reversed.

A. L. Sebille, of Brawley, for appellant.

Hickcox & Trude, of El Centro, for respondents.

MARKS, J.

Appellant brought this action seeking to have it decreed that he was subrogated to the rights of the Los Angeles First National Trust & Savings Bank, hereafter referred to as the respondent bank, the mortgagee named in a chattel mortgage executed by Sue Harwell on certain cattle in Imperial county, which mortgage was paid by appellant upon the demand of the respondent bank after appellant had caused the levy of an execution upon the cattle under a judgment which he held against T. J. Harwell, husband of respondent Sue Harwell. The trial court sustained general and special demurrers to appellant's first amended complaint with leave to amend. Appellant failed to amend, and is here on appeal from the judgment entered against him.

While the separate demurrers of respondents were both general and special, counsel do not seriously consider the grounds of special demurrer in their briefs, but confine their arguments and citations of authorities to the general demurrers. We will therefore consider the sufficiency of the allegations of the first amended complaint as tested by the general demurrers to determine whether or not a cause of action is stated.

Both parties refer to and respondents stress the facts and decision in a former action in which Arthur Fuller was plaintiff and Sue Harwell and T. J. Harwell were defendants, decided by this court in 1931 (Fuller v. Harwell, 117 Cal. App. 280, 3 P.(2d) 592), and which furnishes the historical background of the instant case, as the chattel mortgage, judgment, live stock, and execution there mentioned were the same as those involved here. We stated the facts of the earlier action as follows: "On or about June 13, 1927, plaintiff recovered a judgment against the defendant T. J. Harwell. On May 9, 1928, an execution was issued and a levy made upon the live stock described in plaintiff's complaint in the action now here on appeal. The defendant Sue Harwell filed a third-party claim against which the plainfiff indemnified the sheriff. Thereupon Mrs. Harwell gave an undertaking pursuant to the provisions of the Code of Civil Procedure * * * and the property was released to her. This action was subsequently filed, and the only issue involved here is whether or not this personal property so released was the separate property of the defendant Sue Harwell, or the community property of both defendants, and therefore subject to the levy of the execution. The trial court found that the property was the separate property of Mrs. Harwell, and rendered a judgment in accordance with such finding." We affirmed the judgment of the trial court, holding that it was supported by the evidence, although

the evidence upon the question of the ownership of the cattle was conflicting.

It should be stated that the first amended complaint before us is far from a model pleading, and that counsel for appellant, by refusing to amend his pleading, seriously endangered his client's chances of ever recovering the $820 which he paid to the respondent bank.

The allegations of the first amended complaint may be summarized as follows: On June 13, 1927, appellant recovered judgment in the sum of $4,884.73 against T. J. Harwell in an action in the superior court of Imperial county; on May 9, 1928, there was unpaid on this judgment $2,233.11, for which execution was issued and levied on the cattle already mentioned as the property of T. J. Harwell; at the time the respondent bank had a chattel mortgage executed in due form by Sue Harwell upon which there was unpaid on the principal the sum of $820; the chattel mortgage was recorded in the office of the county recorder of Imperial county; after the levy of the execution, the respondent bank made demand upon the sheriff and appellant for the payment of the chattel mortgage; in order to protect the lien of the execution and prevent the release of the cattle, appellant on May 17, 1928, paid the respondent bank the full amount of the mortgage indebtedness of Sue Harwell to it; the payment was accepted as a full discharge of the mortgage and the note secured thereby; Sue Harwell, wife of T. J. Harwell, filed with the sheriff a third party claim in which she claimed the sole ownership of the cattle; appellant filed a bond with the sheriff to prevent the release of the cattle to the third party claimant; and, on June 11, 1928, Sue Harwell filed an undertaking to release the property, which was approved and the property released to her.

Appellant then instituted his action to have the cattle declared the community property of Sue Harwell and her husband, and before the decision in that cause became final (Fuller v. Harwell, supra), instituted this proceeding.

The sole question to be decided on this appeal is whether or not appellant was subrogated to the rights of the respondent bank on his paying the chattel mortgage on the cattle. He bases whatever rights he may have gained by payment of the mortgage upon the provisions of sections 2903 and 2904 of the Civil Code. The latter section provides as follows: "One who has a lien inferior to another, upon the same property, has a right: 1. To redeem the property in the same manner as its owner might, from the superior lien; and, 2. To be subrogated to all the benefits of the superior lien, when necessary for the protection of his interests, upon satisfying the claim secured thereby."

Respondents urge that there can be no subrogation of appellant to the position of the mortgagor in the chattel mortgage for two reasons: First, that appellant was never in the class of "one who has a lien inferior" to the chattel mortgage on the mortgaged property; and, second, that in paying the chattel mortgage he was a mere volunteer and as such could not be subrogated to the rights of the mortgagor. We will consider these questions in the order stated.

The meat of respondents' first contention is found in the fact that the mortgaged cattle were finally adjudged to be the separate property of Sue Harwell. From this they argue that an execution wrongfully levied upon the cattle to enforce a judgment against the husband could not constitute the judgment creditor a junior lienor, as the levy of an execution can only create a lien on the interest of the judgment debtor in the property levied upon, and, as T. J. Harwell had no interest in the cattle, the levy did not give appellant any lien upon them.

In considering this phase of the case, it should be borne in mind that appellant was a judgment creditor of T. J. Harwell, husband of Sue Harwell, and that there was $2,233.11 unpaid on this judgment; that he apparently in good faith contended that T. J. Harwell had some interest in the mortgaged cattle until after our decision of the case of Fuller v. Harwell, supra; that he levied upon the mortgaged cattle in an attempt to subject this supposed interest of T. J. Harwell to the lien of the execution; that the mortgagor demanded payment of its mortgage or the release of the cattle; that the cattle would have been released had the mortgage debt not been paid; that to prevent the release of the cattle appellant paid the mortgage debt; that the debt so paid was the debt of Sue Harwell, and that it has not been paid by her; that more than three years after the levy of the execution and the payment of the mortgage debt by appellant it was judicially determined that T. J. Harwell had no interest in the mortgaged property.

The general rules prevailing in California on the question of the subrogation of one who pays the debt of another to a creditor are clearly stated by the Supreme Court in the case of Redington v. Cornwell, 90 Cal. 49, 27 P. 40, 42, as follows: "In Mosier's Appeal, 56 Pa. 76 [93 Am. Dec. 783], Thompson, C. J., said: 'I regard the doctrine (of subrogation) as applicable in all cases where a payment has been made under a legitimate and fair effort to protect the ascertained interests of the party paying, and where intervening rights are not thereby jeopardized or defeated. Such payments, whatever their effect might be at law in extinguishing the indebtedness to which they apply, will not be so regarded in equity, if contrary to equi-

ty to regard them so.' See, also, McCormick v. Irwin, 35 Pa. 111; Heart v. Bryan, 2 Dev. Eq. [17 N. C.] 147; Wall v. Mason, 102 Mass. 316; Robinson v. Leavitt, 7 N. H. 99. The case of Guy v. Du Uprey, 16 Cal. 198 [76 Am. Dec. 518], recognizes the principle that a payment is not voluntary when made by a party who is interested in having the payment made. In the first section of Sheldon on Subrogation, the author, by way of definition, gives the following, which, so far as it goes, seems to be well sustained by the authorities cited: 'It is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt. The substitute is put in all respects in the place of the party to whose rights he is subrogated. It is derived from the civil law, from which it has been adopted by courts of equity. In this country, under the initial guidance of Chancellor Kent, its principles have been more widely developed, and its doctrines more generally applied, than in England. It is treated as the creature of equity, and is so administered as to secure real and essential justice without regard to form, and is independent of any contractual relations between the parties to be affected by it. It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter; but it is not to be applied in favor of one who has, officiously and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable, and which he was under no obligation to pay; and it is not allowed where it would work any injustice to the rights of others.'"

There is a long line of cases in California which rather effectually support the conclusion that, if a judgment debtor has an apparent interest in mortgaged property at the time of the levy of an execution, the purported lien created by a levy upon such apparent interest of the judgment debtor is sufficient to support a subrogation to the rights of a mortgagor whose debt is paid by the judgment creditor in an honest endeavor to protect the lien of his levy even though it be subsequently decided that the judgment debtor had no actual interest in the mortgaged property levied upon. Carr v. Caldwell, 10 Cal. 380, 70 Am. Dec. 740; Swift v. Kraemer, 13 Cal. 526, 73 Am. Dec. 603; Tolman v. Smith, 85 Cal. 280, 24 P. 743; Van Sandt v. Alvis, 109 Cal. 165, 41 P. 1014, 50 Am. St. Rep. 25; Ackerman v. Merle, 137 Cal. 169, 69 P. 983; Lean v. Givens, 146 Cal. 739, 81 P. 128, 106 Am. St. Rep. 79; Fritz v. Mills, 170 Cal. 449, 150 P. 375; Simon Newman Co. v. Fink, 206 Cal. 143, 273 P. 565.

The case of Fritz v. Mills, supra, is very similar in principle to the instant case. In that case it appears that Laura J. E. Mills was the owner of a lot in San Francisco which Martha A. Fritz maintained Mrs. Mills agreed to sell to Charles W. Reed, Mrs. Fritz' predecessor in interest, by a verbal contract of purchase and sale. The property was incumbered by a mortgage. The action was for specific performance, and during the proceedings in the trial court the plaintiff was ordered to deposit in court the agreed purchase price of the property. Part of this money was, on order of court, paid to the mortgagor and the mortgage released. It was subsequently determined that there was no legal and binding contract of sale of the property, and that Reed and his successors had no interest in it. They were, however, subrogated to the rights of the mortgagor for the reason that they had paid, under the compulsion of an order of court, a debt of Mrs. Mills which she, in good morals and in equity, should pay. In the instant case it appears from the pleadings that appellant paid the mortgage on the cattle under compulsion of the statute which would have compelled the release of the property from the execution had he not paid the mortgagor, and that the debt paid by appellant was a debt of Sue Harwell which in good morals and in equity she should pay.

In considering the second contention of respondent, it should be borne in mind that appellant paid the mortgage debt upon demand of the mortgagee and under compulsion of the statute to prevent the release of the cattle from the levy of the execution. If it does not already appear from what we have said that appellant was not a volunteer in paying the mortgage, this is made clear in the case of Simon Newman Co. v. Fink, supra. It is there held that, where a party advances money to pay off a prior mortgage, either at the request of the owner of the property or the holder of the mortgage, under circumstances from which it may be implied that the payment is made to secure a first lien upon the property, such party is not a volunteer in making the payment.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

216 Cal. 517

MULCAHY et al. v. BALDWIN.

S. F. 14701.

Supreme Court of California.

Oct. 14, 1932.

As Modified Oct. 20, 1932.

1. Waters and water courses ⇐231.

Statute empowering irrigation district directors to levy annual assessment for payment of district bonds only to amount possible for landowners to pay *held* applicable only to districts declared insolvent (St. 1931, p. 2267, § 11).

2. Statutes ⇐123(7).

Statute empowering irrigation district directors to levy annual assessment for payment of bonds only in amount possible for landowners to pay, if construed as applicable to solvent districts, would be invalid as amending Irrigation District Act without stating such purpose in title (St. 1931, p. 2267, § 11; St. 1897, p. 267, § 39; Const. art. 4, § 24).

St. 1931, p. 2267, § 11, vesting in irrigation district's board of directors, with approval of Securities Commission, power to levy on lands in district annual assessment for payment of principal and interest on district bonds "only such amount as in judgment of said commission it will be possible for the landowner in said district to pay," if construed as applicable to solvent districts, as well as districts declared insolvent under the act, would violate Const. art. 4, § 24, as embracing matter not mentioned in its title, because as thus construed it would amend Irrigation District Act (St. 1897, p. 267, § 39), imposing on directors of district duty to levy annually on lands in district amount sufficient to satisfy obligations of district under its outstanding bonds.

3. Waters and water courses ⇐231.

Districts Securities Commission Act empowering irrigation district directors to levy annual assessment for payment of bonds only in amount possible for landowners to pay *held* inapplicable to district organized under Irrigation District Act (St. 1897, p. 254, as amended; St. 1931, p. 2267, § 11).

4. Statutes ⇐77(1).

Waters and water courses ⇐216.

Statute providing plan for issuance of irrigation district refunding bonds different from that provided for issuance of other district bonds *held* not unconstitutional as special legislation or otherwise (St. 1897, p. 254, § 32a [added by St. 1923, p. 628] as amended, and §§ 32b–32e, as added by St. 1931, p. 777).

5. Waters and water courses ⇐224.

As between irrigation district and state, district has no rights or powers which Legislature may not modify or abrogate at pleasure (St. 1897, p. 254, as amended).

6. Constitutional law ⇐143.

That holders of irrigation district refunding bonds were given additional assurance of payment *held* not to impair contract rights of holders of original bonds electing not to convert (St. 1897, p. 254, as amended, and § 32e, as added by St. 1931, p. 777).

The contract rights of holders of outstanding bonds electing not to convert their holdings into refunding bonds were not impaired by St. 1897, p. 254, as amended, and § 32e, as added by St. 1931, p. 777, because such statute provides for allocation of certain power contract revenues to satisfaction of principal and interest of the refunding bonds, whereas original bondholders had right to enforce demands solely by annual assessment on lands in district, even though such power contracts may have been an inducement to purchasers of original bonds, since they could legally look only to statutory right of assessment.

7. Constitutional law ⇐154(1).

There can be no impairment of contract by change thereof effected with consent of contracting party affected.

8. Constitutional law ⇐143.

Statute authorizing irrigation district to issue refunding bonds on vote of majority of electors *held* not to impair contract rights of landowners who became such on organization of district (St. 1897, p. 254, § 32a [added by St. 1923, p. 628] as amended, and §§ 32b–32e, as added by St. 1931, p. 777).

9. Waters and water courses ⇐230(6).

Irrigation district refunding bonds *held* not required to be made payable serially because original bonds were so payable (St. 1897, p. 254, § 32a [added by St. 1923, p. 628] as amended, and §§ 32b–32e, as added by St. 1931, p. 777).

In Bank.

Proceeding for writ of mandate by Thomas Mulcahy and others, as and constituting the Board of Directors of Nevada Irrigation District, and another, against B. W. Baldwin, as Secretary of the Board of Directors of Nevada Irrigation District.

Peremptory writ granted.

C. F. Metteer, of Sacramento, and W. H. Orrick, of San Francisco (Orrick, Palmer & Dahlquist, of San Francisco, of counsel), for petitioners.

H. J. Hankins, of San Francisco, and A. L. Cowell, of Stockton (Stephen W. Downey, of Sacramento, of counsel), for respondent.

SHENK, J.

Mandate to compel the respondent, as secretary of the board of directors of the Nevada irrigation district, to countersign refunding bonds of the district.

The Nevada irrigation district was formed and came into existence on August 17, 1925, under the California Irrigation District Act (St. 1897, p. 254, as amended). The district is located in the foothill regions of Nevada and Placer counties, and comprises approximately 267,000 acres of land. Of this acreage only 8,000 acres are under irrigation and only about 4,000 acres are being served from the district's works.

In 1925 a first issue of district bonds was duly authorized. Of this issue bonds in the principal sum of $7,250,000 have been issued and sold. Later, and in 1928, a second issue was duly authorized in the amount of $2,592,000. Of the first and second issues, $8,100,000 in bonds are now outstanding. They are serial bonds; the first issue maturing from 1933 to 1965, inclusive, and the second issue maturing from 1949 to 1968, inclusive. All of said bonds bear interest at the rate of 5½ per cent. per annum, and the annual interest charges on the outstanding bonds is $445,500. The district's revenues were contemplated to be, and probably will continue to be, derived in large measure from its contracts for the use of water with the Pacific Gas & Electric Company. On account of the shortage of water in recent years, the revenues of the district from said contracts became greatly depleted and the fixed charges amounted to more than the lands in the district could bear. At the instance of certain bondholders a committee was appointed to inquire into the economic conditions and financial situation of the district. This investigation disclosed that a radical reduction in the present fixed charges on the bonded indebtedness of the district should be made without delay if complete failure was to be avoided. The bondholders' committee, in conjunction with the board of directors of the district, evolved a plan for the issuance of refunding bonds in the sum of $8,100,000, to bear fixed interest at the rate of 4 per cent. per annum, and to carry separate coupons for additional interest, up to 5½ per cent. in all, payable only under certain conditions and from certain revenues specified in the plan. The entire issue of the refunding bonds is to mature on July 1, 1977; provision being made for a special reserve fund to insure the payment of interest and repairs on the district's works and for a sinking fund from the surplus revenues derived from the power contracts for the call and redemption of the bonds or portions thereof prior to maturity. Under the plan the obligation of the district to pay the principal of the refunding bonds at maturity and the fixed interest of 4 per cent. per annum is to be absolute and unconditional, and is to be payable from revenues derived from an annual assessment upon all of the lands within the district in an amount sufficient to pay the same at maturity, unless the district shall have on hand and available for that purpose revenues derived from the power contracts sufficient therefor.

The foregoing plan was adopted by the board of directors of the district, and the proposition for the authorization and issuance of said refunding bonds was duly submitted to the electors of the district at a special election held on September 14, 1931. The favorable vote thereon was nearly five to one. The refunding bonds proposed to be issued and exchanged for the outstanding bonds, at the option of the holders of the latter, contain a recital and certification that the principal and fixed interest of 4 per cent. on said bonds shall be payable from revenue derived from an annual assessment upon the lands in the district and that all of the lands within the district shall be and remain liable to be assessed for such payment.

The respondent seeks to justify a refusal to countersign the bonds, first, on the ground that the foregoing recital and certification is false and contrary to the provisions of that portion of section 11 of the California Districts Securities Commission Act (St. 1931, p. 2267), which purports to vest power in boards of directors of irrigation districts in this state, with the consent of the commission, in levying the annual assessment, when there are not in the district treasury sufficient funds to pay principal and interest on bonds then due, to "levy for the purpose of providing for the payment of principal or interest on bonds only such amount as in the judgment of said commission it will be possible for the landowner in said district to pay."

[1, 2] There appear to be at least two sufficient reasons why the refusal of the respondent to countersign said refunding bonds on the ground stated is not justifiable. The California Districts Securities Commission Act became effective on August 14, 1931. Its purpose undoubtedly was to cover the same field occupied by the California Bond Certificate Commission Act of 1913 (St. 1913, p. 778), as amended, with additional provisions, among which are those of section 11, wherein it is provided that, whenever any district shall have been in default in the payment of any of its bonds or any interest thereon for a period of one year, any holder of bonds of said district may request the commission in writing to take the necessary steps to have the district declared insolvent. The procedure is then outlined for the ultimate declaration of insolvency of the district by the superior court. Thereafter the district is under the control and direction of the commis-

sion to the extent of, and in accordance with the provisions of, the act. The Nevada irrigation district has not been declared insolvent. The reasonable, if not the only, fair construction of said section 11 is that the power therein vested in the board of directors of the district, in conjunction with the approval of the commission, to levy on the lands in the district an annual assessment for the payment of principal and interest on the district bonds "only such amount as in the judgment of said commission it will be possible for the landowner in said district to pay," is confined and limited to such districts as have been declared insolvent in accordance with the provisions of said section. If this be not true, then it is clear that the provisions of section 11 above quoted, purporting to vest in the board of directors the power to levy an assessment on the lands in the district for less than the amount necessary to satisfy the principal and interest of bonds of the district then due, is contrary to the provisions of the Irrigation District Act. Such purported grant of power to be effective must be deemed to amend or supersede the California Irrigation District Act and particularly section 39 thereof (St. 1897, p. 267), which imposes upon the board of directors of the district the duty to levy annually on the lands in the district an amount sufficient to satisfy the obligations of the district under its outstanding bonds. Said section 11 cannot be given that effect, for the reason that the act of which it is a part does not purport to amend the Irrigation District Act, except as might be inferred from the language of the section that the power to levy an assessment for less than the amounts due on principal and interest on the district's bonds is granted "notwithstanding any other provision of law governing such district." But if this language was intended to amend and supersede the provisions of the Irrigation District Act it was ineffectual for the reason that such purpose is not mentioned in the title of the act in which it is included and cannot be included therein by any reasonable construction. If it were intended to be applicable to districts not declared to be insolvent, it is ineffectual under section 24 of article 4 of the Constitution.

[3] The second sufficient reason why the refusal of the respondent to countersign the bonds is not justified is that, if section 11 is to be held to authorize the levy of an assessment in "only such amount as in the judgment of the commission it will be possible for the landowner to pay," the language can only apply to refunding bonds issued under the provisions of that section alone with the approval of the commission but without vote of the landowners, since, obviously, if the language is intended to apply to bonds issued or to be issued under the California Irrigation District Act, the section must be held void for the reasons above stated. Accordingly, the refunding bonds of the respondent, having been issued under the provisions of the California Irrigation District Act, are not subject to the modified assessment provided for in section 11 of the above-mentioned act creating the California Districts Securities Commission.

[4] The second contention of the respondent is that there is no valid authority for the issuance of refunding bonds by the district in the manner proposed. It is claimed that sections 32a to 32e, inclusive, of the Irrigation District Act are unconstitutional and void. Section 32a (as added by St. 1923, p. 628) was amended, and sections 32b to 32e, inclusive, were added as new sections to the Irrigation District Act (St. 1897, p. 254) by an emergency statute enacted in 1931 (St. 1931, p. 777). Section 32a was added as a new section in 1923 (St. 1923, p. 628), and provided for the issuance of refunding bonds of irrigation districts in substantially the same manner as other bonds of the district, which included the approval of two-thirds of the electors of the district, and provided for the exchange of such bonds for outstanding bonds at the option of the holders of the latter. As amended, the section makes like provision but specifies that a majority vote only shall be required for the authorization of such refunding bonds. New section 32b provides that any issue of refunding bonds may, in the discretion of the board, be made to mature serially or at one time, and, if the maturity be at one time, a sinking fund shall be set up to purchase or retire outstanding bonds, which fund shall be fortified and replenished by assessments on the lands in the district. The provisions of new section 32c present no matters in controversy. New section 32d provides that, at the option of the board, the principal and interest of the refunding bonds may be made payable solely from the proceeds, in whole or in part, of any existing or proposed contract or contracts of the districts for the sale of water or electricity, or from any sources of payment other than assessments. New section 32e provides that the board may by resolution allocate to the payment of principal and interest on any bonds of the district, including refunding bonds, the proceeds of any such existing or proposed contracts; that in case such allocation be made the proceeds from such contracts shall be devoted to the exclusive benefit of the bonds designated to be paid therefrom, and neither the district nor any officer thereof shall be liable for such payment otherwise.

The respondent attacks these enactments as special legislation with reference to refunding bonds not made applicable to all bonds of the district. It is pointed out that other bonds must mature serially, whereas refunding bonds may be made to mature at

one time; that other bonds must be authorized by a two-thirds vote, whereas refunding bonds may be authorized by a majority vote; that refunding bonds may be called for redemption, whereas no such provision is made for other bonds; that the board may make refunding bonds payable exclusively from the proceeds of power or other contracts, whereas other bonds are made payable from assessments, and that the board may allocate the proceeds from such contracts exclusively to the payment of refunding bonds to the prejudice of the landowners of the district who have the right to expect that the revenues of the district, including those from the sale of water for power generation purposes, will be applied equitably to all obligations of the district.

[5] The Legislature has power to provide "for the supervision, regulation and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this State." Const. art. 11, § 13. This power has been declared to be plenary. Palo Verde Irr. Dist. v. Seeley, 198 Cal. 477, 483, 245 P. 1092. In its exercise it cannot be said that the Legislature has exceeded constitutional bounds by providing a plan for the authorization and issuance of refunding bonds different from that provided for the issuance of other bonds of the district. Conceivably there may have been sufficient reasons for a different plan due to the changed conditions in the affairs of districts. It is not unusual that the conditions surrounding the renewal of a debt differ from those surrounding its original creation. When the Legislature has, as here, by general law, prescribed how all refunding bonds of such districts shall be authorized and issued, its action in that respect may not be successfully challenged because the plan so laid down is not identical with that required in the case of other bonds. It may be said generally that as between it and the state the district has no rights or powers which the Legislature may not modify or abrogate at pleasure. When private rights have been acquired and become vested under a prior state of the law, the question of the impairment of such rights may become pertinent. La Mesa, etc., Irr. Dist. v. Halley, 197 Cal. 60, 62, 239 P. 719.

[6] It is insisted that the contract rights of the holders of outstanding bonds who may elect not to convert their holdings into refunding bonds are impaired by the provisions of section 32e in so far as they provide for the allocation of the power contract revenues to the satisfaction of principal and interest on the refunding bonds. The declared plan of the Irrigation District Act is that the holders of outstanding bonds of the district have the right to enforce their demands solely by an annual assessment on the lands in the district. Such is their contract. Until the enactment of the refunding statute of 1931, bondholders had recourse in law to no other source of revenue. May it fairly be said that the rights of holders of prior bonds are impaired because the holders of refunding bonds are given assurance of payment thereof in addition to the assessment on the lands in the district? We think not. The power contracts may have been an inducement to the purchasers of the original bonds, but in law purchasers of those bonds could look only to the statutory right of assessment and enforced payment under that method of raising revenue. They must be deemed to have so understood when they made their purchases.

[7-9] It is also contended that rights of contract with the landowners upon the organization of the district will be impaired by the proceedings under the new legislation. It is elementary that there can be no impairment of a contract by a change thereof if the change is effected with the consent of the contracting party affected thereby. Here there can be no change in the landowners' contract for the issuance of new bonds without the consent of a majority of the electors of the district, just as there could be no contract in the first instance without their consent. The vote of the electors in each instance must be deemed to be binding on the landowners. There is no constitutional requirement of a favorable two-thirds vote in the authorization of a bond issue of such a district. A majority vote would seem to be in harmony with our system and form of government. The case of Merchants' Nat. Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 P. 937, so strongly relied upon by the respondent, is not in point. There the Legislature assumed to authorize the board of directors to provide additional security for the payment of bonds of the district by way of pledge, mortgage, or deed of trust on all of the property of the district. By foreclosure of the indentures executed, the property of the district would be lost. The consent of the electors was not required to give effect to the exercise of the power by the board. When, as here, the question of the issuance of refunding bonds must be submitted to and be approved by the electors of the district, the terms of the statute of their authorization must be contemplated in the vote of approval, including the assent of the electors that the revenue from the power contracts be allocated to the payment of their principal and interest. There is no merit in the point that refunding bonds must be made payable serially. When they are made payable at one time with provision for a sinking fund and the retirement of the bonds on call, no additional burden is placed on the landowners of the district. Such a method is within the control of the Legislature.

We conclude that the provisions of section 11 of the California Districts Securities Commission Act of 1931 have no application to the authorization and issuance of refunding bonds of districts which have not been declared insolvent; that the 1931 amendments of the Irrigation District Act are not obnoxious to the Constitution as special legislation, or otherwise, and that no contract rights will be impaired by the issuance of the proposed bonds.

Let a peremptory writ issue as prayed.

We concur: WASTE, C. J.; TYLER, Justice pro tem.; CURTIS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

216 Cal. 599

WHITLEY v. ISLAIS CREEK RECLAMATION DIST. et al.

S. F. 14000.

Supreme Court of California.

Oct. 28, 1932.

1. Judgment ⇐702.

Prior decision as to validity of creation of reclamation district *held* res judicata in action to review reclamation district's assessment (Pol. Code, § 3462).

2. Drains ⇐14(1).

Plan for reclamation district showing proposed work with some degree of certainty enabling interested persons to understand project, is sufficient (Pol. Code, § 3462).

3. Drains ⇐14(1).

Objection to plan of reclamation district for failure to give detailed specifications *held* waived, where not raised before board of supervisors in assessment proceeding (Pol. Code, § 3462).

4. Drains ⇐82(1).

Property owner could not complain of assessment on ground drain was for unauthorized purpose, where cost of drain constituted no part of assessment on his property (Pol. Code, § 3462).

5. Drains ⇐82(1).

Evidence *held* sufficient to justify conclusion that assessment against property for reclamation purposes was not inequitable or confiscatory (Pol. Code, § 3462).

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Henry A. Whitley against the Islais Creek Reclamation District and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

H. M. Anthony, of San Francisco, for appellant.

Allen G. Wright and Wright & Wright & Larson, successors to Wright & Wright & Stetson, all of San Francisco, for respondent Islais Creek Reclamation Dist.

John J. O'Toole, City Atty., of San Francisco, for other respondents.

LANGDON, J.

This is an action to review a reclamation district assessment. The Islais Creek reclamation district, lying wholly within the boundaries of the city and county of San Francisco, was created by a special act of the Legislature in 1925. Stats. 1925, p. 87. Under the provisions thereof, a proceeding in rem was commenced in the superior court of said city and county, wherein it was determined that the district was legally created and organized. This decision was affirmed on appeal. Islais Creek Reclamation District v. All Persons, 200 Cal. 277, 252 P. 1043. Subsequently, the trustees of the district submitted plans for reclamation work to the supervisors of the city and county, and a cost estimate of $1,620,152 was appended thereto. Commissioners were appointed to make the necessary assessment, and, upon the filing of their report, a time was fixed for hearing objections. Plaintiff Whitley and others submitted objections, which were, after a hearing, overruled, and the assessment list approved. Under section 3462 of the Political Code, said plaintiff had thirty days in which to sue in the superior court to have the assessment "corrected, modified or annulled." He commenced the action on July 27, 1928, within the period, seeking to declare the assessment "null and void and of no effect." Judgment was rendered against him, and he brought this appeal.

[1] The written objection filed by plaintiff was on the ground that the assessment was inequitable and confiscatory. By virtue of section 3462 of the Political Code, he is limited to this objection, save that he may raise any others which "go to the jurisdiction and render the proceedings void." Meyer v. Reclamation District No. 17, 172 Cal. 104, 155 P. 635, 637; Luckehe v. Reclamation District No. 2054, 73 Cal. App. 361, 238 P. 760. By virtue also of the prior decision of this court in Islais Creek Reclamation District v. All Persons, supra, he is estopped to question the validity of the creation of the district, or the statutory powers of the board. On these matters that decision is res judicata. See Price

v. Sixth Dist. Agricultural Ass'n, 201 Cal. 502, 258 P. 387; Golden Gate Bridge and Highway District v. Felt (Cal. Sup.) 5 P.(2d) 585.

[2, 3] The principal contentions made by plaintiff are that the plans and cost estimate of the district are indefinite and excessive, that expensive improvements are contemplated in aid of commerce, navigation and other objects instead of reclamation, and that the assessment made on his property is thirteen times its value.

With respect to the plans, plaintiff complains of the absence of detailed specifications as to location of the sea wall or bulkhead, the sewer or drain, and the fill; and the same complaint is made as to the materials to be used. The answer is that, while the statute requires some plan to give the landowner notice (Reclamation District v. Bonbini, 158 Cal. 197, 110 P. 577), it does not require specifications. A plan showing with some degree of certainty the proposed works, so as to enable interested persons to understand the project, is sufficient. Meyer v. Reclamation District, supra; Spurrier v. Reclamation District, 172 Cal. 157, 155 P. 840. It should also be observed that this specific objection was not raised before the board of supervisors, and hence must be deemed to have been waived. Nevertheless, the record shows a great deal of specific matter in the proposed plans, including sketches and maps of the fill, drain, and sea wall, and numerous details of size, type of construction, and materials. For all these reasons we are satisfied that there is no substance to this contention.

[4] It is further contended by plaintiff that much of the contemplated work is not for reclamation purposes at all. It is argued that an elaborate and expensive sea wall is being constructed, control of which must under the law go to the board of state harbor commissioners, and that a sewer is to be built to carry off sewage from territory outside the district. These points likewise were not raised before the supervisors, nor is there anything in the record to support the charge. The evidence shows that, although the sea wall or bulkhead will also benefit navigation, it is an essential part of the reclamation project. The act states that nothing in it shall affect the jurisdiction of the state harbor commissioners, but does not, as plaintiff asserts, make any grant of control of the wall to these commissioners. The alleged sewer appears from the testimony to be a covered wood box drain, for reclamation purposes, and it nowhere appears that it is to be used for the disposal of sewage. Moreover, in making their assessment, the commissioners found that no benefit would accrue to plaintiff's lot from the drain, and hence did not include its cost in the assessment levied against said lot. Obviously, in such case, he has no cause for complaint. Spurrier v. Reclamation District, supra.

[5] The contention that plaintiff's assessment was thirteen times the value of the land is based upon the fact that for the fiscal year commencing July 1, 1927, it was assessed for general tax purposes at $450. Plaintiff proceeds upon the assumption that this was its full cash value. He offered no evidence as to the value of the lot at the trial. The assessment made by the commissioners of the district was $5,991.84, or something less than 80 cents per square foot. Expert witnesses, properly qualified as to knowledge of land values, testified that his lot had a present value of about 50 cents per square foot, or $3,750, and that upon completion of the work of reclamation it would be worth over $1.30 per square foot, or $9,741.74. Inasmuch as plaintiff's lot is now partially submerged and subject to the ebb and flow of the tides, it is not difficult to appreciate this probable large increase in value. In any event, the evidence before the court was amply sufficient to justify the conclusion that this assessment was not inequitable or confiscatory.

No other points raised by plaintiff are worthy of discussion. The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; TYLER, Justice pro tem.; SEAWELL, J.; SHENK, J.

216 Cal. 785

In the Matter of the LEGALITY AND VALIDITY OF BONDS OF ISLAIS CREEK RECLAMATION DISTRICT Authorized at an Election of the Landowners in Said District Held on the 4th Day of September, 1928.

ISLAIS CREEK RECLAMATION DISTRICT, Plaintiff and Respondent, v. The LANDS IN ISLAIS CREEK RECLAMATION DISTRICT etc. et al., Defendants; Henry A. Whitley, Defendant and Appellant.

S. F. 14261.

Supreme Court of California.

Oct. 28, 1932.

In Bank.

Appeal from Superior Court, City and County of San Francisco; K. S. Mahon, Judge.

H. M. Anthony, of San Francisco, for appellant.

Allen G. Wright, of San Francisco, Wright & Wright & Larson and Orrick, all of San Francisco (Palmer & Dahlquist, of San Francisco, of counsel), for respondent.

PER CURIAM.

This is an action brought to determine the validity of bonds issued by Islais Creek reclamation district, in the sum of $1,620,152, the full amount of the assessment levied upon the property owners of said district, representing the cost of the proposed reclamation works. Defendant Whitley contends that the bonds are invalid for the following reasons: First, that the district was never validly organized; second, that the plans of the trustees are indefinite; third, that the proposed works are intended chiefly for harbor development and sewage disposal, and not for reclamation purposes; fourth, that the assessment levied upon his land is inequitable and confiscatory.

These contentions were all made by said defendant and decided adversely to him in the companion case of Whitley v. Islais Creek Reclamation District, 15 P.(2d) 742, this day decided. The views expressed in that opinion make unnecessary any further discussion of the issues.

The judgment is affirmed.

216 Cal. 624

SCHEFSKI v. ANKER et al.

S. F. 14427.

Supreme Court of California.

Oct. 31, 1932.

1. Partnership ⇐20.

Investor's and contractor's agreement to co-operate in erecting apartment house, investor to purchase lot, arrange finances, and receive interest for investment, parties to receive equal salaries and profits, *held* to constitute "partnership" as regards apartment house property.

Agreement provided that investor and contractor were to co-operate in the erection of an apartment building, that a lot was to be purchased by investor, that expenses were to be paid from a special account taken in the investor's name, both parties were to draw equal salaries and equal shares in net profits, and investor was to obtain certain compensation as interest for money invested.

[Ed. Note.—For other definitions of "Partnership," see Words and Phrases.]

2. Stipulations ⇐18(9).

In suit for dissolution of building partnership and for accounting, defendant partner stipulating, regarding sums advanced, interest, income, and profits as settlement of controversy, could not attack validity of stipulation as valid compromise and settlement.

3. Stipulations ⇐18(9).

Where investor, in suit for dissolution of building partnership with contractor, stipulated contractor could retain profits from buildings sold, charging against investor profits of building not mentioned in complaint, and regarding which deal was closed, except division of profits, *held* error.

4. Account ⇐19.

Trial court may order accounting, with or without entry of interlocutory judgment.

5. Reference ⇐102(1).

Where, in partnership dissolution reference was had for accounting to determine division of partnership assets, trial court could refuse acceptance of referee's report and take additional testimony (Code Civ. Proc. § 638, subd. 2, and § 644).

In Bank.

Appeals from Superior Court, City and County of San Francisco; E. N. Rector, Judge.

Action by Dave Schefski against Lewis Anker and another. From the judgment, both plaintiff and named defendant appeal.

Reversed and remanded.

James M. Hanley and Elmer Collett, both of San Francisco, for appellant Lewis Anker.

Vincent W. Hallinan and C. K. Bonestell, both of San Francisco, for respondent.

Louis Ferrari and J. J. Posner, both of San Francisco, for defendant Bank of Italy.

PER CURIAM.

Both plaintiff, Schefski, and defendant Anker appeal from a judgment in an action brought by plaintiff for the dissolution of an alleged partnership and for an accounting. The Bank of Italy was made a purely nominal defendant, and does not appeal. Both appeals have been presented on one transcript.

[1] The facts in reference to the alleged partnership are as follows: In 1926, Schefski was a contractor engaged in acting as a foreman in the construction of various kinds of buildings. Anker desired to invest his money in building operations. Negotiations between the two resulted in a written agreement dated September 23, 1926. By the terms of this agreement, Schefski and Anker agreed to co-operate in the erection of an apartment house on Clayton street in San Francisco, the lot to be purchased by Anker and to be deeded under his name; all bank loans and all expenses to be deposited in and paid from a special account to be taken under Anker's name; both parties to draw an equal salary; all net profits to be divided equally; Anker

to receive $500 for each four months his money was invested, as interest. Although challenged by appellant Anker, there can be no doubt that the parties intended to enter a partnership as to the Clayton street property. At the time of entering into the agreement, it was intended that Anker should advance all sums necessary to erect the apartment house over and above the amount to be secured by him on a bank loan. During the construction of the Clayton street apartment, this plan was abandoned. Anker negotiated a $16,000 bank loan, and then secured a $12,500 second loan on the property. Anker advanced $9,365 of his own money, to complete the construction. The written agreement providing that Anker was to receive $500 as interest for each four months his money was invested had been entered into in the belief that Anker would advance the amount secured by the second loan. This portion of the agreement, therefore, never came into operation. Either expressly or impliedly, it was thereupon agreed that, in place of the interest provided for in the written agreement, Anker was to receive 8 per cent. on all sums advanced by him. After the Clayton street building was constructed, it was sold for $43,000. The purchaser paid part of the purchase price by deeding to Anker a lot on Twenty-Fourth avenue; the lot being taken in at a value of $8,500. If the lot be valued at $8,500, Schefski and Anker made a net profit of $5,135.75 on the deal. Over a period of time Anker paid to Schefski the sum of $1,475. Schefski's total share of the profits on the Clayton street deal was $2,567.87. Anker, therefore, retained $1,092.87 belonging to Schefski. This has admittedly never been paid. The Clayton street deal is only indirectly involved in the present controversy. It is important only to show the amount retained by Anker and to fix the value of the Twenty-Fourth avenue lot at $8,500.

[2-4] After the Clayton street deal was completed, except for the payment by Anker of the above sum, the parties orally agreed to continue operations as partners in the construction of two more apartments, one on the Twenty-Fourth avenue lot and one on Lombard street. The trial court's finding in this regard is amply supported by the record. The complaint mentions only these two properties, and is silent as to the Clayton street property. At the time the complaint was filed, and at the time of trial these last two apartments had been completed, but not sold. Anker had admittedly retained all the income from the properties. During the course of the trial, the attorneys for Anker stipulated, and such stipulation was entered into the minutes of the court, that as and for a complete settlement of the controversy Anker should receive all sums advanced by him, less the income received by him, and 8 per cent. interest, and that Schefski should be entitled to all sums received from a sale of the apartment houses over and in excess of the amounts due Anker. In other words, Anker authorized the court to enter judgment in favor of Schefski for all the net profits realized when the apartments were sold. Anker does not and, in fact, could not, attack the validity of this stipulation as a valid compromise and settlement. However, there is considerable confusion in the record as to whether it was ever intended to include the profits from the Clayton street property in the stipulation. After a careful reading of the record, we do not think it was ever intended that the profits from the Clayton street deal should be included within the stipulation. The Clayton street deal, as already stated, was not mentioned in the complaint. That deal was completely closed, except for the actual division of the profits retained by Anker. We think the trial court was in error in charging Anker with all the profits from the Clayton street deal, and that, under the agreement, Anker was entitled to one-half of the profits from that deal. However, under the agreement of compromise, Schefski is entitled to all the net profits realized from a sale of the Twenty-Fourth avenue and Lombard street apartments. After the compromise agreement was entered into, it became obvious that it was necessary to take an accounting in order to determine how much Anker had advanced in the construction of these buildings and how much he had taken in from the operation thereof. The trial court, by stipulation of the parties, and without first entering an interlocutory judgment, ordered that such an accounting be had. The entering of the interlocutory judgment was not necessarily a condition precedent; it being well settled in this state that the trial court may, whenever necessary, order an accounting, with or without the entry of an interlocutory judgment. Fredendall v. Shrader, 45 Cal. App. 719, 188 P. 580; Putman v. Superior Court, 209 Cal. 223, 286 P. 425. Over a long period of time the referee, who had been stipulated to by the parties, held numerous hearings and finally filed his report. This report was incomplete in several respects, and obviously incorrect as to others. When it was submitted to the trial court, he candidly admitted that he was unable to understand many of the entries. Additional testimony was thereupon taken by the trial judge in open court as to many of the items involved. We have carefully read this additional testimony, and do not believe that it materially assists in clearing up the ambiguities and inaccuracies in the referee's report. The hearings were held at widely separated intervals, so that the record is in hopeless confusion.

[5] Appellant Schefski bases his entire appeal on the ground that the reference in the instant case was had under subdivision 1 of

section 638, Code of Civil Procedure, and contends that therefore, under section 644 of that Code, the trial court had no authority to modify or change the findings of the referee. We find this point to be entirely without merit. The reference was clearly under subdivision 2 of section 638 of the Code of Civil Procedure, and not under subdivision 1. National Brass Works v. Weeks, 92 Cal. App. 318, 268 P. 412; Weavering v. Schneider, 52 Cal. App. 181, 198 P. 418. The trial court was well within its power in refusing to accept the referee's report and in taking additional testimony after the report was submitted.

After the court had taken the additional testimony, by stipulation the two apartments were ordered sold. Schefski purchased both properties, paying a total of $15,000 in cash into court; that sum being the amount bid by him in excess of the loans on the properties. The entire controversy now deals with the proper division of this $15,000. The trial court figured that Anker was entitled to $8,383.15 of this sum, and that Schefski was entitled to the balance. The amount due Anker was computed on the basis of the sums he had advanced on the Twenty-Fourth avenue and Lombard street properties, deducting therefrom the income he had received from the operation of these properties, and deducting all the profit on the Clayton street deal, and allowing him 8 per cent. for 15 months on the balance. This, of course, resulted in Schefski receiving all the profits from all three of the buildings. As already pointed out, under the stipulation embodying the agreement of compromise and settlement, Schefski is entitled to all the net profits from the Twenty-Fourth avenue and Lombard street properties, but the profits from the Clayton street property must be equally divided. If this were the only error in the record, we would be inclined to make the proper corrections in the findings and judgment, and affirm the decision. But it is not the only error. It is very difficult to ascertain what value was placed on the Twenty-Fourth avenue lot. For reasons already discussed, it is clear that this should be $8,500. The referee, the accountant, and the trial judge apparently arrived at a different value for that lot. It is impossible to ascertain the extent of the error from the record before us. Other alleged errors in reference to the period for which Anker should receive interest cannot be properly ascertained from the record before us. For these reasons, it is necessary to reverse the case in order that a proper accounting be had. This ought to be a relatively simple matter. The profit due Schefski and retained by Anker on the Clayton deal was $1,092.87. The accounting should be limited to ascertaining the amounts advanced by Anker in the construction of the Twenty-fourth avenue and Lombard apartments; deducting, with interest, one-half the profit retained by him from the Clayton deal, and the profits secured from the operation of the other two apartments up to the date of sale. Anker should be allowed interest on the amounts advanced by him to the date of the sale, at 8 per cent. This accounting may be taken by the trial court or by a referee appointed by it for that purpose.

For the foregoing reasons, the judgment appealed from is reversed, and the case remanded to the trial court for proceedings not inconsistent with this opinion; neither side to recover costs on this appeal.

216 Cal. 629

MANNING et al. v. BANK OF CALIFORNIA, NATIONAL ASS'N., et al.

S. F. 14419.

Supreme Court of California.

Oct. 31, 1932.

Rehearing Denied Nov. 29, 1932.

1. Executors and administrators ⇐315(6).

Where trust provisions of will are incorporated without change into decree of distribution, such decree is measure of rights of parties, subject only to reversal or modification on appeal.

2. Wills ⇐728.

Trust provisions of will *held* to provide for accumulation and investment of surplus funds over and above expenses of administration and payment of amounts specified to beneficiaries (Civil Code, §§ 724, 733).

Will provided for payment of $300 per month to each of four daughters for life, but, in no event, to exceed twenty years from testator's death. The survival of all four daughters beyond the continuation of the trust, the death of one or more, but fewer than all, prior to expiration of trust leaving issue, the death of a daughter prior to that time without issue, and the death of all four daughters prior to expiration of trust, with or without issue, were provided for. Corpus and income were treated as a unit by testator and the court in its decree of distribution. Authority was given to invest and reinvest surplus. All daughters had attained their majority when will was executed seven years before testator's death. Their expectancy exceeded the life of the trust, testator did not intend that during the trust they should receive more than $300 each monthly, and knew that the income and expenses of the trust would vary.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

3. Executors and administrators ⇐315(5).

Where decree of distribution is counterpart of will, decree cannot be given different interpretation than will (Civ. Code, §§ 724, 733).

4. Wills ⇐447.

While clearer manifestation of intent to direct unlawful accumulation is required than where it is lawful, such rule does not authorize palpable disregard of plain meaning of language used (Civ. Code, §§ 724, 733).

In Bank.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Suit by Bessie Ella Manning and others against the Bank of California, National Association, and Albert S. Weaver, as trustees by decree of distribution and appointment of of trust created by last will and testament of Daniel Best, deceased. From decree for defendants, plaintiffs appeal.

Affirmed.

Justin M. Jacobs and Christopher M. Jenks, both of San Francisco, for appellants.

Cross & Brandt, of San Francisco, for respondents.

SEAWELL, J.

Plaintiffs are the beneficiaries of a trust created by the will of their father, Daniel Best, deceased, pursuant to which the entire estate of said decedent was distributed to defendant Albert S. Weaver, as trustee, by a decree of distribution duly made and entered on January 6, 1925, by the Superior Court of Alameda county. The defendant Bank of California, National Association, was appointed cotrustee with Weaver by court order on October 24, 1928. The four plaintiffs, all of whom were past the age of majority at the death of their father, brought the present action to compel said trustees presently to pay to them in equal shares the sum of $16,601.29, which they claim remained in the control of said trustees on December 31, 1929, as accumulations of income from the trust estate after all expenses and charges against said trust estate had been paid. From a decree adjudging that they take nothing, plaintiffs prosecute this appeal. The fourteen children of the four plaintiffs were also named as parties defendant by reason of the fact that they have a contingent interest in the trust estate, as will more fully appear hereafter.

The appeal is taken on the judgment roll. The case was tried on a stipulation of facts, which has been embodied in the findings. The contention of respondent trustees is that the plaintiffs, under the terms of the decree of distribution, are not entitled to receive any income from said trust estate during the continuance of the trust in excess of the sum of $300 a month each, which has been paid to them in full to date, and, further, that the funds which plaintiffs claim constitute income in fact are not income, but belong to the corpus of the estate, a portion being the proceeds received by the trustees from the sale of certain bank stock held by them, and the balance being sums set aside by the trustees annually to cover depreciations in the value of certain real and tangible personal property distributed to them. It cannot be determined from the findings whether the court was of the view that both of said issues, or only one of them, should be determined adversely to plaintiffs. The court simply finds the facts from which it deduces that plaintiffs take nothing, without specifying its legal conclusion on said two separate issues.

Respondent trustees state that as individuals they are not interested in any controversy between appellants and their children, the contingent remaindermen, but in their representative capacity it is their duty to defend the trust, especially in view of the fact that most of the issue of appellants are minors, and while joined as parties in the action have taken no active part in the case.

The decree of distribution under which appellants claim to be entitled to the funds in dispute is set forth in full in the court's findings in the action herein, except as to description of assets of the estate. By said decree all property of said estate of Daniel Best, deceased, is distributed to Albert S. Weaver, as trustee, upon the following uses and purposes:

"To pay to Clarence Leo Best one-fifth (1/5) interest of said estate as represented by the inventory thereof, less his estimated proportionate share of the cost of administration. [This legacy has been paid in full, and no question relating thereto is involved upon this appeal.]

"To pay over and distribute to each of the daughters of said Daniel Best, deceased, namely, Meta Vivian Best Jackson, Viola Else Webster, Bessie Ella Manning and Helena Oleta Stanley, the sum of three hundred ($300.00) dollars per month during the lifetime of such daughter, but in no event to exceed the period of twenty (20) years from the 22nd day of August, 1923, the date of death of said Daniel Best; and in any event to terminate with the expiration of this trust. Upon the death of either of said daughters before the expiration of this trust, or upon the expiration of the said twenty (20) years above mentioned, leaving no issue of her body, then the interest or share of such deceased daughter shall terminate, but in case of such death of such daughter, leaving living issue, then the same shall be paid

to such issue of such daughter, share and share alike, if there should be more than one of such issue. If all of said daughters above named should die before the expiration of twenty (20) years, said trustee shall immediately distribute said estate to the surviving issue of said daughter or daughters, the issue of said daughters taking by right of representation the share of their parent. At the expiration of twenty (20) years from the said 22nd day of August, 1923, unless said trust is sooner closed, as in said will provided, this trust shall be closed and the entire estate then remaining in the hands of said trustee shall be distributed share and share alike amongst the surviving daughters, and the issue of any deceased daughter or daughters, by right of representation. * * * If at any time prior to the expiration of said twenty (20) years all of said daughters shall be deceased, without issue of their body, then and in that event the trust estate therein provided shall cease and determine and the said trustee shall immediately close the estate and distribute to those who would be entitled at that time to succeed to said estate under the laws of the State of California."

The will of decedent is also incorporated in the findings, from which it appears that the trust provisions of said decree of distribution, above quoted, are practically identical in form and language with the provision in the will of decedent.

By the terms of said will and decree of distribution, the trustee is directed to pay $300 a month to each of the four daughters of decedent during the period of twenty years limited for the continuation of the trust, this sum to be paid to the issue of any daughter who shall die during the continuation of the trust leaving issue, otherwise the interest of the deceased daughter to terminate. Upon the termination of the trust, the "trust estate" is to be divided among said four daughters and the issue of any deceased daughter by right of representation. The theory of appellants is that the will and decree of distribution fail either expressly or by implication to provide for the disposition of income which may arise from the trust in excess of the sum required to pay $300 a month to each of the four daughters. In this situation, appellants argue, section 733, Civil Code, governs and requires payment of the entire surplus to them as the same may accrue. Said section provides: "When, in consequence of a valid limitation of a future interest there is a suspension of the power of alienation or of the ownership during the continuation of which the income is undisposed of, and no valid direction for its accumulation is given, such income belongs to the persons presumptively entitled to the next eventual interest."

There is no dispute between the parties but that the will of decedent creates a valid future interest in remainder limited to take effect upon the termination of the trust established by the will of decedent, that the effect of said limitation is to suspend the power of alienation, and that the plaintiffs are presumptively the persons who will succeed to the title upon the termination of said trust estate. The question on which the rights of the parties revolve is whether the income in excess of that consumed in paying expenses and the payments of $300 a month to each of the four plaintiffs is "undisposed of." To establish their present right to surplus income, plaintiffs must show either that said surplus income is "undisposed of," or, if a direction for its accumulation has been given, that said direction is void.

Respondent trustees acknowledge, as they must, that the will contains no express or implied provision for present disbursement of the surplus income during the continuance of the trust. They find, however, considering the trust provisions in the will and decree as an entirety, an implied provision by necessary implication for accumulation of the surplus by the trustee, to be held by said trustee as part of the trust estate, and to be distributed upon the termination of said trusts to the persons entitled to the estate in remainder, that is, to the present plaintiffs, or to the issue of any of them who shall die during the life of the trust. Respondents must also concede that such implied provision for accumulation, being for the benefit of plaintiffs, all of whom were adults at the date of the testator's death, is in violation of the laws of this state as they stood at the time of the death of the testator and the entry of the decree of distribution. Section 724, Civ. Code, prior to 1929 amendment (St. 1929, p. 276, § 1).

[1] By virtue of section 733, Civil Code, the persons presumptively entitled to the next eventual interest receive the income, not only where no present disposition thereof is made, but also where a direction for its accumulation is given which is void. Estate of Duffill, 180 Cal. 748, 183 P. 337. If the present appeal were from the decree of distribution, it would be unhesitatingly held that under the will of their father plaintiffs had established their right to the surplus income, whether said income should be regarded as undisposed of, or as income directed to be accumulated by a void direction. However, the present appeal is not from the decree of distribution in said estate, which became final long prior to the action herein, but from the judgment in an action subsequently brought by plaintiffs to determine their rights under said decree. The trust provisions of the will have been incorporated, substantially word for word, and without the addition of other directions, into the decree of distribution. After the entry of the decree of distribution, such decree becomes the measure of the rights

of the parties. Goad v. Montgomery, 119 Cal. 552, 51 P. 681, 63 Am. St. Rep. 145; Luscomb v. Fintzelberg, 162 Cal. 433, 123 P. 247; Newport v. Hatton, 195 Cal. 132, 151, 231 P. 987. The function of the court upon distribution is to distribute the property of the decedent. Since, on the one hand, the court must direct distribution in accordance with the will of the testator, provided the directions of the testator as embodied in his will can lawfully be carried out, and, on the other hand, effect should not be given to testamentary provisions which are in violation of the laws of this state, the court in decreeing distribution necessarily passes on the validity of trusts created by the will of the testator. If distribution is directed to a trustee to be held upon the precise trusts set forth in the will, the validity of the trust is by the court upheld. The decree of distribution is final and conclusive as to the rights of those interested in the estate, subject only to be reversed, set aside, or modified on appeal. In Keating v. Smith, 154 Cal. 186, 97 P. 300, 302, this court said in discussing this subject: "The will attempted to create a trust, which, considered by itself, was no doubt invalid under the rule declared in Estate of Fair, 132 Cal. 523, 60 P. 442, 64 P. 1000, 84 Am. St. Rep. 70. The validity of the trust is, however, no longer open to question. The decree of the superior court distributing the residue of the estate to trustees upon certain trusts is a conclusive adjudication of the validity of the disposition made by the testator"—citing cases.

The language of this court in Estate of Pratt, 119 Cal. 139, 51 P. 38, 43, is also instructive. We there said:

"The subject-matter upon which the court was called to act in the present instance was the settlement of the final account and distribution of the estate of O. C. Pratt, under his last will. To make the final distribution under section 1666, Code Civ. Proc. 'the court must name the persons and the proportions or parts to which each shall be entitled.'

"As an incident of this duty, it devolved upon the court to determine whether or not there was a valid trust created by the will, and whether the respondents were lawfully created the trustees thereof. The court could not dispose of this question without passing upon the validity of the trust. It was the fulcrum upon which that branch of the case turned. * * *

"In the present case we are of the opinion it was, under the law, the duty of the court to adjudicate the question of the validity of the Pratt trust, and that, having done so, and adjudged it to be valid, while its conclusion was erroneous and the judgment open to reversal on appeal, yet as no appeal was taken therefrom, and as the time therefor has long since expired, it is not now open to collateral attack."

[2] Appellants answer that they concede the force and effect of said adjudications, but that the instant case is not one where an implied direction for accumulation, although void in its inception, has acquired validity through a decree of distribution. Rather, they contend, the will and decree should be interpreted as failing to provide either for present disposition of the surplus income during the life of the trust or for its accumulation. If this is the proper interpretation, it follows from those directions expressly contained in the will and decree that appellants are entitled to the surplus income under the provisions of section 733, Civil Code. We are unable to accede to appellants' contention.

The testator bequeathed his entire estate to the trustee upon the trusts named. The trust as declared is not fragmentary. The intent of the testator to make a complete disposition of his property is apparent from the instrument. The will undertakes to cover all contingencies—the survival of all four daughters beyond the period of twenty years limited for the continuation of the trust, the death of one or more of the daughters, less than all, prior to that time leaving issue, the death of a daughter prior to that time without issue, and the death of all four daughters prior to expiration of the twenty-year period with and without issue. To concede force to appellants' contention that there has been a failure to direct what shall be done as to the surplus income is to charge the testator with an omission in a plan carefully calculated to be complete, contrary to what we consider to be the plain and necessary implication of the trust provisions as a whole.

The testator by his will and the court by the form of its decree of distribution, exactly following the will, treated the trust estate, including both corpus and income, as a unit, to be held, managed, and controlled by the trustee for the benefit of his four daughters, and the issue of any daughter dying prior to the termination of the trust, subject to diminution only to meet lawful expenses of the trust administration and pay the monthly legacies to the four daughters. The will and the decree direct distribution of the "trust estate" upon the termination of the trust. The reference is not to the "corpus remaining after paying out all income during the continuation of the trust."

Broad powers of management, control, authority to sell, subject to approval of the court, and to collect, and to invest and reinvest "any moneys or *surplus* or proceeds" of sale and collection, or to deposit the same in solvent banks at interest, are conferred on the trustee. (Italics supplied.) At the time of execution of the will, seven years before his death, the testator's four daughters ranged between twenty-six and thirty-four years of age. Their normal life expectancy

at the time of his death exceeded twenty years. The testator necessarily knew that the income from a large estate, and the expenses incident to the management thereof, are uncertain and variable from year to year. Of this income, whatever it might be, it is very plain that the testator intended his four daughters should not receive more than $300 a month each during the continuation of the trust. It is equally plain that he desired his entire estate not consumed in paying his daughters the specified income and discharging expenses of the trust administration ultimately to go to said four daughters, the issue of any deceased daughter taking by representation, to the exclusion of other persons to whom he might have made legacies and bequests. The conclusion that the surplus income was to be accumulated and invested during the life of the trust is inescapable from the language used in creating the trust.

The testator not only desired that his daughters should receive no more than $300 a month, but he intended to assure them that sum. The accomplishment of this purpose he could make more secure by directing accumulation of income in the years when there was more than enough to pay the stated legacies in order that the sums thus accumulated would be available in lean years. Accumulations for the benefit of adults were not permitted by our law as it stood at the death of the testator and entry of the decree of distribution. Section 724, Civ. Code; Estate of Duffill, 180 Cal. 748, 183 P. 337; Estate of Whitney, 176 Cal. 12, 167 P. 399. In 1929 the law was amended. We are not here concerned with the scope and effect of the amendment. Effect must be given in the case herein to the direction for accumulation by reason of the action of the court in upholding its validity on distribution. (Cases cited, supra.)

[3] We are not unmindful of appellants' argument that, where a decree is ambiguous, it should be construed as making a lawful disposition of property rather than a disposition in violation of the statutory rules restricting accumulations, perpetuities, or restraints on alienation. This is in accord with the rule as to judgments generally that, where a judgment admits of two constructions, that one will be adopted which is consonant with the judgment that should have been rendered on the facts and law. Watson v. Lawson, 166 Cal. 235, 241, 135 P. 961. Although the decree of distribution supersedes the will as the measure of the rights of the parties, the will is part of the record in a probate proceeding, and, where it is ascertained upon comparison that the decree is a counterpart of the will, without additions or alterations, the decree cannot be given a different or broader interpretation than the will.

[4] Our decision in Hornung v. Sedgwick, 164 Cal. 629, 130 P. 212, is persuasive authority for the conclusion we have reached, although the trust provision in that case is not identical with the provision before us. It is true that the direction for accumulation found to exist in that case was valid, being for the benefit of a minor. Clearer manifestation of intent to direct an accumulation should be required where the accumulation is contrary to law than where it is proper. However, this principle does not authorize a palpable disregard of the plain meaning of the language adopted. See, also, Estate of Whitney, 176 Cal. 12, 167 P. 399; Estate of Duffill, 180 Cal. 748, 183 P. 337.

Appellants cite certain decisions of the courts of this state and other jurisdictions, placing particular emphasis on the decision of the appellate court in Woestman v. Union Trust, etc., Bank, 50 Cal. App. 604, 195 P. 944. In that case the appellate court, after devoting the major portion of the opinion to other questions, in conclusion makes a statement in a few brief lines which supports appellants' contention. Each case must necessarily rest on the particular provisions of the will and decree creating the trust. In so far as the decision in said case is in conflict with our holding herein, it is not the law. Estate of Pichoir, 139 Cal. 682, 73 P. 606, is distinguishable on the facts. In that case the remainderman to whom it was held the surplus income should be paid as it accrued was not, as in the case herein, the person to receive income during the life of the trust in a fixed sum only, and it did no violence to the intent of the testator to permit such remainderman to receive accruing surplus income from time to time. The cases from other jurisdictions involve trust instruments differing so widely in their terms that they are readily distinguishable.

Since plaintiffs are not entitled to receive more than $300 a month during the period limited for the continuation of the trust, and they make no contention that they have not been paid this amount in full to date, it becomes unnecessary for the disposition of the present appeal to determine whether the funds which plaintiffs claim are surplus income, or, as respondent trustees contend, are part of the corpus. Plaintiffs have no present right to receive payment of the surplus funds whatever their nature. Nor do we deem it advisable in the circumstances shown to pass upon this question for guidance of the trustees in future transactions where the question of whether the funds are income or part of the corpus may arise. Future problems may be determined if and as they arise.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; TYLER, Justice pro tem.; PRESTON, J.; LANGDON, J.

216 Cal. 658

ELKO MFG. CO. et al. v. BRINKMEYER et ux.

S. F. 14437.

Supreme Court of California.

Nov. 1, 1932.

Rehearing Denied Dec. 1, 1932.

1. Appeal and error ⇐931(1).

In determining sufficiency of evidence to support finding for plaintiff, appellate court must resolve conflicts in plaintiff's favor.

2. Vendor and purchaser ⇐44.

Plaintiff seeking rescission of contract for purchase of property because of defendant's alleged false representations as to title had burden of proof.

3. Vendor and purchaser ⇐37(1).

Owner's representation that corporation to be formed for promotion of mining activities on property purchased would have no difficulty in securing permit for issuance of stock *held* statement of opinion and not of fact as respects rescission for fraud.

4. Appeal and error ⇐1011(1).

Court's findings based on conflicting evidence cannot be rejected on appeal.

5. Vendor and purchaser ⇐44.

Evidence *held* insufficient to sustain finding that owner's representation that he had good title to property corporation attempted to acquire for promotion of mining activities was false.

6. Vendor and purchaser ⇐37(1).

Where, at time when third contract whereby corporation was to acquire properties was entered into, and which provided that it was a substitute for other contracts, plaintiffs had full knowledge of alleged falsity of owner's representations as to title, plaintiffs were not entitled to rescission because of misrepresentations as to title.

7. Vendor and purchaser ⇐37(1).

Where plaintiffs, with knowledge of alleged fraud inducing execution of prior contracts whereby corporation was to acquire property, entered third contract, which by its terms superseded prior contracts, provisions of third contract purporting to preserve corporation's cause of action for owner's alleged fraud did not permit rescission of contract for such fraud.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by the Elko Manufacturing Company and others against L. C. Brinkmeyer and wife. Judgment for plaintiffs, and defendants appeal.

Reversed.

Thomas R. White, of San Francisco, and William M. Thornton, of Oakland, for appellants.

H. S. Henion and F. B. Hart, both of Oakland, for respondents.

WASTE, C. J.

Defendants appeal from a judgment in favor of plaintiffs canceling and rescinding certain contracts existing between the parties and decreeing that defendants refund to plaintiffs the sum of $3,550.94, expended by plaintiffs under the contracts.

[1] The amended complaint is based on three theories. Primarily, the rescission is asked for on the ground that plaintiffs were induced to enter into the agreements by reason of certain false and fraudulent representations alleged to have been made by defendants. It is also alleged that there was a failure of consideration and that defendants abandoned the contracts. The trial court found that all of the allegations of the complaint were true, and likewise made extensive findings in reference to all the transactions between the parties. A reading of the record readily discloses that the case was tried almost entirely on the theory that plaintiffs were induced to enter the contracts by reason of certain representations alleged to have been made by defendant L. C. Brinkmeyer in reference to his title to the properties involved. It is contended that such representations were false and that plaintiffs relied upon them to their damage. The failure of consideration and abandonment issues were involved only incidentally and only imperfectly developed at the time of trial. Appellants first contend that the findings in reference to the alleged false representations are not sustained by the evidence. In the second place, appellants contend that, even if such findings are supported, the record conclusively shows that after the plaintiffs became fully aware of the falsity of the representations they voluntarily cancelled all prior agreements and entered into a new written contract. This last contract, appellants contend, was not affected by the alleged fraud. In order properly to discuss either of these contentions, it is first necessary to recount the facts giving rise to this controversy. In this summary of the facts, it should be mentioned that we have resolved all conflicts in favor of plaintiffs, as we are bound to do under well-settled principles.

During the year 1929 defendants owned certain mining lands and claims in the state of Nevada. Defendant L. C. Brinkmeyer had in

his possession certain secret formulæ for the making of soap and other products from the ore on said lands. Both Brinkmeyer and the individual plaintiffs were desirous of exploiting these properties. After several meetings, on March 13, 1929, the parties entered into a written agreement whereby Brinkmeyer agreed to sell and the individual plaintiffs agreed to buy the mines, claims and formulæ at an agreed price of $150,000, on specified terms. This agreement will hereafter be referred to as the "first" contract. Defendant Margaret Brinkmeyer was not named in the agreement as a party to it, but signed it as the "wife of L. C. Brinkmeyer." By the terms of this first agreement, the plaintiffs agreed to form, at their own expense, a Nevada corporation, and to do or cause to be done at their own expense all annual work required by the government to be done on the mining claims. The trial court found that the plaintiffs were induced to enter into this agreement by reason of the representations made by the defendants that they were the owners of the real and personal property involved, and had a good and merchantable title thereto sufficient to obtain a permit from the corporation department of the state of California to sell the stock and securities of the Nevada corporation to be formed, and that there was nothing in the past record of the defendants or of the properties that would debar or prevent the issuance of the permit. It should be mentioned that neither the first agreement nor any of the other written contracts entered into between the parties contained any such warranty of ability to secure a permit. However, the record does support the finding that some such oral representations were made by L. C. Brinkmeyer, although, even according to the testimony of plaintiffs, the representations were not as clear or as explicit as found by the trial court. As to whether such representations were false, as found by the trial court, more will be said later in this opinion.

In pursuance to the first agreement, a corporation, the plaintiff Elko Manufacturing Company, was formed in Nevada. On March 21, 1929, the defendant L. C. Brinkmeyer and the new corporation entered into a new written agreement. This agreement will hereafter be referred to as the "second" contract. By the terms of this agreement, Brinkmeyer agreed to sell to the corporation the mining property and claims and the formulæ described in the first agreement. The second agreement provided for a new and complete arrangement for the payment for the properties. One of the plaintiffs testified, and it was undoubtedly the fact, that this second agreement "took the place of the contract of March 13." It is worthy of mention that at all times after the first agreement was entered into plaintiffs were represented by an attorney and that all of the arrangements plaintiffs had with L. C. Brinkmeyer were first scrutinized by him.

After the Nevada corporation had been formed, and after the second contract had been executed, an application was made to the corporation department of the state of California for a permit to sell stock. The application in due course was referred to a Mr. Wyman, who was connected with the corporation department in its Sacramento office. Several conferences were held with Wyman; all the plaintiffs and their attorney, and L. C. Brinkmeyer and his attorney, being present. At these conferences all of the facts in reference to the past history of the properties and Brinkmeyer's connection therewith were divulged. It appeared that four other corporations had had some dealings with L. C. Brinkmeyer in reference to these properties. The corporation department was not satisfied that the various contracts between Brinkmeyer and these four corporations had been effectually terminated, nor was the department satisfied with the status of the record title to the real properties. On April 22, 1929, Wyman wrote to one of the attorneys for plaintiff, informing him that before the permit could be granted "certain matters" had to receive "further consideration." These matters were itemized as follows:

1. The department desired a complete abstract of title to the real property.

2. Various provisions of the second contract in reference to the amount to be paid for the properties were found to be excessive.

3. The amount of promotion stock provided for in the second contract was found to be excessive.

4. The department desired a complete history and explanation of the transactions of Brinkmeyer with the other four corporations.

Under the circumstances, and after plaintiffs and their attorney had full knowledge of all the prior transactions in reference to the properties, and after the plaintiffs and their attorney had full and complete information as to what was to be required in order to secure a permit, L. C. Brinkmeyer and Elko Manufacturing Company entered into a new agreement on May 10, 1929. This agreement will hereafter be referred to as the "third" agreement. It is entitled "Amended Option to Sell Real Property." It refers to the second contract and recites that because "certain changes have arisen necessitating a change in said option, this amended option is hereby substituted" and it further states that "this amended option cancels any and all previous options and agreements made and entered into by and between the parties hereto or L. C. Brinkmeyer and T. A. Bowen, Harry Bartell, and John Le Grand." This third agreement provides for new terms of payment for the properties and for a different stock set-up.

There is no dispute but that these new provisions were intended to meet, and apparently did meet, the objections numbered 2 and 3 in Wyman's letter. The third agreement specifically recognized that difficulties might arise in the securing of a permit. It recited that the "parties hereto agree to use their best endeavors to obtain a permit"; that Brinkmeyer had already received $2,500 from plaintiffs; that no further payments should be made to him until the objections of the corporation department were removed. The agreement specifically enumerated the past transactions of Brinkmeyer with the other corporations and stated that because thereof the corporation department had certain objections to granting a permit; that in the event such objections were removed, Brinkmeyer was to receive a $1,000 payment "regardless of whether the said Permit is or is not issued"; that if the permit is not issued within thirty days the Elko Manufacturing Company "may cancel this option" by giving Brinkmeyer "fifteen days written notice of such cancellation; that if the objection is not removed within fifteen days thereafter, then this option is to be cancelled." Brinkmeyer agreed to furnish an "abstract of title of said real property, showing a good and marketable title in and to the said real property and all of it free and clear of all encumbrances." Brinkmeyer likewise agreed to hold the Elko Manufacturing Company free and harmless from all claims or litigation involving the property and from all claims of the prior corporations or their stockholders, and to defend all suits at his own expense. The agreement then contained this clause: "It is further mutually understood and agreed that nothing contained in this amended option, or the present negotiations and endeavors to obtain said permit from the California State Corporation Department, shall waive any rights that the said party of the second part may have against the said party of the first part, to misrepresentation as to the title, encumbrances or records of the real property and formulas herein involved."

After the third agreement had been executed, another effort was made to secure a permit. All the parties participated in good faith in this effort. The corporation department transferred the application to the San Francisco office. Brinkmeyer secured a letter from the attorney for one of the old corporations, explaining as best he remembered, its relation to the properties; a telegram from the secretary of state of Delaware as to the status of another; and secured the signature of the president of another of the old companies to a letter prepared by plaintiff's attorney. He compromised satisfactorily to the commission a claim of a Mr. Ferris. He likewise furnished, as required by the third contract, an abstract of title to the Nevada properties, showing that according to the Nevada records his title was clear. The representative of the corporation department was not satisfied. Although there is some confusion in the testimony, it appears that the representative of the corporation department finally agreed that he would recommend the granting ot a permit on condition a title insurance policy insuring the title to the patented claims was presented. Brinkmeyer refused to pay for this title insurance policy, properly claiming that under the contract he was to supply only "an abstract of title," which he had done. The plaintiffs likewise refused to advance the $215 necessary to secure the policy. As a result, the corporation department did not issue the permit, but eventually considered the application therefor "withdrawn." No further effort was made by any one to secure it.

Another fact should be mentioned. The plaintiffs refused to do or pay the expense for doing the necessary annual assessment work on the unpatented claims, as provided for in the contract. Brinkmeyer made demand that such work be done, but upon plaintiffs' refusal, was forced to have the work done at his own expense.

Early in July, 1929, a meeting of all the directors of Elko Manufacturing Company was held, all the parties to this action, other than Mrs. Brinkmeyer, and their attorneys being present. At that meeting, plaintiff Bowen, apparently on behalf of all the plaintiffs, stated that the corporation would not go further with the deal. After a rather stormy meeting, Brinkmeyer tendered his resignation and left the meeting. A few days later he was served with a notice of rescission and a demand for all moneys expended by plaintiffs under the contracts. The notice of rescission purports to rescind "all contracts or agreements had with you by us or any of us, particularly that certain amended option * * * dated May 10, 1929." The grounds of rescission as stated in the notice are "fraud, deceit and misrepresentations in the negotiations leading up to the execution of said amended option, and failure to comply with the terms and conditions of said agreements and amended option thereafter made by the said L. C. Brinkmeyer, all of which resulted in inducing the undersigned to pay him the sum of Twenty-five Hundred and 00/100 ($2500.00) Dollars and incur certain incidental expenses to the giving of the said amended option and in furtherance of said option and agreements, and on the further ground of failure of consideration."

On these facts a general judgment was entered for the plaintiffs against both defendants for the cancellation of "all" agreements between the parties and for the amount of money ($3,550.94) paid by plaintiffs to L. C. Brinkmeyer on account of the purchase price of the property and otherwise expended by them in connection with the contracts.

[2-5] As already stated, the main theory upon which the case was tried and decided was that defendant L. C. Brinkmeyer had made false statements as to the status of his title and his ability to secure a permit and that plaintiffs, believing the statements to be true, had relied thereon to their damage. Although there can be no doubt that the evidence supports the finding that such representations were made, we are not convinced that the record supports the finding that the representation that he had good title was false. The burden of proof was, of course, on plaintiffs to prove all the elements of their cause of action. It seems to be admitted by all concerned that the Brinkmeyers had a good record title to all the patented claims. It is true that the transcript is replete with references to the other corporations with whom Brinkmeyer had dealt in reference to the properties, but we have been referred to no positive and convincing evidence, nor have we found any such evidence that any of these corporations had any valid claim against the properties. It is true that the corporation department did not grant a permit, but this refusal was predicated on the failure to furnish a title policy in reference to the real properties. As to these properties, all are agreed the record title was clear. Brinkmeyer was not required by the contract to furnish the policy. He was required to furnish only an abstract of title, which he supplied. Under such circumstances, it is difficult to find any support for the finding that the representation as to title was false. As to the representation that no trouble would be had in securing a permit, it is our opinion that such a representation, under the facts of this case, was a statement of opinion and not of fact. It must be remembered that the individual plaintiffs are all experienced business men who at all times were represented by counsel of their own choosing. Although we are well aware of the rule that this court cannot reject findings based on conflicting evidence, we are of the opinion that the findings that the alleged representations were false are not supported by the evidence.

[6] However, even if we assume for the purposes of this opinion that the first and second contracts were induced by fraud, the unquestioned fact remains that when the third contract was entered into on May 10, 1929, all the plaintiffs and their attorney had actual knowledge of the status of Brinkmeyer's title to the properties, and knew of all the difficulties that would have to be overcome to secure a permit. In other words, if we assume the representations as to title and ability to secure a permit were false, plaintiffs and their attorney had full knowledge of their falsity. Having this knowledge, plaintiffs' own counsel prepared the third contract and expressly provided therein that it was intended as a substitute for the other contracts, and that it cancelled any and all previous options and agreements between the parties. The third contract expressly recognized the difficulties in reference to the securing of a permit and provided in detail as to what was to happen if the permit was or was not granted. Under such circumstances, it cannot successfully be contended that the third contract was induced by fraud. It is elementary, of course, that even if false representations are made, no cause of action arises unless there is reasonable reliance placed thereon by the other contracting parties. Certainly there can be no reliance where actual knowledge of the falsity of the statements exists. Nor can it be contended successfully that all three of the contracts were part of one transaction. Not only did the third contract expressly provide to the contrary, but plaintiffs testified that such was not their intent.

[7] The clause in the third contract, quoted supra, attempting to preserve any cause of action for fraud, does not in any way alter the fact that the third contract, which, after its execution, was the only contract existing between the parties, was not affected by the alleged fraud. To give that clause the effect of keeping alive the alleged cause of action would be to permit a party to state that he will voluntarily cancel and extinguish all prior contracts; that he will enter into a new contract; that he now knows certain representations made by the other contracting party were false when made; that he does not now rely on them; but that he still retains a cause of action for inducing the last contract for fraud. Such an interpretation does not appeal to our reason or justice. This is an action for rescission based on fraud. As to the contract sought to be rescinded, there was no fraud. It, therefore, follows that it cannot be rescinded on that ground.

In reference to the alleged cause of action for failure of consideration and abandonment little need be said. For reasons already stated, we are of the opinion that defendants did all that was required of them under the contract. Moreover, plaintiffs themselves testified that they rescinded not because of Brinkmeyer's alleged repudiation, but solely because they could not get a permit. The third contract expressly provided for a method of cancellation. Plaintiffs did not elect to follow the procedure there provided, but elected to rely on fraud. As we have already seen, this charge they failed to substantiate.

For the foregoing reasons the judgment appealed from is reversed.

We concur: SHENK, J.; PRESTON, J.; SEAWELL, J.; CURTIS, J.

216 Cal. 677

Ex parte BOATWRIGHT.

Cr. 3548.

Supreme Court of California.

Nov. 1, 1932.

1. Indictment and information ⇐114.

Allegation in information that accused had been convicted of felonies and judgments pronounced and never reversed *held* sufficient allegation of previous convictions (Pen. Code, § 969, as amended by St. 1927, p. 1152).

2. Criminal law ⇐1186(4).

That proof of service under prior felony convictions was not shown *held* not to deprive court of jurisdiction to adjudge accused habitual criminal, where accused admitted service before judgment was pronounced (Const. art. 6, § 4½; Pen. Code, § 644, as amended by St. 1927, p. 1066; § 667, subd. 2, as amended by St. 1909, p. 364).

3. Criminal law ⇐27.

Petit theft is no felony, and becomes such only when superadded to some other offense.

This is done, not to enlarge the scope of the crime, but to add to the punishment of the person who commits it for his many prior violations of the law.

4. Larceny ⇐88.

On conviction of petit theft, five years' imprisonment was maximum penalty, though accused had served time for other felonies (Pen. Code, § 644, as amended by St. 1927, p. 1066; § 667, subd. 2, as amended by St. 1909, p. 364).

In Bank.

Application by James Boatwright for a writ of habeas corpus prayed to be directed to the Warden of San Quentin Prison to secure release of petitioner from custody.

Writ granted, and petitioner discharged.

See, also (Cal. App.) 6 P.(2d) 972.

E. E. Keyes, Milton E. D'Askquith, Willard W. Shea, Public Defender, and Hugh Kenneth Forsman, Deputy Public Defender, all of Oakland, for petitioner.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

SEAWELL, J.

The petitioner, James Boatwright, who at present is incarcerated in the state prison at San Quentin, seeks by this application for a writ of habeas corpus to be discharged therefrom. The facts upon which the petition is based are as follows:

On October 4, 1927, by an information filed in Fresno county, petitioner was charged with "a felony, to-wit: Petit Theft, with Prior Convictions." The charge was based on the alleged theft by petitioner of certain articles valued at $25. The information, in addition to charging the petit theft, likewise charged petitioner with four previous felony convictions, as follows: Burglary in Oklahoma; first degree burglary in Los Angeles county; attempt to commit burglary, second degree, in the city and county of San Francisco; and second degree burglary in Yolo county. In each case the information charged that Boatwright had previously been convicted of the offense, "that the judgment upon said conviction [or plea of guilty] was pronounced, given and made [setting forth the date thereof] * * * and has never since been reversed, annulled or set aside." In no case did the information charge that petitioner had served a term in any penal institution for any of the prior felonies. Upon arraignment, petitioner pleaded not guilty to the charge of petit theft, but admitted "said prior conviction as charged in the information." In due course, petitioner was tried on the petty theft charge and was found, "Guilty as charged in the information." No evidence was introduced at the trial concerning the prior convictions. On November 5, 1927, petitioner appeared for sentence. At that time, the sentencing judge interrogated petitioner concerning the prior convictions, and elicited the information from him that he had been convicted of three former felonies, and had served time in a penal institution for each of them. He denied that he had been convicted of a fourth felony, alleged to have been committed in San Francisco. The fourth conviction, however, is immaterial. After this interrogation, the court pronounced the following sentence:

"That Whereas, The said James Boatwright, having been convicted of the crime of petit theft with prior convictions,

"It is Therefore ordered, adjudged and decreed, that the said James Boatwright be punished by imprisonment in the State Prison of the state of California, at San Quentin, California, until legally discharged."

So far as the record shows, no appeal was taken from that judgment. Pursuant to the judgment, petitioner was taken to San Quentin on November 6, 1927, where he ever since has been held in execution of the sentence. Petitioner contends that he has long since served the time required by the judgment. He contends, in the first place, that petit larceny is not a felony, but is only a misdemeanor; that in order to give petit larceny the status of a felony, under the provisions of section 667, subdivision 2, of the Penal Code, as it read in 1927, it was necessary for the prosecution to plead and prove not only the prior felony convictions, but also that petitioner had served a term therefor in some penal institution; that since the prosecution failed to plead or prove the fact of service

of a term in a penal institution, all that petitioner has been convicted of is petit larceny with prior felony convictions, which is only a misdemeanor.

In the second place, petitioner contends that even if he has been convicted of a felony, the maximum penalty therefor is five years under the express terms of section 667, subdivision 2, of the Penal Code as it read in 1927. Petitioner urges that the five-year sentence, less the credits which it is alleged, and not denied, he has earned, has long since expired. The warden of San Quentin, however, has refused to release petitioner, for the reason that he interprets the judgment of conviction as one imposing a life sentence, without parole, under the terms of the Habitual Criminal Act, as contained in section 644 of the Penal Code, as it read in 1927 (St. 1927, p. 1066).

[1] The information, being in the language of the statute, is sufficient. Section 969, Penal Code (as amended by St. 1927, p. 1152), provides: "In charging in an indictment or information the fact of a previous conviction of felony, * * * it is sufficient to state, 'That the defendant, before the commission of the offense charged in this indictment or information, was * * * convicted of a felony. * * *' If more than one previous conviction is charged, the date of the judgment upon each conviction may be stated, and all known previous convictions, whether in this state or elsewhere, must be charged."

The prior convictions were specifically set forth and were in full compliance with the above section of the Penal Code.

[2] It is true that the information did not specifically allege that the petitioner had served time upon each of the prior convictions alleged against him. As we have observed, the statute did not make such an allegation an essential part of the pleading. Section 969, Pen. Code, as amended in 1927, Deering. It was essential, however, that proof of service under said prior convictions in a penal institution be shown, in order to give the court jurisdiction to adjudge the defendant an habitual criminal. At least three felonies having been alleged against petitioner, for each of which he admitted, before the pronouncing of judgment, that he had served a term in a penal institution, as required by section 667 of said Penal Code, as it stood at the time of conviction, we are of the view that the fact that the information was silent on this subject would not entitle him to his discharge. It may be observed that the better practice would be to allege service of time under said prior convictions, but inasmuch as the petitioner admitted before the court pronounced its sentence upon him that he had served a term in a penal institution upon three of said prior convictions, we are at a loss to understand how he could have suffered any prejudice by a failure of the information to contain the matter which was necessary to give the court jurisdiction to adjudge him to be an habitual criminal.

Section 4½, article 6, of the Constitution provides: "No judgment shall be set aside, or new trial granted, in any case, * * * for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

How can it be said, in the light of the facts presented by the petitioner, that petitioner has in any wise suffered prejudice by the omission of the information to state that he had served time in a penal institution under said previous convictions upon his admission before judgment that he had served a term in a penal institution on account of each conviction? There is no authority in this state, including the two leading cases relied upon by petitioner, to wit, People v. Dawson, 210 Cal. 366, 292 P. 267, and People v. Sampson, 99 Cal. App. 306, 278 P. 492, which so holds. The most that can be said for those cases is that, while the information did not charge service of time under said convictions, it was not shown, as a matter of fact, that the defendants in those cases had actually served a term under said prior convictions. And further, the applicability of section 4½, article 6, to said cases was not brought to the attention of the court and, therefore, it gave no consideration to the aptness of the provision as it confronts us in the instant case.

As above observed, we are of the view that it is the better practice to allege not only the prior convictions in the manner pointed out by the statute, but also the fact that a term was served under each. This, at least, would be the safe rule to be followed in all such cases.

We now come to a more serious question.

Section 667 of the Penal Code, so far as here pertinent, as it stood in 1927, provided:

"Every person who, having been convicted of any offense punishable by imprisonment in the state prison, and having served a term therefor in any penal institution, commits any crime after such conviction, is punishable therefor as follows:

"1. If the offense of which such person is subsequently convicted is such that, upon a first conviction, an offender would be punishable by imprisonment in the state prison, such person is punishable by imprisonment in the state prison for the maximum period for which he might have been sentenced, if such offense had been his first offense.

"2. If the subsequent conviction is for petit

larceny, then the person convicted of such subsequent offense is punishable by imprisonment in the state prison not exceeding five years, provided, however, that any person who has been, or who shall hereafter be, sentenced to the state prison shall be subject to parole by the state board of prison directors, under the restrictions now provided by law for the parole of first term prisoners, any act to the contrary notwithstanding."

Section 644 of the Penal Code, as it stood at the time of petitioner's conviction, provided that every person convicted in this state of any felony, who shall previously have been three times convicted, whether in this state or elsewhere, of the crimes of which petitioner admitted that he had served a sentence therefor, shall be punished by imprisonment in the state penitentiary for not less than life.

The question presented is whether or not the conviction of petitioner herein on the charge of petit theft, taking into consideration the prior convictions which he had suffered, amounted to a felony. If not, then a greater punishment than imprisonment for five years could not have been imposed. In other words, is not the language of section 667, as the law stood when petitioner was convicted, so specific as to make it clear that the Legislature ex industria provided that, upon a conviction of *petit larceny*, prior convictions, however many, could not be considered in their cumulative effect to exceed a maximum of five years' imprisonment?

[3] Petit larceny, or petit theft, is not of itself a felony, and becomes such only when it is superadded to some other offense of which the party charged has suffered conviction, and this is done, not to enlarge the scope of the crime, but to add to the punishment of the person who commits it, for his many prior violations of the law.

[4] The language of our statute is so clear and unequivocal as to compel this court to hold that the Legislature intended, by the enactment of said subdivision 2 of section 667, of the Penal Code, under which petitioner was convicted, that on a conviction of petit theft, no greater penalty is to be imposed than imprisonment for a period of five years, notwithstanding the fact that the defendant had suffered other convictions and served time thereunder on more serious charges than the petit charge, of which he was lastly convicted. The section of the Code deals ex industria with a specific subject and leaves nothing open for construction.

It is brought to our attention that the wardens of the state prisons, in the interest of the discipline of said prisons, are desirous that this court should pass upon the question as to whether or not the court, in pronouncing judgment, should make the order, where the facts warrant such finding, that the person charged is an habitual criminal. The question is not directly involved in the instant case, inasmuch as we are of the view that the prisoner is entitled to his discharge on the ground that he has served the time prescribed by statute as a punishment for the crime of which he was convicted. However, if the question were before us, we would be inclined to hold that it is the duty of the judges of the superior court, in pronouncing judgment in like cases, to recite in their commitments or judgments briefly the crimes of which the defendant was previously convicted, and also find as a fact whether or not the defendant had served time therefor, and, if so, make a formal adjudication that the defendant is an habitual criminal. Our views in this respect are at least impliedly, if not expressly, supported by the language of section 644 of the Penal Code, as it now stands (St. 1931, p. 1052), which, in naming the offenses constituting an habitual criminal, uses the language that such person "shall be *adjudged* an habitual criminal and shall be punished by imprisonment in the state prison. * * *" Courts in criminal matters are the only ones empowered to pronounce judgments, and the language above quoted is sufficient in itself to justify the conclusion that the adjudication of habitual criminals should be pronounced by the court. We do not mean to say, however, that in those cases where a formal order has not been made by the court, the omission could not be supplied by the return of the prisoner to the court which pronounced the judgment in the first instance. An appropriate order, under former conditions not dissimilar to this, would be a precedent for such action. The subject fully comes within this court's ruling upon its consideration of the question of indeterminate sentences. This subject is fully covered in 8 California Jurisprudence, § 495, notes and cases therein cited. It is, therefore, unnecessary to discuss the subject further at this time.

We are of the view that the writ should be granted and the prisoner discharged from custody, it appearing that he has served a term greater than five years.

It is so ordered.

We concur: WASTE, C. J.; PRESTON, J.

CURTIS, J. (concurring).

I concur in the judgment but not upon the grounds stated in the opinion. On the other hand, I think the petitioner is entitled to his discharge for the reason that it was not alleged in the information under which he was prosecuted that he had served a term of imprisonment under his prior convictions, or under any of them. Section 667 of the Penal Code as it stood prior to its amendment in 1931 (St. 1931, p. 1051) required in the words of the main opinion, ex industria, that

an accused convicted of petit theft, after a prior conviction of a felony, shall have served a term of imprisonment therefor in a penal institution before the crime of petit theft can be raised to a felony. In construing this section we held in People v. Dawson, 210 Cal. 366, 292 P. 267, that it was necessary to allege and prove all the statutory requirements going to make up the crime charged, and that a judgment based upon an information charging the defendant with forgery and a prior conviction of a felony without alleging that the defendant had served a term of imprisonment therefor, would be construed simply as a judgment that the defendant be punished, not as prescribed by section 667 of the Penal Code, but only as was provided by the appropriate statute for a first offender convicted of a crime of forgery. Applying the principle of law enunciated in that case to the judgment under which the petitioner was sentenced, all we have is a judgment of conviction of petit theft. The information here, as in the case of People v. Dawson, supra, failed to bring the case against the defendant charged within the terms of section 667 of the Penal Code. As the requirements of the statute regarding service of time after previous conviction was one of the essential elements of the crime of which petitioner was convicted, it would be violative of one of his substantial rights to punish him therefor without charging and proving this element of the offense. In such a case section 4½ of article 6 of the Constitution should not be applied. The fact that the petitioner after his trial admitted that he had served time on one or more of these prior convictions would not, in my opinion, cure the fatal defect in the information.

127 Cal.App. 244

In re HUEBNER'S ESTATE.

GILL et al. v. JOLLIFFE et al.

Civ. 669.

District Court of Appeal, Fourth District, California.

Oct. 28, 1932.

Hearing Denied by Supreme Court Dec. 27, 1932.

Charities ⇐8.

Will providing that at life tenant's death remainder should be made into fund, interest of which was to be used to defray expenses of educating "some" boy or girl in music or art, recipient to be appointed by named individual, *held* not to create "charitable trust" (Probate Code, §§ 101, 103, 105, 106).

No "charitable trust" was created, since the phraseology adopted by the testatrix in drafting her bequest negatived any idea of benefiting the public or some particular class of persons indefinite in number who constituted a part of the public which was essential in order to create such trust; the word "some" being defined as a certain one, indicating a person, thing, or event as not known individually or designated specifically, often correlative to another, other, or others.

[Ed. Note.—For other definitions of "Charitable Trust," see Words and Phrases.]

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Proceeding between Paul L. Gill and another and E. H. Jolliffe, executor of the estate of Lauren M. Townsend, deceased, and Mary I. Van Wie, executrix of the estate of Grace E. Huebner, deceased, involving the construction of the will of Grace E. Huebner, deceased. From the judgment, the former appeal.

Affirmed.

Flint & MacKay and Wesley L. Nutten, Jr., all of Los Angeles, for appellants.

E. H. Jolliffe, of Ontario, for respondents.

AMES, Justice pro tem.

Grace E. Huebner executed a will dated February 11, 1928, which is as follows:

"Out of my estate I wish to give

"Libbie Townsend Cortland, N. Y.	$1000	
"Paul Gill	2000	
"Ida Gill	1000	
"Harry Gill	1000	
"Gussie Woodcock	3000	
"Mary I. Van Wie	1000	
~~"Kusie Ando~~	~~1000~~	
"Dot Graber	~~500~~	$1000
"Laguna Beach Art Galery	500	
"Merton E. Hill, Jr.	500	

"Lauren M. Townsend, my father, $4000 outright and the interest for life on the remainder after the above bequests and my funeral expenses are paid. After his death I wish Paul Gill to have $2000 in addition to the first bequest and that the remainder be made into a fund, the interest of which shall be used to help defray the expense of educating some girl or boy in music or art. I appoint Paul Gill to have charge of selecting the recipient of this last bequest.

"I appoint Lauren M. Townsend and Mary I. Van Wie my Executor and Executrix, respectively without bond.

"Grace E. Huebner,
"Mary I. Van Wie."

On March 26, 1929, she executed a codicil to said will, which is as follows: "March 26,

1929. I wish to cancel the above bequest to Kunie Ando and instead add the $1000 that would have gone to him to the $4000 which I have left my father. I have also changed the amount left to Dot Graber from $500 to $1000. Grace Huebner."

Grace Huebner died on or about the 11th day of November, 1929, and the will above referred to was thereafter admitted to probate in the superior court of San Bernardino county. Lauren M. Townsend, father of said decedent, died on or about the 17th day of May, 1931, and left a last will and testament which was subsequently admitted to probate in the superior court of San Bernardino county, and E. H. Jolliffe was duly appointed and qualified as the executor thereof. The said Lauren M. Townsend was the sole surviving heir and next of kin of Grace E. Huebner, and thereafter the executor of his will filed in the superior court of San Bernardino county a petition praying said court to determine the heirship of the deceased Grace E. Huebner and adjudge Lauren M. Townsend to be the sole heir at law of said Grace E. Huebner, and further adjudicate his rights to the residue of said estate upon its final distribution.

After a hearing thereon the superior court made and entered its decree adjudging that the clause in said will providing for and attempting to create a fund, the interest of which should be used to help defray the expenses of educating some girl or boy in music or art, was void and that the residue be distributed to the executor of the will of Lauren M. Townsend, deceased. From that judgment Paul L. Gill and Sarah Elizabeth Langley have appealed.

Appellants contend that the clause in the will here in controversy creates a valid charitable trust. Respondents, on the contrary, contend that all of the elements necessary to the validity of a charitable trust are not present in this attempted bequest and that, therefore, the bequest must fail. In an early Massachusetts case a charity was defined as follows: "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an *indefinite number of persons*, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government." Jackson v. Phillips, 14 Allen, 539, at page 556. (Italics ours.)

This definition has been adopted and followed by the courts of California in many decisions, some of which are hereinafter referred to. It will be noted that one element of the definition above quoted is that the gift must be for the benefit of *an indefinite number of persons*. Can the language in the will of Grace Huebner be construed as including such indefinite number of persons, or did the testatrix have in mind the education of but one girl or boy? If the latter was her intention, then we think that she has failed to create a charitable use. In Estate of Dol, 182 Cal. 159, 187 P. 428, 430, the court says: "One of the essential features of a charitable use is that it shall be for the public benefit, either for the entire public or for some particular class of persons, *indefinite in number*, who constitute a part of the public. The persons to be benefited must consist of 'the general public or some class of the general public indefinite as to names and numbers.'" Citing Estate of Coleman, 167 Cal. 214, 138 P. 992, Ann. Cas. 1915C, 682. In Russell v. Allen, 107 U. S. 163, 2 S. Ct. 327, 330, 27 L. Ed. 397, cited with approval in People v. Cogswell, 113 Cal. 129, 45 P. 270, 271, 35 L. R. A. 269, the Supreme Court of the United States, in referring to charitable trusts, says: "They may, and indeed must, be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity." And the court in the Cogswell Case says: "A charitable trust or a charity is a donation in trust for promoting the welfare of mankind at large, or of a community, or of some class forming a part of it, indefinite as to numbers and individuals." In Estate of Sutro, 155 Cal. 727, 102 P. 920, 923, after quoting the definition of a charity from Jackson v. Phillips, supra, the court says: "This definition, as applied to charitable perpetuities, must be read with the opening phrase constantly in mind, that the benefit is for 'an indefinite number of persons,' and not for any particular person or persons, and it must be for all persons falling within a described class, indefinite in number." In Estate of Graham, 63 Cal. App. 41, 218 P. 84, 85, the court says: "Whatever may be the rule in other jurisdictions, the law in this state is settled without conflict that a charitable trust is constituted by a donation in trust for establishing or carrying on an institution dedicated to the welfare of the public or of some definite class or part of it."

Appellants contend that the phrase "some girl or boy" should be construed as "many." The word "some," argue appellants, only limits the number that will presently benefit by the bequest, i. e., the beneficiary for the time being.

If an ambiguity is apparent in this will and an interpretation is necessary, the following canons of construction, which were formerly a part of the Civil Code, but are now enacted in the Probate Code, would apply. "A will is to be construed according to the intention of the testator." Civ. Code, § 1317, now Probate Code, § 101. "When an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention

is to be ascertained from the words of the will." Civ. Code, § 1318, Probate Code, § 105. "All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole." Civ. Code, § 1321, Probate Code, § 103. "The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained." Civ. Code, § 1324, Probate Code, § 106.

Examining the will of decedent, in the light of these rules of construction, we find that in the bequests contained in the first portion of the will now under consideration, the testatrix used the phrase "wish to give," to the legatees therein named, the sums set opposite their respective names. These bequests are followed by the following clause: "Lauren M. Townsend, my father $4000 outright and the interest for life on the remainder after the above bequests and my funeral expenses are paid."

In the second bequest to Paul Gill she wishes him to have $2,000 in addition to the first "bequest," referring to the former gift by that name.

In the codicil she revokes the "bequest" to Kunie Ando, again referring to the former gift as a "bequest" and says the testatrix, "add the $1000 that would have gone to him to the $4000 which I have left my father."

The thought conveyed in all of the foregoing bequests is that of an absolute gift, subject to the life interest in Lauren M. Townsend "on the remainder."

But the phraseology employed in the bequest involved in this litigation does not convey that thought. After the death of Lauren M. Townsend she expressed the desire "that the remainder be made into a fund" the interest of which shall be used for the laudable purpose therein expressed. In this bequest alone she refrains from making a "gift" or a "bequest" and it is devoid of any expression conveying the thought that the title to the "remainder" shall vest permanently in any trustee or devisee.

It will be noted that the disjunctive "or" is used which, together with the succeeding sentence, attempts to vest in Paul Gill the power of exercising his own discretion as to the individual to be chosen. The singular number of each noun is employed. The word "some" is defined in Webster's New International Dictionary as: "A certain; one; —indicating a person, thing, event, etc., as not known individually or designated specifically; —often correlative to *another*, *other*, or *others;* as *some* man, that is some one man. * * *" The testatrix further says: "I appoint Paul Gill to have charge of selecting the recipient of this last bequest." Again the beneficiary is designated in the singular number as the recipient. No idea of permanence is conveyed by the language thus used. The power of selecting the sole beneficiary is vested exclusively in one individual. If it were the purpose of the testatrix to create a charitable use, with Paul Gill as trustee, she failed to indicate who his successor would be, or how such successor should be chosen, and she also failed to designate by whom, or in what manner, the beneficiary should be chosen after Paul Gill has ceased to act. It may be that such failure, standing alone, would not be sufficient to defeat her purpose in creating a charitable use, if any such purpose existed, but that fact should nevertheless be considered in construing the language of the bequests and ascertaining her purpose.

The phraseology adopted by the testatrix in drafting her bequest itself negatives any idea of benefiting the public or "some particular class of persons, indefinite in number, who constitute a part of the public." Estate of Dol, supra. The dominant thought expressed in this attempted devise, and the only idea therein conveyed, was a desire that the interest from a certain fund should be used to help defray the expense of educating some individual to be selected by Paul Gill. For that reason we think the testatrix has wholly failed to create a charitable trust.

The judgment appealed from is affirmed.

We concur: JENNINGS, Acting P. J.; MARKS, J.

127 Cal.App. 183

Ex parte O'LEARY.

Cr. 2254.

District Court of Appeal, Second District, Division 2, California.

Oct. 26, 1932.

1. Habeas corpus ⇐83.

On habeas corpus to secure release from custody under commitment for contempt for failure to pay alimony, testimony in contempt hearing could not be considered, where return was not traversed and consideration of such testimony was opposed.

2. Divorce ⇐269(9).

One continually refusing to pay alimony, notwithstanding ability to pay, is not immune from punishment for contempt after having once been punished.

Proceeding on the petition of John Walker O'Leary for a writ of habeas corpus to secure his release from custody under a commitment for contempt of court.

Writ discharged, and proceeding dismissed.

Harry J. Miller, of Los Angeles, for petitioner.

Samuel L. Rummel and Kenneth K. Scott, both of Los Angeles, for respondent.

STEPHENS, Justice pro tem.

An interlocutory decree of divorce, with alimony and attorney fees, was heretofore secured against the petitioner herein, John Walker O'Leary, by his wife, Clara Mae O'Leary. Thereafter the wife filed an affidavit alleging that the attorney fees and the accrued alimony had not been paid. Proceedings were had on an order to show cause and the husband was sentenced to jail for contempt in not complying with the order to pay. A few months later the wife filed another affidavit to the same effect as the first one, but bringing it up to date. After hearing on the usual order to show cause the husband was again sent to jail for contempt for failure to pay. It is of this last order that he complains by petitioning this court for release from custody by the writ of habeas corpus.

[1] The petition relates what it alleges to be all of the testimony given at the hearing on the order to show cause. Petitioner contends that this testimony shows that the trial court had no jurisdiction to adjudge him in contempt and that he presented this point to the court below. Respondent contends that such testimony is not before this court.

The return sets out in haec verba the interlocutory decree of divorce, the order adjudging petitioner guilty of contempt and sentencing him to jail, and the commitment. As no question is raised as to the sufficiency of any of these documents or orders, it will not be necessary to detail their contents. No traverse has been filed.

In the habeas corpus proceeding entitled In re Smith, 143 Cal. 368, 77 P. 180, 181, appears the following: "Under our practice, upon the filing of the return the petition is treated as a traverse to it. Then, if any of the matters in the petition, so treated as a traverse to the return, are denied, it is incumbent upon the person to whom the writ is addressed to join issue upon them. In the absence of such issue joined, the facts set forth in the petition will be taken as true." This doctrine has been referred to with seeming approval in Re O'Connor, 80 Cal. App. 648, 252 P. 730, and in Re Hoffman, 155 Cal. 114, 99 P. 517, 132 Am. St. Rep. 75; but the decision in Re Collins, 151 Cal. 340, 90 P. 827, 828, 91 P. 397, 129 Am. St. Rep. 122, clarifies the point by saying that the petition is not regarded as a traverse except through agreement or stipulation. Mr. Justice Sloss says in the latter case: "The function of the petition is to secure the issuance of the writ, and when the writ is issued the petition has accomplished its purpose. The writ requires a return by the officer or other person having the custody of the prisoner. To such return the prisoner may present exceptions, raising questions of law, or a traverse, raising issues of fact, or both. Where * * * the traverse alleges matter tending to invalidate the apparent effect of such process —the burden of proving such new matter is on the petitioner. The remarks in Re Smith, supra, are to be taken as referring only to the case where, by agreement of the parties and the consent of the court, the petition is treated as a traverse to the return, and its averments are not disputed." See In re Delgado, 107 Cal. App. 689, 290 P. 589, and Matter of Wilson (Cal. App.) 11 P.(2d) 652. Since no traverse has been filed herein and there has been no agreement by counsel nor consent of the court, but, on the contrary, there has been affirmative objection on behalf of respondent to the consideration of the testimony taken below, we are of the opinion that it cannot be considered here at all.

[2] Petitioner also raises the point that he has already been punished for the same offense, but it was stated by this court when oral argument was heard that this would not be considered, as it had never been presented in the superior court. It would seem obvious, however, that there can be nothing to the point, as the refusal to pay, having

the ability so to do, is a continuing offense, and petitioner cannot escape the disciplinary arm of the court ever after, by having once suffered punishment for refusing to pay.

From the foregoing it will be seen that a consideration of the other points raised is not necessary.

The writ is discharged, and the proceeding dismissed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

127 Cal.App. 374

GRAY v. CRAIG et al.*

Civ. 4678.

District Court of Appeal, Third District, California.

Nov. 4, 1932.

Rehearing Denied Dec. 3, 1932.

Hearing Denied by Supreme Court Dec. 30, 1932.

1. Jury ⇐26.

Denial of jury trial demanded by plaintiff in writing when cause was set for trial, without depositing one day's jury fees with court clerk, *held* not violation of constitutional guaranty (Code Civ. Proc. § 631, subd. 5).

2. Appeal and error ⇐994(1), 1012(1).

Appellate court cannot pass on weight of evidence or witnesses' credibility.

3. Appeal and error ⇐1010(1).

Appellate court is bound by trial court's fact findings on substantial evidence.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by John Gray against Walton Craig, Jr., and others, in which defendant Craig filed a counterclaim. From the judgment entered, plaintiff appeals.

Affirmed.

John Gray, in pro. per.

H. E. Schmidt, of Bakersfield, and George Wadsworth, of Tracy, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is a motion to submit upon appellant's opening brief; no points and authorities being filed on behalf of respondents. The motion being granted, we will consider the appeal on its merits.

From the complaint it appears that respondent Craig and the appellant entered into a contract whereby the possession of certain personal property was delivered by respondent Craig to appellant, who agreed to use and care for the same, and to deliver to respondent Craig 50 per cent. of the yield therefrom for five years, and, if the share delivered amounted to $4,000, appellant was to become the sole owner of the personal property so delivered.

Thereafter appellant alleges the respondent, actuated by express malice, caused an action to be filed against him in the justice's court of Kern county, presided over by T. A. Baker, one of the respondents. Appellant defaulted, and a judgment was entered against him. In due time an execution was issued and levied upon the property described in the agreement, and thereafter sold in partial satisfaction of the judgment.

It is alleged that the respondents conspired together to abuse the processes of the court and thereby to oppress and injure appellant and to deprive him of his rights under the agreement between himself and respondent Craig.

Upon issue joined, the trial court entered judgment in favor of the plaintiff and against defendant Craig for nominal damages in the sum of $50, and upon the counterclaim of defendant Craig entered a judgment against plaintiff in the sum of $50, and judgment in favor of the remaining respondents and against appellant.

Appellant, being dissatisfied, prosecutes this appeal and brings his objections to the rulings of the trial court here by a bill of exceptions.

[1] The first point urged for reversal is that the plaintiff was denied the right of trial by jury. It appears that, at the time of the setting of the cause for trial, appellant demanded in writing a jury, but failed to deposit with the clerk of the court a sum equal to one day's jury fees payable under the law, as required by the rules of the court and section 631, subdivision 5, Code of Civil Procedure.

Appellant claims he was thereby denied the right of trial by jury guaranteed to him by the Constitution, but this point has been upon a number of occasions before the court, and his contention is without merit. Norland v. Gould, 200 Cal. 706, 254 P. 560.

[2, 3] Appellant has also cited numerous instances where it is alleged that the findings made and adopted by the court are not supported by the evidence, but we have carefully examined the evidence appearing in the bill of exceptions, and find there is in each instance ample evidence to support the several findings.

True, there is a conflict in the evidence, but it is not the function of this court to pass upon the weight of the evidence or the credibility of the witnesses, that duty resting

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 16 P.(2d) 798.

upon the trial court, and that tribunal, having heard the evidence and observed the demeanor of the witnesses on the stand, and having found upon substantial evidence as to certain facts in controversy, this court is bound thereby.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

127 Cal.App. 331

PEOPLE v. BENDER.

Cr. 1229.

District Court of Appeal, Third District, California.

Nov. 3, 1932.

1. False pretenses ⇐49(1).

Evidence *held* to establish guilt of accused for grand theft by use of false pretenses.

2. Criminal law ⇐1159(1).

Courts of review are not authorized to reverse judgment of conviction because of conflict in testimony, or discrepancy of witnesses, or because testimony is susceptible of two reasonable inferences.

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Fred Bender was convicted of grand theft, and from the judgment and from an order denying his motion for new trial, he appeals.

Judgment, and order affirmed.

Bryce Swartfager, of Santa Rosa, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN, delivered the opinion of the court.

The defendant was convicted of grand theft in having obtained by the use of false pretenses $2,000 from the complaining witnesses. The alleged offense arose out of a mining venture involving a lease of certain properties to be developed for the mining and reduction of cinnabar.

The essence of the offense sought to be charged lies in the obtaining of the money by means of false representations uttered with intent to defraud, and proof that those false representations were relied upon and caused the owner to part with his money.

In order to determine what, if any, were the false representations here relied upon for a conviction, it is necessary to set forth portions of the testimony adduced at the trial. We have no instrument in writing containing the agreement of the parties for the understanding of the various parties was never reduced to a formal written contract.

One of the complaining witnesses testified as to a meeting with the defendant on April 29, 1931, that being the first that appears in the record, as follows: "A. Mr. Bender told me he was desirous of securing $2,000, and said he would give me good rights in the property. He said, 'I will guarantee you will get your money back in six months and a per cent, or an interest in the property.'" Later, the same evening, the following transpired: "A. I asked Mr. Bender, what kind of a lease do you have on this property? He said, 'I have a bonded lease on this property for five years.'" Further, in regard to the lease on the property, Mr. Cutter testified as follows: "On June 3rd, I asked to see him again. 'What kind of a lease do you have here, Mr. Bender?' He said, 'I have a bonded lease.' I said, 'How much is the bond on that lease?' He said, '$5,000.00.' I said, 'What are the conditions of that lease, Mr. Bender?' He said, 'Simply that I pay $1,000 the first year, $5,000 the second, $5,000 the third, $5,000 the fourth and $5,000 the fifth.'" On another occasion defendant was asked: "What do you have to offer for the $2,000 that we have? He said, 'Well, boys, how does this proposition strike you? I will give you twenty per cent, and I will keep thirty per cent, and we will reserve the other fifty per cent for the operation of the mine, further financing, and further development of the property.'"

A further conversation was had as to a retort for the smelting of the ores as testified to by one of the complaining witnesses: "We asked Mr. Bender in regard to that continuous retort * * *. There was a drawing of that continuous retort spoken of, there, the drawing of which was on the wall above the mantel of the fireplace, and it was one of a continuous retort manufactured by the Pacific Foundry. That retort, Mr. Bender told us, that that was the one that he had placed the money on account and intended to get."

Upon another occasion, defendant wrote to one of the complaining witnesses, in part, as follows: "Naturally you understand that $2,000.00 would not finance for you the new retort, as I have already payed some on account & the whole amount for the retort is $2,000.00 the only payment due yet is $750.00."

Mr. Blankenship testified that in his first conversation about the mine he had with defendant was about June 2, 1931, when defendant said: "He had paid $1,250.00 on a continuous retort and he wanted some more money

to finish paying for it, he wanted us boys to help him out, and to work there with him, get the retort up." The next day the three met and "Mr. Cutter first asked him what kind of a hold he had on the property. He said, 'Well, I have a bonded lease for five years.' Mr. Cutter asked him what kind of a proposition he had to offer. He says, 'Well, I already have $1,250.00 paid on a retort, and done a lot of work here.' He says, 'I will give you boys twenty per cent interest in this bonded lease, and I will keep thirty per cent of it, and we will reserve 50 per cent of it for $2,000.00.' "

Again Mr. Blankenship testified as to a conversation had about June 26, 1931, with defendant as follows: "A. I asked Mr. Bender, I would like to meet Mr. Vought, he talked very much of him this way and the other, so we went back into San Francisco that day, he says, 'Well Mr. Vought is a very busy man, you can't see him today, besides I have to go down to the Pacific Foundry and see if we can't get the retort sent up to the Mine within this week,' he says, 'We want to get that up there quicker than anything else to get it in operation.' " And again the same witness had a further conversation with defendant about September 21st concerning the retort:

"I told him I had been down to the Pacific Foundries in San Francisco, and talked to the officials of the company and found he never paid a dime on the retort, and he did not use any of our money to finish paying for it, and that he never ordered one and never intended to get one.

"Q. What did Mr. Bender say? A. 'Well,' he said, 'I decided not to get that retort, I wanted to get a larger furnace.' I said, 'Well, you told us you had money paid on a retort and you were going to use our money to finish paying for it, and as we were going to get it up there and have it installed in a month or six weeks, we would be making quicksilver, and have our money back. I find out, you did not even pay a dime on it, never ordered one or anything.' He said, 'Well, I wanted to get a larger furnace and so we could operate it on a better scale.' "

About July 7 or 8, 1931, a form of agreement was prepared by defendant and submitted to Mr. Cutter and Mr. Blankenship, the complaining witnesses, but objection was made on the ground it was for a percentage only of the profits and did not convey an interest in the bonded lease. Defendant then told Mr. Cutter and Mr. Blankenship to prepare an agreement satisfactory to them, which was done about September 14th, but was not signed by defendant on account of another deal pending.

In order to show what the agreement contained which was drafted and submitted by the complaining witnesses to the defendant as being satisfactory to them, it is, perhaps, enlightening to set forth its essential provisions, as follows:

"Agreement

"This agreement made and entered into this (Sept. 14) day of August, Nineteen Hundred Thirty One, by and between Fred Bender, party of the first part, and Richard Bryce Blankenship and Glen G. Cutter, parties of the second part:

"Witnesseth: That whereas the party of the first part is the owner of a certain bonded lease known as the Socrates Leasing Company on certain properties situated approximately twenty (20) miles from Healdsburg, in Sonoma and Lake Counties, California, commonly known as the Socrates Consolidated Mining Company properties, from which quicksilver and other minerals are being and have been extracted; and

"Whereas, the parties of the second part have advanced to the party of the first part the sum of two thousand ($2,000.00) Dollars to be used in the development of said properties and the extraction of quicksilver and other minerals therefrom.

"Now, therefore, in consideration of the premises and of said sum of Two Thousand ($2,000.00) Dollars, the receipt of which is hereby acknowledged, the party of the first part does hereby agree to accept parties of the second part as associates in the Socrates Leasing Company, a sharing in the following ratio:

"Thirty (30%) per cent to the party of the first part.

"Twenty (20%) per cent to parties of the second part.

"The remaining fifty (50%) per cent to be used for further financing, cost of development and operating expenses of said properties. All profits accruing from the last said fifty (50%) shall be divided equally among the three associates.

"In Witness Whereof, the parties hereunto have set their hands, the day and year first above written.

.....

"Party of the First Part.

.....

.....

"Parties of the Second Part."

Mr. Cutter, one of the complaining witnesses, was asked on cross-examination as to the foregoing agreement:

"Q. After you finished preparing that memorandum and that document, did you have it in such shape it met your approval? Was that your final understanding as to what you had agreed to with Mr. Bender? A. That generally represented what they considered our interest there, yes."

Mr. Blankenship, the other complaining witness, testified with reference to the agree-

ment; when asked: "Q. Who wrote it out on the other piece of paper, who put that there, you and Mr. Cutter?" He answered, "Yes, both of us did some of the writing."

"Q. Did Mr. Bender put any of the data on there? A. No, he said we could have it fixed like we wanted it, he always seemed very agreeable. * * *

"Q. Did you bring it back? A. Brought it back and gave it to Mr. Bender, he read it over and said, 'That is satisfactory,' he said, 'this Butler Bros. deal is coming on now, I don't want to sign it right now,' he says, 'if that turns out right, I will incorporate you boys in that,' he says, 'there will only be one deal then, don't want to get too many irons in one fire,' I think that is the expression he used."

Complainants claim that the defendant misrepresented the nature and character of the lease he had upon the property. He (defendant) said he "had a bonded lease for five years." Under the theory that the words "bonded lease" were peculiar to the mining industry and had a peculiar meaning among mining men, the court permitted a witness for the people to qualify as an expert in mining, and the following questions were asked and answered:

"Mr. Koford: Q. Mr. Ricketts, are you familiar with the term in mining parlance known as a bonded lease? A. Yes.

"Q. Do any of these instruments or either of them comply with the requirements of a bonded lease, as understood in mining parlance? A. Yes, there is practically a bond for a deed here. I will say * * * that a bond for a deed, as I understand it, * * * is an executory contract to make title upon the performance of conditions stated, and this paper particularly states that upon the payment of the said purchase price * * * the said lessor shall give to the lessee and his assigns a good and sufficient deed to all of said property, and this agreement shall thereafter terminate."

It is conceded that the agreement under which defendant was operating the property gave him the right to enter upon the described lands for the period of one year under certain terms and conditions as to the use and care of the property, the amount of royalty to be paid, provisions against assignment, etc., and a further agreement that upon the faithful performance of this agreement, the defendant would, at the expiration thereof, be granted a working lease on the property for the further term of four years, a copy of which lease had been submitted and placed in escrow, in which lease the rental was on a guaranteed royalty basis of $5,000 per year or four years, with a further option to purchase the property, if the lessee desired, at the stipulated amount of $200,000, all royalties paid to be applied as a credit on the option price.

The foregoing briefly are the facts upon which the defendant was convicted of fraudulent representations.

The testimony offered to show the fraudulent representations is not as clear and convincing as one would like to see where the liberty of a man is at stake, but we do find the positive statements of the defendant in his first conversations with the complaining witnesses that they would receive a per cent. or interest in the property. The complaining witnesses made repeated demands upon the defendant to submit for examination the lease under which he claimed, but it was never produced. One of the complaining witnesses suggested that he should go to see Mr. Vought, an officer of the company leasing to defendant, but the defendant did what he could to discourage such a visit, and when finally they did examine the lease, they discovered it contained a clause against assignment and various conditions not theretofore revealed to them. The only answer of the defendant was to suggest some other method of negotiating the lease and obtaining their money for them.

Defendant's several statements with regard to the purchase of a retort had the effect of misleading the complainants. It is true the draft of the agreement prepared by the complaining witnesses did not provide for a retort or for an interest in the leasehold, but it is apparent from the actions of these young men that they were inexperienced in business dealings and the drafting of legal documents, and it is plain from the use of the words "agrees to accept parties of the second part as associates" meant on an equal footing to the extent of the interest conveyed.

[1] Various alleged errors are pointed out by the appellant in the admission of evidence and in the instructions of the court to the jury, but, in view of the correct instructions given and of the evidence properly admitted, we are satisfied it was sufficient to establish the guilt of the defendant, and that it did convince the jury of that fact.

[2] Courts of review are not authorized to reverse a judgment of conviction because of conflict in the testimony, or because of discrepancy of any of the witnesses, or because the testimony is susceptible of two reasonable inferences, one looking to the guilt of the defendant and the other to his innocence. In such cases, the finding of the jury is conclusive.

The judgment and the order are affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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FARBSTEIN v. PACIFIC OIL TOOL CO., Limited.

Civ. 4573.

District Court of Appeal, Third District, California.

Oct. 25, 1932.

1. Corporations ⇐289.

In stockholder's action to declare stock assessment void, plaintiff *held* not entitled to question legality of election of de facto directors (Civ. Code, §§ 346, 347 [now §§ 338, 339]).

2. Corporations ⇐189(11).

In stockholder's action to declare stock assessment void, allegation that no notice of directors' meeting was mailed, not negativing actual notice, *held* insufficient (Civ. Code, §§ 346, 347 [now §§ 338, 339]).

3. Pleading ⇐8(15).

In stockholder's action to declare stock assessment void, allegation that one director's and stockholder's assent to amendment of articles of incorporation permitting assessment was secured by representation that consent went only to change of corporate name, not alleging facts showing fraud or improper conduct, *held* mere conclusion (Civ. Code, §§ 346, 347 [now §§ 338, 339], 362, and § 331, as amended by St. 1929, p. 1268).

4. Corporations ⇐654.

Foreign corporation's voting of stock in domestic corporation, though corporation failed to qualify for doing business in state, *held* not prohibited, as regards validity of foreign corporation's consent to change of domestic corporation's articles of association (Civ. Code, §§ 362, 408).

5. Pleading ⇐8(11).

In stockholder's action to declare stock assessment void, plaintiff's allegation that person assenting to amendment of articles of incorporation to permit assessment was not stockholder as disclosed by books *held* not to negative ownership, and allegation that person was not owner was mere conclusion (Civ. Code, § 362, and § 331, as amended by St. 1929, p. 1268).

6. Corporations ⇐40.

Statute authorizing directors and specified majority of stockholders to change articles of incorporation so as to empower directors to assess stock *held* constitutional (Civ. Code, § 362; Const. art. 12, § 1).

Civ. Code, § 362, permitting such amendment, was constitutional, in view of Const. art. 12, § 1, empowering Legislature to alter or repeal from time to time all laws concerning corporations.

7. Corporations ⇐175.

Directors' power to assess stock *held* exercisable, though part of stock was unsubscribed (Civ. Code, § 331, as amended by St. 1929, p. 1268).

8. Corporations ⇐175.

Directors' resolution assessing stock *held* not required to specify name of person to whom assessment should be paid (Civ. Code, § 331, as amended by St. 1929, p. 1268).

Specification of name was unnecessary; it being sufficient if there was a statement that assessment is payable to corporation's secretary.

9. Corporations ⇐189(11).

In stockholder's action to declare stock assessment void, allegations of complaint *held* insufficient to raise question of directors' estoppel to sell stock to enforce assessment (Civ. Code, § 331, as amended by St. 1929, p. 1268).

Complaint alleged, in substance, that certain alleged directors had assured stockholders that directors would try to adopt plan to liquidate business by selling business to larger concern without enforcing assessment of stock, and lulled stockholders into feeling of security that payment of assessment would not be necessary.

10. Corporations ⇐189(11).

In stockholder's action to declare assessment void and enjoin sale of stock for failure to pay assessment, complaint showing mere irregularities *held* not to allege cause of action (Civ. Code, § 331, as amended by St. 1929, p. 1268, and §§ 346, 347 [now §§ 338, 339]).

No cause of action was alleged where complaint showed mere technical irregularities in proceeding and plaintiff had not tendered to buyers of stock amount paid for stock sold and delinquent, nor offered to pay assessment to corporation.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Della Greenberg, against the Pacific Oil Tool Company, Limited, in which after plaintiff's decease, J. Farbstein, administrator, was substituted as plaintiff. From a judgment sustaining a demurrer, substituted plaintiff appeals.

Affirmed.

R. Dechter, of Los Angeles, for appellant.

Robert H. Dunlap and George R. Larwill, both of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The trial court sustained the defendant's demurrer to the plaintiff's third amended complaint without leave to amend. From the judgment entered thereafter, the plaintiff appeals.

The action was originally begun by Della Greenberg, a stockholder in the defendant corporation, by a complaint filed December 13, 1929, in which it was sought to enjoin the sale of the stock belonging to the plaintiff for the failure to pay an assessment levied thereon, and also to have the assessment declared void. After the decease of Della Greenberg, J. Farbstein, the administrator of her estate, was substituted as plaintiff. The demurrer interposed by the defendant was general, and the question before us upon this appeal is whether the third amended complaint states facts sufficient to constitute a cause of action. Omitting the title, formal allegations of the complaint, and the allegations of plaintiff's ownership of shares of stock in the defendant corporation, the complaint is as follows:

"That on or about August 14, 1929, the articles of incorporation of the defendant corporation provided, and do now provide that the stock of the defendant corporation should be non-assessable; that on or about August 14, 1929, the articles of incorporation of the defendant corporation provided, and do now provide that the number of directors of the defendant corporation shall be three; that at all times herein mentioned the by-laws of the defendant corporation provided, and do now provide that the secretary of the defendant corporation shall mail, at least five days before the date of any meeting, either regular or special, a notice of the time and place of such meeting; that the by-laws of the defendant corporation at all times herein mentioned did not provide, and do not now provide for the time and place of regular meetings.

"That on or about August 14th, 1929, a meeting of the Board of Directors was attempted to be held at the office of the defendant corporation in the City of Vernon; that no notice of such meeting was ever mailed by the secretary of the defendant corporation, of the time and place of such meeting of the Board of Directors so attempted to be held as aforesaid on August 14th, 1929; that no waiver of notice was executed of such meeting so attempted to be held on August 14th, 1929; that at said meeting there were present as directors, W. T. Wells, Lee Champion, W. G. Lane, Roy R. Renouf, H. E. Hofer and absent, J. Farbstein; that on or about August 14, 1929, said corporation, by its articles of incorporation, only had, and only could have three directors; that on or about said August 14, 1929, the directors of said defendant corporation were Lee Champion, Roy R. Renouf and J. Farbstein; that on or about said August 14, 1929, W. T. Wells, W. G. Lane and H. E. Hofer were not directors of the defendant corporation; that at said meeting so attempted to be held on August 14th, 1929, there was attempted to be passed a resolution amending the articles of incorporation as follows:

"1. Change the name of the defendant corporation by adding the word 'Ltd.'; the place of business to County of Los Angeles;

"2. Increasing the capital stock of the corporation to 300,000 shares of the par value of $1.00 each from an authorized capital stock of $150,000.00 divided into 150,000 shares of the par value of $1.00 each;

"3. Increasing the number of directors of the corporation from three to five;

"4. That shares of stock shall be assessable from time to time by the board of directors subject to the provisions concerning assessments on capital stock of corporations which may from time to time exist or be enforced in the State of California;

"That said resolution of said board of directors was alleged to contain, and showed the assent of a majority of the stockholders executed prior to said resolution, and which assent is set out in said resolution; that the certificate filed with the Secretary of State and the County Clerk of Los Angeles County of said amendment of articles of incorporation so attempted to be passed as aforesaid, on or about August 14, 1929, was certified by one W. T. Wells who, at the time of the certification, was not a director nor a president; that the copy of the certificate of amendment of said articles of incorporation filed in the County Clerk's office, further certifies that such amendment was passed by the unanimous vote of five directors, and in such copy the word 'five' is scratched out and the word 'all' written above it, when in truth and in fact, and as the very minutes of said meeting show, director J. Farbstein was absent.

"That alleged assent of stockholders to the amendment of the articles of incorporation as aforesaid, contained the signature of W. T. Wells as owning 22,848 shares of the capital stock of the defendant corporation; that in truth and in fact said W. T. Wells was not at said time a stockholder, owning any stock in said corporation, as disclosed by the books of the defendant corporation; that the alleged assent of the stockholders to such amendment to the articles of incorporation contained the signature of the Champion Supply Company, a Wyoming corporation, as owning 36,000 shares of the capital stock of the defendant corporation; that said Champion Supply Company, a Wyoming corporation, was at all times herein mentioned transacting business in the State of California, but has failed to qualify pursuant to California laws applicable to the doing business in the State of California by foreign corporations; that there was not at the time of the alleged execution

of such assent by the stockholders to the amendment of the articles of incorporation, any authorization of the Champion Supply Company on file in the defendant corporation authorizing the execution of such assent on behalf of the Champion Supply Company by Lee Champion, who signed said assent on behalf of said corporation.

"That on or about said August 14, 1929, when said articles of incorporation were attempted to be amended as aforesaid, there was present one Roy Renouf, a director of said corporation and a stockholder owning 24,911 shares of the capital stock of said corporation; that at said time and place the only matters discussed by the people present at said meeting was the matter of change of name of said corporation by adding the word 'Ltd.'; that the assent to the amendment of the articles of incorporation were signed at said time by said persons then present; that at said time and place the other persons present represented to said Roy Renouf that said amendment only contained the fact of the change of name, by adding the word 'Ltd,' and nothing else; that said Roy Renouf believed and relied on said representation and affixed his signature to the assent to the amendment of the articles of incorporation, and thereafter voted for the resolution amending the articles of incorporation, and had he known that said amendment contained anything else, such as authority of the board of directors to levy assessments on stock, he would not have signed said assent to said amendment of the articles of incorporation; that had said Roy Renouf not executed said amendment of the articles of incorporation, said assent would not have had a majority of the stock of said corporation to said amendment.

"That on or about October 23, 1929, a meeting was alleged to have been held of the board of directors of the defendant corporation, at which meeting a resolution was adopted levying an assessment on the stock of the defendant corporation; that no notice whatsoever was mailed by the secretary of said defendant corporation, of the date and place of such meeting as required by the by-laws; that there was present at said meeting as directors of said defendant corporation, W. T. Wells, Lee Champion, H. E. Hofer, and absent W. G. Lane and O. G. Keil; that no waiver of notice was ever executed of said meeting; that the only director present at said meeting was Lee Champion; that at said time and said place, to-wit: October 23, 1929, neither W. T. Wells nor H. E. Hofer were directors of said corporation; that the alleged resolution levying said assessment failed to state the name of the person to whom said assessment was payable; that as aforesaid at all times herein mentioned the total subscribed, outstanding and/or issued capital stock of the defendant corporation was 132,665 shares.

"That the stock of said defendant corporation is not listed on any stock exchange and has no sales market; that if said stock is sold, said stock cannot be purchased back in the open market; that persons at present claiming to be the Board of Directors are, and for some time past have been under the control and dominion of Lee Champion; that said Lee Champion and the present persons claiming to be the Board of Directors of the defendant corporation have schemed and conspired to eliminate from ownership and participation in the affairs of the defendant corporation, this plaintiff, as well as other stockholders, representing in all a total of over 60,000 shares of stock, or almost one-half of the total amount of stock outstanding; that said Lee Champion caused two informal meetings of the Board of Directors and the stockholders to be held about a month and a week, respectively, prior to the alleged date of the sale of the stock under such assessment, and said directors assured such stockholders that they would try to adopt a plan to liquidate the business of the defendant corporation by selling the business to some larger concern without enforcing any assessment of stock, and lulled said stockholders so representing about 60,000 shares of stock into a feeling of security that payment of the assessment would not be necessary and their stock would not be sold under said levy of assessment; that such attempted levy of assessment was part of a plan and scheme on the part of said present Board of Directors, including Lee Champion, to eliminate the stockholders other than the present Board of Directors from the corporation, and thus enable the present Board of Directors to appropriate the assets of the defendant corporation to their own use and benefit.

"Wherefore, plaintiff prays judgment against the defendant that said assessment be declared void and the amendment of the articles of incorporation of no force and effect, and for such other and further relief as to the court may seem equitable in the premises."

[1] The contention of the respondent is that, while some technical irregularities may be shown by the complaint, when analyzed, it shows a substantial compliance with the requirements of the Code; that the election of the directors cannot be inquired into in this action, and that the assessment cannot be set aside nor recovery of the stock had by the plaintiff without tendering the amount of the assessment; that the complaint affirmatively shows that the amendments to the articles of incorporation were made by a resolution adopted by five persons acting at least as de facto directors of the corporation after the resolutions providing for a change in the ar-

ticles of incorporation had been approved by the requisite number of stockholders.

In the case of Consumers Salt Co. v. Riggins, 208 Cal. 537, 282 P. 954, 956, wherein it was sought to raise the question of the legality of the election of certain directors of the corporation, it was held that neither the corporate creditors nor the corporation, nor the stockholders, nor the director himself would be allowed to raise the objection in an action involving an assessment. It was further held that, "assessments or calls by a de facto board of directors are valid." In other words, the right of a person assuming to act as a director could be questioned only in quo warranto proceedings.

To the same effect is the text in 7 Ruling Case Law, page 346, where it is said: "A call for an assessment on a stock subscription, by a de facto board of directors, is binding and the validity of the directors' election cannot be questioned in an action to enforce the assessment." See, also, San Joaquin L. & W. Co. v. Beecher, 101 Cal. 70, 35 P. 349, 352, where, speaking of the directors, we find the following: "If not properly, they were at least nominally, elected, organized as a board of directors, and acted as such; and, being de facto officers, their acts as such are valid." The validity of an assessment was involved in that action.

In Balfour-Guthrie Inv. Co. v. Woodworth, 124 Cal. 169, 56 P. 891, 892, the questions involved in the instant action are very similar to the questions there considered, and it was held that the validity of the proceedings could not be inquired into in an action to hold invalid a transfer and assignment. The court used the following language: "The objection of the defendant to the regularity of the stockholders' meeting at which the directors were elected was properly overruled. For the purposes of this action, it was immaterial whether this meeting was properly called or not, or whether the election was by the stockholders in person or by proxy, or whether the proxies were sufficient in form to entitle the holders to vote at the election. The records of the corporation show that five persons were elected at that meeting to serve as its directors, and, whether their election was regular or not, they assumed the trust, and became at least de facto directors. So long as they held this position unchallenged by any member of the corporation, their acts as directors were binding upon the corporation, and upon strangers dealing with it."

[2] It will also be noticed that in the allegations of the complaint where it is said that no notice was mailed and no waiver was filed, it is not alleged that notice in fact was not given, or that the absent director or stockholder did not in fact have actual notice of the meetings referred to.

Respondent also calls our attention to section 346, Civil Code, as it then read (which is now section 338), and also to section 347, Civil Code (which is now section 339). Section 346 (changed in number as just stated) provided, and still provides, that: "No assessment is invalidated by a failure to make publication of the notice hereinbefore provided for, nor by the nonperformance of any act required * * * to enforce the payment of the same; but in case of any substantial error or omission in the course of proceedings for collection, all previous proceedings, except the levying of the assessment, are void, and publication must be begun anew." And section 347 (now section 339) specifies that no action can be sustained to recover stock sold for delinquent assessments upon the ground of irregularity or defect in notice of sale, unless the party seeking to maintain such action pays, or tenders to the corporation, or to the party holding the stock sold, the sum for which the same was sold, together with the assessment, or subsequent assessments, if any, remaining unpaid.

The appellant assigns nine different reasons as to why the judgment should be reversed. The first relates to notices, which we have answered and which need not be further considered. The second assignment alleges that the procedure outlined in section 362 of the Civil Code was not complied with. The complaint, however, shows that the resolution levying the assessment was adopted by a majority vote of de facto directors, and, as we shall hereafter show, was authorized by the amended articles approved by the assent of the requisite number of shareholders owning at least a majority of the outstanding stock.

Section 362, Civil Code, provides for changing the name of the corporation, increasing the capital stock, increasing the number of directors, and also permitting a change in the stock from nonassessable to stock that can be assessed. After the proceedings had been taken and had by the board of directors, and also by the stockholders, a certificate was filed with the county clerk of the county of Los Angeles and also with the secretary of state.

[3] The contention that the assent was not given by the requisite number of stockholders is based upon the allegation that W. T. Wells, who signed the consent as the owner of 32,848 shares of the capital stock of the defendant corporation, was not shown by the books of the corporation to be the owner of that number of shares; likewise that the consent of the Champion Supply Company as the owner of 6,000 shares was ineffectual because that company was not qualified to do business in the state of California; and, further, that the assent of Roy R. Renouf, holding 24,911 shares, was secured by representations that the consent went only to changing the name of the corporation by adding the letters "Ltd." The complaint, however, contains no allega-

tions of any facts showing that the consent of Renouf was obtained by any fraudulent or improper means, and what is set forth amounts only to the conclusions of the pleader.

[4] Our attention has not been called to any case holding that the mere ownership of stock in a domestic corporation by a foreign corporation constitutes the transacting of business by a foreign corporation within this state. On the other hand, in Fletcher Cyc. of Law of Corporations, vol. 9, § 5940, the text is to the effect that the purchase by a foreign corporation of stock in a domestic corporation is not doing business within the state where the domestic corporation is located. Even though it should be held that owning stock by a foreign corporation in a domestic corporation is doing business, the voting of the stock does not appear to be prohibited by section 408, Civil Code. The acts there prohibited, and for which penalties are attached, do not include the voting of stock.

[5] As to the allegation concerning the ownership of stock by W. T. Wells, it may be further added that the allegation simply states that the books of the corporation do not show such ownership. The allegation that Wells was not the owner is, of course, only a conclusion, and, for all that appears in the complaint, Wells might be the owner of the 22,848 shares without any transfers having been made upon the books of the corporation. The exhibiting of the shares of stock regularly transferred to him by assignment thereof would establish his ownership.

[6] What we have said covers objections Nos. 3 and 4, and brings us to objection No. 5, where the appellant's contention is that the articles of incorporation could not have been amended to make the stock assessable without the entire voting of all the stockholders. As we have just stated, section 362 of the Civil Code, as it read in 1929, gave authority to the board of directors and to a specified number of the shareholders to alter the articles of incorporation. In pursuance of this section, the articles of incorporation of the defendant corporation were amended so as to permit the board of directors to levy an assessment on the outstanding capital stock of the corporation. In this state, corporations are mere creatures of the law. Section 1, article 12, of the Constitution, at the time of the proceedings referred to herein, then read: "Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in the state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed." The amendment to this section adopted in November, 1930, changed the wording, but not the substance of the section so far as this case is concerned. Thus section 362, Civil Code, relative to the power to change the articles of incorporation of a corporation so as to make the stock assessable, is constitutional, and a valid change of the articles can be made under the provisions of said section so as to empower the board of directors to levy assessments.

The case of Lum v. American Wheel & Vehicle Co., 165 Cal. 657, 133 P. 303, Ann. Cas. 1915A, 816, cited by appellant, is not controlling here, for the simple reason that the articles involved in the Lum Case did not provide for the assessment of stock. The stock had been issued as nonassessable stock, and the articles of incorporation had not been changed to permit the assessment thereof.

That the power of the Legislature, who authorized the stockholders and directors to change the articles of incorporation affecting the liability of stockholders, is amply supported by the case of McGowan v. McDonald, 111 Cal. 57, 43 P. 418, 52 Am. St. Rep. 149. See, also, 6 Cal. Jur., p. 620. Cases decided in other states having different constitutional provisions are not controlling here.

[7] The sixth ground assigned for the invalidity of the assessment is that the assessment was levied before all of the stock had been subscribed. Prior to 1929, the Code provided for assessments after one-fourth of the capital stock had been subscribed. In 1929 (St. 1929, p. 1268) section 331, Civil Code, was amended to read as follows: "Shares are not assessable except as provided in this article. If the articles expressly confer such authority, and subject to any limitations therein contained, the directors of any corporation may in their discretion levy and collect assessments upon all shares of any or all classes made subject to assessment by the articles. This authority is additional to that of making calls for the unpaid subscription price of shares." Nothing is contained in the amended section as to the number of shares which must be subscribed or paid for before an assessment can be levied. The articles of incorporation of the defendant as amended provided that the shares should be assessable from time to time. That this power does not depend upon all of the capital stock having been previously subscribed for is shown by the case of Bottle Mining & Milling Co. v. Kern, 9 Cal. App. 527, 99 P. 994. The capital stock of the corporation in that case was fixed at 500,000 shares, of which only 426,000 shares had been subscribed for.

The seventh ground alleged by the appellant as a reason for holding the assessment invalid is that it was levied at a meeting not regularly called and assembled. This raises again an issue which we have heretofore considered. The complaint alleges that, as to the meeting at which the assessment was levied, no notice was mailed by the secretary. It

does not state, however, that notice was not given, and that the directors were not regularly assembled as a board. It does show at least a board of directors de facto acting.

[8] Objection No. 8 is to the effect that no name was given in the resolution specifying the person to whom the assessment should be paid. This, however, is unnecessary. A statement that the assessment is payable to the secretary of a corporation is sufficient. In Stephens v. Lemoore Canal & Irr. Co., 22 Cal. App. 579, 135 P. 707, this court held a resolution making the payment of an assessment to the secretary of a corporation without naming the secretary, sufficient.

[9] Objection No. 9 raises the question of estoppel. A reading of paragraph 7 of the complaint as set out herein shows that it is wholly insufficient to raise the question of estoppel, and no further consideration need be given thereto.

[10] While technical irregularities are shown to have characterized the proceedings involved herein, we think that substantial compliance has been had, and, as the plaintiff has not tendered or offered to pay to the purchasers the amount paid for the stock sold and delinquent, nor offered to pay to the corporation the assessment or any assessments, that a cause of action has not been pleaded.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

127 Cal.App. 283

In re GOODHUE'S ESTATE.

Civ. 8433.

District Court of Appeal, Second District, Division 1, California.

Nov. 1, 1932.

Taxation ⇐895(5).

Where during ten years 1,657 shares of total unlisted issue of 10,000 were sold at from $83 to $150, and shares were sold shortly before decedent's death at $100, value of $100, instead of book value of $210, for inheritance tax purposes, *held* not error.

Appeal from Superior Court, Los Angeles County; Frank H. Dunne, Judge.

In the matter of the estate of Annie A. Pierce Goodhue, deceased. The State Inheritance Tax Appraiser appraised certain shares of capital stock belonging to the estate of Annie A. Pierce Goodhue, deceased, the First Trust & Savings Bank of Pasadena, executor, to which Elisabeth Kaime filed objections. From an order fixing the value of such shares of stock, Ray L. Riley, State Controller, appeals.

Affirmed.

David Tannenbaum and Charles M. Cassin, both of Los Angeles (W. H. H. Gentry, of Sacramento, of counsel), for appellant.

Flint & MacKay, of Los Angeles, for respondent Kaime.

YORK, J.

The question involved in this appeal relates to the appraisement of 938 shares of the capital stock of the Pacific Manufacturing Company of the par value of $100 per share. The state inheritance tax appraiser appraised this stock at its book value of $210 per share. Respondent Kaime, one of the heirs at law of decedent, filed her objections to said appraisement, and the matter was tried upon an agreed statement of facts, with the result that the lower court fixed the value of said shares of stock at $100 per share.

The agreed statement of facts is, in part, as follows:

"The decedent above named died testate on or about December 16, 1928, a resident of Los Angeles County and left property taxable under the Inheritance Tax Laws of the State of California; that included in property left by decedent is intangible property which the Inheritance Tax Appraiser has reported to be of the fair market value of $209,230.13. That of said amount said Inheritance Tax Appraiser has reported 938 shares of the capital stock of Pacific Manufacturing Company belonging to decedent at the time of her death at $196,980.00, or $210.00 per share. That the method used by said Inheritance Tax Appraiser in arriving at such valuation on said shares of stock was to take into consideration the book value only of said shares, to-wit, by appraising the value of the assets of said Pacific Manufacturing Company and by dividing the aggregate value of the entire assets, including the surplus, of said company by the number of shares of stock issued, but that in reaching such valuation the said appraiser did not take into consideration any sale of shares of stock in said corporation made before or after the death of decedent.

"II.

"Respondent (State Controller) contends that the Inheritance Tax Appraiser used the correct and lawful method of arriving at the market value of said shares of stock and that the market value thereof is the book value thereof and is $210.00 per share.

"Objector (Respondent Kaime) contends that the Inheritance Tax Appraiser did not

use the correct method in arriving at the market value of the shares of said stock and contends that the market value of said stock is the value established by actual sales of shares of stock in the Pacific Manufacturing Company both before and after the date of death of decedent, and is not in excess of $100.00 per share.

"That the controversy herein shall be limited entirely to the issue as to the method of arriving at the market value of said shares of stock, and it is agreed that no other question shall be presented to the Court for decision.

"III.

"That Pacific Manufacturing Company is a California corporation with its principal place of business in the city of San Jose, California; that at all times herein mentioned it had issued and outstanding 10,000 shares of its capital stock of the par value of $100.00 per share; that at the date of the death of decedent she owned 938 shares of the capital stock of said company; that said stock is not listed on any stock exchange, and no sales thereof have been made by or through any stock exchange.

"IV.

"That in the year 1918 William Hayward, Manager of a branch office of the company, purchased 10 shares of the stock of the company from F. Beaver, Jr., at $95.00 per share; that in the year 1919 the Pacific Manufacturing Company, through its officers, purchased from William Druffel 1200 shares of the stock of the company at $83.00 per share; that in the year 1920 C. Regnart, an employee of the company, purchased 35 shares of said stock from D. W. McSwain, another employee of the company, for $85.00 per share; that in the same year William Hayward, an employee of the company, purchased 15 shares of said stock from C. Regnart, an employee of the company, at $100.00 per share; that in the same year J. H. Quinn purchased from C. Regnart 20 shares of said stock at $100.00 per share; that in the year 1922 M. A. Van Sichlin purchased from the company 5 of its shares at $100.00 per share, and in the same year E. Jones purchased from the company 1 share of said stock at $100.00; and in the same year William Hayward purchased from F. Beaver, Jr., 10 shares of said stock at $95.-00 per share; that in the year 1924 the company purchased from Hubert Quinn, a retiring employee, 95 shares of said stock at $110.-00 per share; that in the year 1926 J. J. Miller, a director of the company, purchased from Franc Morse 5 shares of said stock at $150.00 per share, and in the same year Mrs. J. H. Pierce, already a stockholder in the company, purchased from Fred H. Metcalf, 5 shares of said stock at $125.00 per share; that in the year 1927, F. A. Birge, Vice President of the Bank of Italy, purchased from Mrs. J. H. Pierce, the wife of the President of the company, 5 shares of said stock at $125.00 per share; that on December 12, 1928, S. I. Carter purchased from H. M. Pierce 5 shares of said stock at $100.00 per share; that on October 30, 1928, C. W. Koenig, an employee of the company, purchased from the company 100 shares of said stock at $100.00 per share; that on October 2, 1928, C. A. Linderoth purchased from S. I. Carter 5 shares of said stock at $115.00 per share; that on October 5, 1929, John J. Miller, already a stockholder in the company, purchased 50 shares of said stock from Ruth Brown at $100.00 per share; that on October 5, 1929, Franc Morse purchased from Ruth Brown 91 shares of said stock at $100.00 per share.

"That there were other sales of said stock made during said years as a result of deaths of stockholders and disposition of estates, but sales made under said circumstances are not included in the above."

Appellant contends that isolated sales of closely held stock do not establish market value, and maintains that "the law in California upon the valuation of closely held stock is set forth in the Estate of Felton, 176 Cal. 663, at page 667, 169 P. 392, 393," in which case the court held that the only way to establish market value of closely held stock is to ascertain the value of the property which it represents, assigning to each share its proportionate worth. It should be noted, however, that in the Felton Case the court said: "Its shares of stock have never been upon the market, and they have never been sold privately." In Re Dupignac's Estate, 123 Misc. 21, 204 N. Y. S. 273, 279 (cited by appellant), the court said: "The book value of stock is its intrinsic value. If there have been no sales, the assessor must necessarily fall back upon the book value as the nearest approximation to the fair market value. In the absence of sales, the book value must be taken as the basis of computation. Any other rule would be illogical, and create an impotent conclusion. The use of the words 'fair market,' or 'clear market' value, when applied to closely held stock, is meaningless. Because there is no market to guide, such stock must be appraised at its value in money —its intrinsic worth." So, too, in the case just cited, it was said: "The stock of the instant corporation is known as a closely held stock, no sales having been reported for over 10 years last past."

Surrogate Slater, who wrote the opinion in the Dupignac Case, later had occasion to write the opinion in Re Kerr's Estate, 128 Misc. 353, 219 N. Y. S. 487. In the latter case, which was cited by respondent, the state tax commission had appraised 400 shares of stock at $219.89, and the executors contended the fair market value was $165 per share, based upon sales. There the report of the appraiser referred to two actual sales of the

stock, one made in 1924 at $160 per share, and one made in 1926, after decedent's death, at $145 per share, which sales were made in the course of settling two estates. It was in that case held: "There is not a wide difference in range of value between $165 per share and the appraised value of $219.89, indicating that the actual sale at $165 was possibly the fair market value on a narrow market. Without these sales, and following my opinion in Matter of Dupignac, supra, I would necessarily have to find the value of the stock as the actual value. But, even to do that, no testimony has been offered, except as may be found in the report of the appraiser, and that fails to indicate how the appraiser arrived at the value of good will. Consequently I feel, with proof of actual sales, that I might very well decide this matter by reducing the value of the shares of stock and appraise them at $175 per share. An order may be entered in accordance with this memorandum."

In Heiner v. Crosby (C. C. A.) 24 F.(2d) 191, at page 193: "The fair market price or value of stock at a particular time is a question of fact, to be determined from all the circumstances. Market price implies the existence of a market, of supply and demand, of sellers and buyers. * * * [At page 195 of 24 F.(2d).] After giving due consideration to the sale and prices bid on the Pittsburgh Stock Exchange, restricted as they were, and taking into consideration the company's property, good will, and strategic position, together with the evidence of those most familiar with the property and most competent to estimate its value, the learned District Judge found as a fact that the fair market value of the plaintiff's stock on the dates in question was $22.50 per share, making the taxable gain by reason of the sale $2 per share."

In the case of Union Trust Co. v. Heiner (D. C.) 19 F.(2d) 362, where the Commissioner of Internal Revenue valued certain stock owned by decedent at $140 per share, the court said [page 364 of 19 F.(2d)]: "Next, as to the value of the Dilworth-Porter stock, there were no sales in the open market of this stock, and it is only a question of determining the intrinsic worth of the stock. Taking all factors into consideration, we conclude that the government is altogether too high in placing the value of this stock at $140 per share. The company had come to the crest of its operation; it was on the decline; it was beginning to lose money at the time of the death of the decedent; and we believe that the value admitted by the plaintiff [$110] was not in excess of the value of the stock in question, and was its intrinsic worth at the time of the decedent's death."

Even in Jackson's Estate, 125 Misc. 787, 211 N. Y. S. 537, cited by appellant, in which it was held that isolated sales were not conclusive evidence that selling price was market value of the stock, the court reduced the value of $299.21 per share to $250 per share, taking into consideration all the proof of value submitted to the appraiser, including actual sales of the stock, the statements of assets and liabilities, the actual earnings and the earning power of the corporation, and the other evidence submitted to the appraiser.

As authority sustaining his contention, appellant cites In re Colt's Estate, 125 Misc. 373, 211 N. Y. S. 541. In that case it was held that shares of stock in a corporation closely held and sales of which have occurred infrequently are to be appraised at the book value of the stock, and that an isolated sale of stock made more than five months after decedent's death is not sufficient to establish market value. He also cites In re Davidson's Estate (Sur.) 211 N. Y. S. 540. In that case a sale of five shares made eight months prior to the death of decedent, and a sale of two shares made fourteen months prior to such death, were held too isolated to be of assistance in establishing market value. Nevertheless, the court did reduce the value set by the tax commissioner from $179.27 per share to $150 per share.

None of the cases cited by appellant is analogous to the facts of the instant case. The agreed statement of facts shows a consistent sale of shares of this stock over a period of ten years, sold privately, it is true, since it was never listed on the market, but to persons who, it may be assumed, knew its true value. The sales over this period aggregated 1,657 shares out of a total issue of 10,000 shares. On December 12, 1928, four days prior to decedent's death, 5 shares were sold at $100 per share, and 105 shares were sold during the preceding month of October (100 at $100 and 5 at $115), which was less than two months prior to the said death. We are of the opinion that there was no error on the part of the trial court, when it established a market value of $100 per share, taking into consideration not only the value of the property of the corporation, but also this constant stream of sales flowing over a period of years.

The order appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J

126 Cal.App. 514

ANDERSON v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al.*

Civ. 8696.

District Court of Appeal, First District, Division 2, California.

Oct. 29, 1932.

Hearing Denied by Supreme Court Nov. 28, 1932.

1. Schools and school districts ⇐133.

Charter provision for classification of teachers, heads of departments, principals, etc., as permanent employees after service for probationary period, *held* authorized under state tenure law (St. 1931, p. 3057, § 135; School Code, §§ 5.405, 5.501 [re-enacted as § 5.502 by St. 1931, p. 1395]).

2. Schools and school districts ⇐133.

Word "position" in school law and charter providing for tenure of teachers and principals applies to employment of individuals (St. 1931, p. 3057, § 135; School Code, § 5.501 [re-enacted as § 5.502 by St. 1931, p. 1395]).

[Ed. Note.—For other definitions of "Position," see Words and Phrases.]

Proceedings by Edgar S. Anderson to compel the Board of Education of the City and County of San Francisco to annul a resolution purporting to dismiss the petitioner, and to restore petitioner to his original status.

Writ granted.

Andrew F. Burke, of San Francisco, for petitioner.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for respondents.

PER CURIAM.

For the opinion heretofore filed in the above-entitled action the following is substituted:

Petitioner has been employed by respondents continuously since January 22, 1923, as a teacher in the day high schools of the city and county of San Francisco, and continuously since January 16, 1927, as principal of the Humboldt evening high school. On May 4, 1932, respondent board of education passed a resolution purporting to dismiss petitioner from his employment as principal of the evening school, and this proceeding was instituted to compel the board to annul that resolution and to restore petitioner to his original status.

The distinction between this case and Cullen v. Board of Education et al. (Cal. App.) 15 P.(2d) 227, is that here the petitioner, in addition to his work as classroom teacher in the day high school, also served as principal of the evening high school; whereas, in the Cullen Case the petitioner served as a classroom teacher in both schools. The failure of respondents to argue this distinction in the original presentation of this case led us to believe that they did not rely upon it until their petition for a rehearing was filed. In all other respects the opinion in the Cullen Case is determinative of the issues raised here. But it should be borne in mind that each case came to us upon a demurrer to a petition pleading facts applicable to teachers in the San Francisco schools only. Hence we do not discuss what might occur under some other state of facts.

The rights of this petitioner cannot be decided on the limited ground urged by respondents in the Cullen Case, but must be decided upon the broad ground whether any high school principal in the San Francisco district is entitled to protection either under the state tenure law or under the municipal charter. In January, 1890, our Supreme Court interpreted the provisions of section 1793 of the Political Code as granting tenure after election to a principal of an elementary school. Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042. The provisions of that section relating to tenure of teachers had been added by amendment in 1881. The first freeholders' charter of the city and county of San Francisco, which became effective January 1, 1900, amplified the provisions of section 1793 and granted permanent tenure to all teachers of the city school district except those holding only special certificates and those serving a probationary term. Section 1793 remained without substantial amendment until repealed by the School Code in 1929. The charter section likewise stood until superseded by the new charter in 1931. During all this time the construction given section 1793 by the Supreme Court in the Kennedy Case remained unchallenged.

As this section related only to those who held "city, or city and county" certificates, a statewide teachers' tenure was provided in 1921 by amendment to section 1609 of the Political Code (St. 1921, p. 1664). Therein we find the first mention of principals in the limitation of the power of boards of education to dismiss "permanent teachers, principals, or supervisors of special subjects" except for cause and a public hearing. In Bland v. Board of Trustees, 67 Cal. App. 784, 791, 228 P. 395, the court of the Third Appellate District ruled that this section did not grant full tenure to a principal who was not a "teaching principal" as such principals could be elected for a definite period only. The ruling was based on the provisions of the section relating to the appointment and election of teachers as contrasted with those relating to principals. Thereafter the Legislature amended the section (St. 1927, p. 1913) by

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Hearing denied 16 P.(2d) 272.

striking out the references to teachers and inserting "persons in public school service requiring certification qualifications." By the same amendment the one-year limitation upon the election of principals was eliminated and the clause relating to dismissals was extended to include all "permanent employees in positions requiring certification qualifications." By subsection "E" of subdivision 3 of the amended section it was provided that: "No person employed in an administrative or supervisory position requiring certification qualifications shall be classified as a permanent employee other than as a classroom teacher."

This limitation was carried into the School Code of 1929 (section 5.501) and so far has not been given judicial interpretation. The petitioner herein argues that the words "administrative or supervisory position" relate only to those positions in the executive branch as distinguished from those in the teaching branch. Respondents do not argue the point other than to say that the points of law involved in this case are the same as those in Cullen v. Board, etc., supra. That this is not so must be obvious as Cullen was a classroom teacher in both schools and the question of the rights of a principal was not properly raised in that case. For this reason we said in the Cullen Case that it was unnecessary to decide whether the petitioner's rights were governed by the School Code or by the municipal charter as both statutes were identical in their application to the facts of that case. In this case we purposely refrain from determining the application of the School Code to the principals in districts outside of San Francisco and confine our judgment to the facts presented in the petition.

For the purpose of this decision only we may assume that the School Code does not cover principals generally and we hold that the rights of the petitioner in the instant case are governed by the San Francisco charter, and that the charter is a constitutional enactment in relation to this subject.

[1] Section 135 of the charter (St. 1931, pp. 2973, 3057) provides that: "All teachers, heads of departments, vice-principals, principals, supervisors and directors shall be classified as permanent employees in their respective positions after they have been successfully employed in such positions in the school department for a probationary period of three years. In the absence of any action to the contrary by the board of education at the end of the third year of such employment, the classification shall be considered as permanent." Prior to the approval of this charter, section 5.405 of the School Code was enacted providing that: "Nothing in this Part shall be construed so as to repeal or negate any provisions concerning employees of school districts contained in the charter of any city, county, or city and county, heretofore or hereafter adopted and approved in conformity with Article XI of the Constitution of this state." The charter was approved by the Legislature on May 5, 1931. On June 9, 1931, the Legislature enacted numerous amendments to the School Code including the following addition to section 5.502 heretofore quoted: "This section shall not apply to persons employed in administrative or supervisory positions in a district situated within, partly within, or conterminous with the boundaries of, a city or city and county where the charter, if any, of such city or city and county provides otherwise." (St. 1931, p. 1395). Thus we find a clear legislative intention to permit municipal charters to regulate the tenure of certain employees of conterminous districts combined with a contemporaneous construction running over a period of time far in excess of that fixed for the determination of permanent tenure.

But respondents argue that these provisions of the charter are unconstitutional because the maintenance of the public schools is a "state affair" which cannot be governed by a local charter. They cite Kennedy v. Miller, 97 Cal. 429, 32 P. 558; and Bruch v. Colombet, 104 Cal. 347, 38 P. 45. Neither case is helpful. Both hold that the Constitution contemplates a uniform system of public schools and that provisions of municipal charters in conflict therewith cannot stand. Respondents also cite Esberg v. Badaracco, 202 Cal. 110, 259 P. 730. In that case the Supreme Court held that the provisions of the San Francisco charter relating to the levying of taxes for school purposes could not prevail over the general state laws covering the same matter because they were in direct conflict therewith. It should be noted, however, that the court said (page 116 of 202 Cal., 259 P. 730, 732) that the "charters may provide for matters not enumerated in the general laws and not in conflict therewith, including matters in furtherance of the purpose of the general laws of the state." This is the criterion upon which the question must be decided. If the charter provisions relating to the tenure of principals is in conflict with the general laws of the state, then, of course, those provisions may not prevail.

It is our conclusion that there is no conflict, but that the charter is "in furtherance of the purpose of the general laws of the State." The so-called state tenure law granted tenure during good behavior to all classroom teachers after a fixed period of service. It may have been contemplated that in many of the smaller school districts it might not be practicable to place principals in this classification, but that, in the larger districts which were conterminous with the boundaries of chartered cities, permanency in the employment of school principals would be desirable. But, whatever the purpose of the

Legislature may have been, it must be apparent that the charter provisions are not in conflict with, but are "in furtherance of the purpose" of the general tenure law. The latest expression of the Supreme Court upon this general subject is found in Whitmore v. Brown, 207 Cal. 473, 480, 279 P. 447, 450, where Los Angeles School Dist. v. Longden, 148 Cal. 380, 383, 83 P. 246; Malaley v. City of Marysville, 37 Cal. App. 638, 644, 174 P. 367; and Esberg v. Badaracco, 202 Cal. 110, 116, 259 P. 730, are cited in support of the statement that school matters may be made a municipal affair by the city "when acting in promotion and not in derogation of the legislative school plans and purposes of the state."

[2] A slightly different line of reasoning brings us to the same conclusion that this charter provision is constitutional and controlling in this instance. When the charter was approved the Code section limiting the appointment of principals to a period of one school year had been repealed. The School Code then, as now, read: "Boards of school trustees, and city, and city and county boards of education shall have power and it shall be their duty to employ a principal for each school under their control." Section 5.410, School Code. Under sections 5.500–5.502 these boards were required to classify as permanent employees those who had served the probationary period. If section 5.502 exempted principals from this classification it did so with the qualification that municipal charters might include them, and, if the general law did not grant them permanent tenure, it did not *limit* their term. Hence, in so far as principals in charter cities are concerned, it was competent for the city to make their tenure *a municipal affair* which the Supreme Court in the Whitmore Case said could be done in those instances when the city is "acting in promotion and not in derogation of the legislative school plans and purposes of the state." The instant case is closely akin to Malaley v. City of Marysville, 37 Cal. App. 638, 644, 174 P. 367, 370, where the state school law provided that the board of education could appoint a city superintendent and fix his salary and the city charter provided that the county superintendent should be ex officio city superintendent and for such services should receive a salary of $50 a month. In holding the charter provision effective the District Court said that the city may, if the Legislature elects to give it the right to do so, "exercise precisely the same identical power with respect to matters connected with and calculated to further the interests of the public school system, *in so far as such city and school districts are concerned.* * * *"

The principle which we deduce from these cases is that matters of purely local concern, such as the appointment, assignment, and removal of employees, may be exclusively regulated by general laws because the public school system is one of general as well as local concern, but that, when the Legislature omits the full control over such local matters, it is competent for the city to make that a matter of "municipal affair." Then the validity of the charter regulation is to be determined upon an examination whether it is "in furtherance and not in derogation of the general school system."

Our conclusion is that section 135 of the San Francisco charter is wholly consistent with and in no wise in derogation of the general purposes of the state tenure law and that, in adding principals and vice principals to those who are protected from dismissal without cause, the city has merely furthered the general purposes of the state act (or clarified that act, as the case may be) without taking anything away from its principles or purposes.

In this connection we should add that we are not impressed with respondents' insistent argument that our judgment grants *double* tenure to these teachers and principals. Bearing in mind that for more than forty years the rule of the Kennedy Case that they are *employees* and not officers has stood unchallenged we must interpret the word "position," as used in the school law and in the charter, as applying to the "employment" of the individual. If they were officers the term "position" would be interpreted with greater strictness as to the term, duties, and place of employment. But, generally speaking, these factors do not control the relation of master and servant, or employer and employee. The latter may be assigned to such duties within his employment as the employer may designate. Here the employer assigned the employee to teach in two separate school buildings and permitted him to continue in that *service* beyond the probationary period and to become classified as a permanent employee—not for a part of the service only—but for all. The tenure, therefore, runs to a position of employment, *or service*, of equal grade and rank to that to which the statutory classification has applied, and such is the settled rule of the Kennedy Case.

It follows that, when respondents removed the petitioner from his position of principal of the evening school without cause and without a trial, they acted without right or power.

Let a peremptory writ issue in accordance herewith.

The petition for a rehearing is denied.

127 Cal.App. 294

JANSEN v. JANSEN.

Civ. 8276.

District Court of Appeal, First District, Division 1, California.

Nov. 2, 1932.

1. Divorce ⇐184(6).

As respects review, weight of testimony corroborating wife's testimony as to husband's cruelty in her divorce suit was primarily for trial court (Civ. Code, § 130).

2. Divorce ⇐184(10).

Appellate court will not disturb trial court's finding on sufficient evidence in wife's divorce suit that defendant was guilty of extreme cruelty (Civ. Code, § 130).

3. Husband and wife ⇐266.

Conveyance of property, purchased with community funds, to spouses by joint tenancy deed, did not terminate community character thereof.

4. Divorce ⇐249(1).

Court has full power to determine status of spouses' property in divorce suit, regardless of name in which title stands.

5. Husband and wife ⇐262(1).

Recitals of transfers of property between and to parties in divorce suit are merely prima facie evidence of ownership, and raise only disputable presumptions as to whether property is separate or community.

6. Divorce ⇐184(4).

Appellate court will not assume that husband's motion for new trial of divorce suit was heard at another hour than that noticed, where trial court's minutes do not disclose hour of hearing.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds and Marshall F. McComb, Judges.

Action by Elizabeth Jansen against Joseph M. Jansen. From a judgment for plaintiff and an order allowing her additional counsel fees to resist defendant's motion for a new trial, defendant appeals.

Affirmed.

Guy B. Graham and William Bronsten, both of Los Angeles, for appellant.

Oliver O. Clark, of Los Angeles, and James F. McBryde, of Glendale, for respondent.

PARKER, Justice pro tem.

The purpose of the action was to dissolve the bonds of matrimony theretofore and then existing between the parties. Plaintiff alleged extreme cruelty and failure to provide. Defendant denied the allegations of the complaint, seeking no affirmative relief. Certain allegations were made and denials thereto entered, which went to the character and amount of property held by the parties, of which mention will be made hereinafter. The trial court awarded to plaintiff an interlocutory decree of divorce upon the grounds of extreme cruelty; a nonsuit having been entered on the failure to provide count. The said decree further determined certain property to be community property and divided the same between the parties. After judgment, defendant moved for a new trial which was denied. Prior to the hearing of the motion for a new trial and after notice of intention to move for a new trial, the plaintiff noticed a motion to award her additional counsel fees to resist the said motion. Counsel fees were awarded plaintiff. Defendant appeals from the judgment and from the order allowing the said counsel fees.

[1, 2] It is first contended by appellant that the evidence is insufficient to uphold the trial court's conclusion that the defendant was guilty of extreme or any cruelty toward plaintiff. The main ground of this contention is that the charges of the plaintiff lack corroboration. It must be conceded that the testimony of the plaintiff herself shows a continued course of cruelty, aggravated by specific incidents of overt acts of violence and abuse. On this there can be no question, though the appellant in his testimony makes general and specific denial. The contention, however, as stated, is that there is a complete lack of corroboration, and that without corroboration the facts could not be found. It will be conceded that no divorce may be granted upon the uncorroborated testimony of either party. Civ. Code, § 130. Corroboration is rather an elastic term, and whether or not testimony is corroborated depends upon the facts and circumstances of the particular case under discussion. Corroboration may be slight or it may be so compelling as to become actually direct evidence. The law has laid down no standard by which its weight or sufficiency may be gauged. To go into detail of the facts of the instant case would be but an epic of discord and lack of harmony, too often encountered in nearly all cases of this character. The weight of the corroborating testimony was primarily one for the trial court to be determined with reference to the truth or falsity of the main testimony. We have carefully read and re-read the entire transcript of testimony, and, while it may be true that the testimony offered as corroborative may support different conclusions or permit varying inferences to be drawn therefrom, yet it does support the inference drawn by the trial court. To repeat, we decline to analyze the testimony offered, upon the grounds that to do so would be to invade,

to some extent, the province of the trial court, and would make only more confusing the trial practice. If it were apparent that the corroborating testimony was in no sense corroborative or that it was not corroborative of jurisdictional facts or of facts necessary to a judgment, our course would naturally be different. But as a rule of law and appellate practice we must decline to set up what might be classed as a standard of corroborative sufficiency in the absence of a necessity therefor. We find sufficient evidence from which the trial court might conclude as it did, and there our inquiry rests.

[3] The next claim of appellant is that the trial court erred in determining that certain property was the community property of the spouses. It may be conceded that the property in question was purchased with community funds. The record discloses, without conflict as far as appellant's theory goes, that the source of the money going into the purchase of the property was the earnings of the husband. It is true that the wife claims that some of her separate money was invested and that likewise some of her earnings helped defray the cost. Passing these claims, the husband and appellant insists that the money paid was money earned by him during coverture and earned by his daily labor. If this were the entire state of the record, we can hardly imagine any claim that could be made negativing the fact that the property was and is community property. In the verified complaint it is alleged that the property is community property save and except that to the extent of $1,000 it is the separate property of the wife. The answer does not deny that the property is community property. The answer denies that it is the separate property of plaintiff, and denies that she has a $1,000 interest therein or any interest whatsoever. Defendant then alleges that the property is held in joint tenancy between the parties. At the trial it was stipulated that the property was held in joint tenancy.

It may be well to note that this is the extent of the record. There is nothing to show how the joint tenancy was created, whether by deed between the spouses or by deed from a third person or otherwise. However, there is sufficient in the record from which we may infer that, when the property was purchased, the original vendor conveyed to the spouses by a deed of joint tenancy. Appellant contends that, regardless of the source of the purchase price, and regardless of the fact that these funds were admittedly community funds, the taking of the property as joint tenants destroyed the community interest, once and for all, and was in the nature of and equivalent to a property settlement by the parties, it being their intention that their property be held equally, with right of survivorship. No authority is cited, nor is there a word of testimony to establish the fact or the assumed intent. The undenied and undeniable fact is that the parties put their community property in the form of joint tenancy. But we are pointed to no authority nor is there any line of reasoning that supports the conclusion that by that act the community character of the property was immediately terminated.

It seems that whenever the subject of community property arises it calls for a more or less philosophical legal treatise involving marital relations from the date of the origin of species down through the Spanish laws and customs to the present date. It is at times difficult to reconcile the rulings on the nature of community property and the application of the theories to the changing modes of transfer and holding. Much of this difficulty is overcome when we recognize the community property rule, as between the spouses themselves, as possessing certain peculiarities necessary to round out the true purpose and intent of marriage both as a civil contract and as a highly social relationship.

[4, 5] Dispensing with any academic discussion or review of the authorities, it is now generally conceded and recognized that the courts are invested with full power to determine the status of the property of both or each of the spouses, regardless of the name of either in which title to such property stands, and the recitals of whatever transfers there may have been between the spouses regarding such property or in transfers to one or the other, are merely prima facie evidence of ownership, and raise only disputable presumptions as to whether such property is the separate or community property of the parties. Hamilton v. Hubbard, 134 Cal. 603, 65 P. 321, 66 P. 860; Alferitz v. Arrivillaga, 143 Cal. 646, 77 P. 657; Salveter v. Salveter, 206 Cal. 657, 275 P. 801; Steere v. Barnet, 54 Cal. App. 589, 202 P. 166; Estate of Jolly, 196 Cal. 547, 238 P. 353.

We conclude that there was no error in the trial court's holding that the property was community. No error is assigned in the manner of distribution if the property was community, other than the claim that no cause of action was proven. This latter point has hereinbefore been determined.

[6] As to the award of counsel fees to resist the motion for a new trial, the only error assigned is that the motion was heard at a time other than the time noticed. The record does not disclose this error; it being urged merely in the way of naked allegation. The motion was noticed for December 18, 1928, at 2 o'clock p. m. of said date. Appellant contends that without further notice the motion was heard at 11 o'clock a. m. of said date. The minutes of the court disclose that the motion was heard on December 18, 1928, without disclosing the hour of hearing other than to

state that the motion came on to be heard. We assume nothing in contravention of the regularity of the proceeding. The claim noted is the only specification of error on the order.

The judgment is affirmed, as is the order allowing counsel fees.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

127 Cal.App. 209

LYNCH v. BOSCH.

Civ. 7775.

District Court of Appeal, First District, Division 1, California.

Oct. 28, 1932.

Joint adventures ⇐5(2).

Evidence sustained finding that joint adventurers agreed to do furring and lathing work on building for reasonable portion of entire contract price.

Appeal from Superior Court, City and County of San Francisco; John L. Fleming, Judge.

Action by Hubert T. Lynch against Hermann Bosch. From a judgment for plaintiff for a smaller amount than sought, plaintiff appeals.

Affirmed.

For prior opinion, see 4 P.(2d) 801.

Edward J. Lynch, of San Francisco, for appellant.

Coffey & Coffey and John O'Gara, all of San Francisco, for respondent.

PER CURIAM.

Action to recover profits earned in a joint venture.

Defendant had procured a contract to furnish the materials and perform the labor necessary for the work of furring, lathing, and plastering a certain thirteen-story steel and concrete structure. The amount to be paid defendant for the entire work, unsegregated, was the lump sum of $43,200, subject to increase or diminution in case of changes in the plans and specifications. After obtaining said contract, defendant invited plaintiff, with whom he had former transactions, to join him as a partner in the performance of the part of the contract relating to the furring and lathing (excluding the plastering). Plaintiff accepted the offer, and this portion of the contract was performed by them. The agreement between the parties was not reduced to writing, and after the work was finished a dispute arose between them as to the terms of the agreement relative to their joint adventure. Being unable to adjust their differences, the present action followed.

It was the claim of plaintiff at the trial that defendant agreed they should be paid a definite sum for the work, to wit, 85 cents a square yard. Defendant, on the other hand, claimed that no specified price was fixed for yardage; but that on the contrary the parties were merely substituted in the place of defendant in that portion of the contract relating to the furring and lathing, and were to receive therefor a fair and reasonable proportion of the total amount to be paid under the entire contract.

The trial court made an express finding in negation of plaintiff's claim, and found in accordance with the claim of the defendant; its finding in this latter respect being as follows: "That said plaintiff and defendant were to receive for said furring and lathing work a fair and reasonable proportion of the contract price provided for in said contract awarded to defendant for the plastering, furring and lathing of said building, subject to additions and deductions; that the fair and reasonable cost of the labor and of the materials required in performing said furring and lathing work was to be deducted therefrom; and that the balance remaining as profits should be divided equally between said plaintiff and defendant. That said plaintiff and defendant undertook said furring and lathing work as a joint venture." It further found that the total amount of furring and lathing done was 17,648 square yards, and that "the fair and reasonable proportion of the contract price to be allowed for furring and lathing under the contract awarded to defendant" was $13,629, after allowing for all additions and deductions; that the sum of $11,619.92 was expended by the parties in performing the work, leaving a net profit of $2,009.08 to be divided between the parties, or the sum of $1,004.54 for each; that appellant had already been paid the sum of $862.04; and that consequently there was a balance due him of $142.50, for which amount he was given judgment. Being dissatisfied with the amount awarded, he has taken this appeal.

The findings as to the amount of yardage and the sums expended in performing the work are not challenged, but it is contended that the main finding above quoted as to the terms of the agreement between the parties is wholly unsupported. Conceding that the evidence relating to this subject is somewhat meager, we are not prepared to hold as plaintiff claims that there is no evidence whatever in the record to support the conclu-

sion arrived at by the trial court. As mentioned, it appears from the evidence that prior to the transaction in question here the parties had done similar work on other jobs under like arrangements. One of the jobs so performed was the furring and lathing of a certain building connected with St. Mary's Hospital, which was just about completed at the time the parties entered into the present transaction. There, as here, defendant took an unsegregated contract for the furring, lathing, and plastering of the building, and afterwards entered into a partnership arrangement with plaintiff whereby they agreed to perform the work of furring and lathing (excluding the plastering) for a reasonable proportion of the contract price for the entire work; and as a result of such arrangement they received for their work an average of 85 cents a square yard. Having in mind the result of that venture, the defendant, after obtaining the unsegregated contract for the furring, lathing, and plastering of the building here involved, said to plaintiff, according to his testimony: "Now, Hubert, I also have the furring and lathing on the Marine View Apartments. I can tell you beforehand it is very peppy and speedy; I have a powerful contract to be completed within sixty days. I do think that the furring and lathing you done before was not a bad price; he did that, and averaged around 85 cents. And if you, Hubert T. Lynch, will go in this work in the same manner as we are doing our previous work at St. Mary's Hospital, you are perfectly welcome to do it. I afterwards said I can encourage you in the following way: That I bought the metal lath rather reasonable, and bought the iron rather reasonable, I told him the price: That metal only 17 cents and the iron $54.00, and I think Hubert, I do think I have —I do think I have a fairly good price for the furring, and we will do the same as on the St. Mary's Hospital. The plaintiff stated some such words that he would be willing to swim or sink with me; to win and lose with me." He further testified that for the furring and lathing on the present job he apportioned the sum of $13,570 (which with subsequent additions brought the sum up to $13,629), and that he based such apportionment on the contract price for the entire work after having deducted therefrom approximately $29,650 for the cost of plastering. Furthermore he stated that the amount apportioned for the furring and lathing was "a very good price" because it resulted in a net profit on the work of more than 16 per cent.; whereas he lost money on the plastering; and he positively denied ever having agreed to allow 85 cents a square yard for the work or any other sum based on yardage. The evidence also showed that, although the sum apportioned for the work on the job at St. Mary's Hospital amounted to only 21 per cent. of the entire contract price, the sum apportioned here for the same work amounted to more than 31 per cent. of the entire contract price.

It is true, as plaintiff points out, in the conversation hereinabove quoted, defendant mentioned the fact that the parties had "averaged around 85 cents" on the St. Mary's Hospital job (which if allowed here would have added approximately $685 to plaintiff's share of the net profits). But in the light of the entire conversation and the other facts and circumstances connected with the transaction, as shown by the evidence, including the matter of the cost of materials, etc., we think it would be a strained construction to hold as appellant claims we should that by the use of the words above quoted defendant agreed to allow 85 cents a square yard for the work to be performed under the present contract.

The judgment is affirmed.

127 Cal.App. 272

PEOPLE v. RUMSEY.

Cr. 1682.

District Court of Appeal, First District, Division 2, California.

Nov. 1, 1932.

Rehearing Denied Nov. 16, 1932.

Hearing Denied by Supreme Court Dec. 1, 1932.

1. Jury ⇐29(6).

Defendant, declaring in open court, while acting as his own attorney, that he waived jury trial of insanity issue, waived such trial (Const. art. 1, § 7, as amended in 1928).

2. Constitutional law ⇐24.

Constitutional amendment, authorizing waiver of jury trial, changed law theretofore expressed in amended section and statute respecting such trial of insanity issue (Const. art. 1, § 7, as amended in 1928; Pen. Code, § 1026).

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Jesse C. Rumsey was convicted of robbery, and he appeals.

Affirmed.

Jesse C. Rumsey, in pro. per.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

STURTEVANT, J.

From a judgment convicting him of the crime of robbery and an order denying a

new trial, the defendant has appealed and has brought up typewritten transcripts.

[1] Acting as his own attorney, the defendant has filed briefs in which he makes the point that he was wrongfully deprived of a jury trial. To get an understanding of his claim, it is necessary to consider the following facts: Under the amended indictment, the defendant was accused of committing robbery on the 29th day of April, 1932. The indictment charged a prior conviction on the 13th day of December, 1906, and it also charged a prior conviction on the 28th day of December, 1921. On his arraignment, the defendant, acting as his own attorney, entered a plea of not guilty. Later he was allowed to withdraw that plea and enter a plea of not guilty and not guilty by reason of insanity. Later he went to trial before a jury on his plea of not guilty. After the evidence had been introduced, the trial court granted the defendant's motion advising a verdict in behalf of the defendant as to the second prior conviction. The jury returned a verdict finding the defendant guilty of robbery in the first degree and finding the defendant had suffered the prior conviction under date of December 13, 1906, and that the defendant had not suffered a conviction on the 28th day of December, 1921. Thereupon the jurors were excused until 10 a. m., July 7, 1932, but were directed to return into court to try the issue of insanity. However, on July 1, 1932, the district attorney, with the defendant still representing himself, appeared in court that the defendant might be arraigned for judgment. At that time the defendant made a motion that the jurors so directed to return on July 7, 1932, be excused. As recited in the minutes of the clerk: "Thereupon the court upon request of the defendant appointed James Toner, assistant public defender, or Joseph Trusty to appear as counsel for defendant after today's proceedings. Thereupon the defendant waived trial by a jury on the insanity issue." The reporter's transcript does not contain a transcript of the reporter's notes, if any, of the proceedings had on July 1, 1932. Except as stated above, the record contains nothing purporting to recite what occurred on that date. At 10 a. m. on July 7, 1932, the defendant, Joseph M. Trusty, Esq., his attorney, the officers of the court, and the jurors were present as shown by the reporter's transcript. Continuing, the proceedings were as follows:

"The Court: Mr. Trusty, at the last calling of this matter the defendant waived a jury.

"Mr. Trusty: That is my understanding. * * * Yes, your Honor, at the time of the waiver the defendant, as I understand it, was conducting his own case, and a waiver by him at that time is a legal waiver, and I come in after, as I understand it, the jury has been waived and the matter is to be determined by your Honor.

"The Court: Let the record show in this case the defendant entered a plea of not guilty by reason of insanity, in addition to the plea of not guilty, and the defendant was found guilty by a jury as charged in the indictment and one prior was found not true, and the other prior was found true, and the matter, by consent, was continued until this date for a presentation of the merits of the issue raised by the plea of the defendant, not guilty by reason of insanity. The Court will therefore call upon the defendant to present any evidence that he desires." As to the question before us, we have quoted the entire record. Addressing himself to the record as so presented, it is the claim of the defendant that he did not waive a jury.

Article 1, § 7, of the Constitution as amended in 1928, among other things, provides: "The right of trial by jury shall be secured to all, and remain inviolate. * * * A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel. * * *" Looking back over the record, it is perfectly clear that Jesse C. Rumsey in open court declared that he waived a jury trial on the issue of insanity. By making that statement he consented. By the silence of the district attorney, the people of the state of California consented. At the time that Jesse C. Rumsey addressed the court, he was acting as his own attorney, and his views were therefore "expressed in open court by the defendant and his counsel." All of the provisions of the Constitution as quoted above were duly and exactly followed, and a jury trial was waived. The defendant cites People v. Wilkerson, 99 Cal. App. 123, 127, 278 P. 466. The case is not in point because in attempting to make the waiver Wilkerson stood silent and said nothing. People v. Garcia, 98 Cal. App. 702, 277 P. 747, is not helpful. It may be distinguished on the same grounds as the Wilkerson Case.

[2] Still claiming that the issue of insanity should have been tried before a jury, the defendant cites and relies on sections 1026, 1042, 1201, and 1368 of the Penal Code and earnestly calls attention to the fact that the word "must" is used. As the defendant was being tried on the issue of insanity section 1026 was the controlling statute; but that section was enacted in 1927 (added by St. 1927, p. 1149, § 4). When thereafter article 1, § 7, of the Constitution was amended, expressly giving the right to waive a jury trial, the amendment changed the law as it had theretofore been expressed in section 7 of article 1 of the Constitution and also as it had been expressed in the stat-

utes theretofore enacted. Furthermore, section 1026 expressly deals with trials on the issue of insanity. That section controls and not the other sections cited by the defendant.

The judgment and order are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

CHUTUK et al. v. SOUTHERN CALIFORNIA GAS CO. et al. *

Civ. 7489.

District Court of Appeal, Second District, Division 1, California.

Oct. 28, 1932.

Rehearing Denied Nov. 23, 1932.
Hearing Granted by Supreme Court Dec. 27, 1932.

1. Gas ⇐20(2).

In action against gas company for damages to building from gas explosion when match was thrown near defendant's capped riser few inches from plaintiffs' building, res ipsa loquitur *held* applicable.

Facts disclosed that the thing which caused the injury was under the management of the defendant, and that the accident was such as in the ordinary course of things would not have happened if those who had the management used proper care, so that, in the absence of explanation by defendant, it might properly be inferred that the accident arose from defendant's want of care.

2. Gas ⇐17.

Gas company must use great care in management and control of gas.

3. Gas ⇐20(4).

In action against gas company for damages from gas explosion, evidence of defendant's negligence *held* for jury under res ipsa loquitur doctrine.

Facts that no complaint had ever been made relative to gas company's service pipe or riser near plaintiffs' building destroyed in the explosion, that the average length of service of gas pipes was much greater than the age of the pipe in controversy, that such pipe after explosion was generally still in good serviceable condition, and that defendant employed a watchman in every district to look after leaks, had no tendency to prove that defendant gas company was not negligent.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Nick Chutuk and others, individually and as copartners doing business under the firm name and style of Chutuk, Kordich & Vukojevich, against the Southern California Gas Company and others. From the judgment for defendants, plaintiffs appeal.

Reversed.

Albert J. Sherer and Earl E. Howard, both of Los Angeles, for appellants.

Thomas J. Reynolds and L. T. Rice, both of Los Angeles, for respondent Gas Co.

HOUSER, J.

The plaintiffs were the owners of a frame building, one side of which was adjacent to the property line of the lot upon which the building was located. Several years preceding the date when the plaintiffs became the owners of said property, at the instance and request of the then owner thereof, the defendant Southern California Gas Company (hereinafter designated the defendant), which was engaged in the business of furnishing gas to the public generally, installed a service gas pipe from its gas main in the public street to the premises of such owner, and thereupon and thereafter by such means furnished gas to said owner for his use. At a later date, which also preceded the acquisition of the property by the plaintiffs, the gas service of the then owner was discontinued, and, with the exception of the service pipe which had been installed and was owned by the defendant, all gas pipes were removed from the premises. The service pipe "was located one foot east of the property line," which placed it just outside of the plaintiffs' building and property and within a few inches thereof. In discontinuing the service of the gas, the defendant caused to be capped the riser which extended perpendicularly from the service pipe above the surface of the soil for about four inches. The building was constructed "about six inches * * * above the ground surface." At no time did the plaintiffs have knowledge either of the location or of the existence of either the service pipe or the capped riser. Between the side of the building that was adjacent to the property line and the curb line of the street was a space of ten or twelve feet upon which a night watchman employed by the plaintiffs sometimes parked his automobile. Early in the evening of a certain day, which was several months subsequent to the date on which the plaintiffs became the owners of the premises, a boy with whom the watchman was conversing at the time, threw a burning match upon the ground near the place where the capped riser was located, and thereupon an explosion of accumulated gas occurred underneath the building, which was followed by a fire that resulted in a damage to the building, stipulated by the parties hereto to

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 23 P.2d 285.

amount to the sum of $1,500. Thereafter, in an action brought by the plaintiffs against the defendant, the trial court denied to the plaintiffs any right of recovery against the defendant, but rendered judgment in favor of the latter. It is from such judgment that the instant appeal is prosecuted.

[1] In the leading case of Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146, the principle of law known as "res ipsa loquitur" was applied to a situation somewhat similar to that portrayed by the facts herein, since which time the rule therein announced has been generally recognized and followed by the courts of this state. See 19 Cal. Jur. 704 et seq.; Willard v. Valley Gas & Fuel Co., 171 Cal. 9, 151 P. 286; Id., 180 Cal. 561, 182 P. 32; Phœnix Assurance Co. v. Texas Holding Co., 81 Cal. App. 61, 252 P. 1082, and especially Smith v. Southern Counties Gas Co., 89 Cal. App. 81, 264 P. 532.

In the instant case it appears that, since "the thing which caused the injury" was shown to have been under the management of the defendant, and that the accident was such "as in the ordinary course of things does not happen if those who have the management use proper care," in the absence of explanation by the defendant, it may properly be inferred that the accident arose from its want of care. In other words, in the situation as hereinbefore has been set forth, without further evidence on the part of the defendant, a prima facie case of negligence on the part of the defendant was established; and the plaintiffs were entitled to a judgment in their favor, unless it further appeared that, by substantial evidence introduced in behalf of the defendant, the trial court was authorized to conclude that the defendant was not negligent in the premises. See authorities cited, supra.

In substance, all the facts in evidence which in any manner even tended to warrant a surmise that the defendant had not been negligent, or that the accident was directly attributable to the negligence of either of the plaintiffs, or of some other person, were the location of the riser on the service pipe, which was shown to have been outside the property of the plaintiffs and a few inches from their building; that after the explosion and the fire the connecting threads between the riser and the service pipe were found to have been cracked; the possibility that on some indefinite and uncertain date the watchman may have driven his automobile upon or over said service pipe; that no complaints of leaks in the service pipe had ever been registered with the defendant; that the average life of gas pipes in the locality in which the one in question was located far exceeded the length of time that the particular service pipe and riser had been in use; and that, although no evidence was introduced to the effect that said service pipe and riser at any time had ever been inspected by any person, it did appear that the defendant had employed a man in "every district * * * looking for these leaks."

[2, 3] It is clear that, because of the nature and the dangerous qualities of gas, the defendant was required to use great care in its management and control. Considering the fact that the defendant simply capped the riser, rather than adopted a safer measure for its protection against liability for injuries or damages which might arise from "these leaks," especially in view of the fact that neither the service pipe nor the riser was located on the property of the plaintiffs, and that the latter neither had nor assumed to have any management or control of either the service pipe or the riser, in the absence of any substantial evidence in its defense, the responsibility of the defendant in the premises approaches a certainty. The mere possibility that the watchman may have driven his automobile over or upon or against the riser, and thus have caused the leakage of the gas, amounts to nothing more than a conjecture. For aught that appears, the breaking of the connecting threads between the service pipe and the riser may have resulted from any one or more of many different conditions which may have been present. If complaints had been made and no attention had been paid to them, such a fact might constitute additional evidence of the negligence of the defendant; but the fact that no complaints had ever been made relative to the situation would have no tendency to prove affirmatively that care had been exercised on the part of the defendant. And the same principle would apply with reference to the average length of the life of the gas pipe. If its age limit had expired, that fact might well be an item tending to show lack of care; but, because the pipe was generally still in good serviceable condition has no tendency to prove that in the circumstances present herein the defendant was not guilty of negligence. As to the inspection of the service pipe and the riser in question, the evidence merely shows that the defendant employed a man in "every district" whose business was "to look after these leaks." No evidence was presented to the effect that he had ever inspected this particular service pipe and riser. But even if it might be surmised that he had done so, the evidence contains no information as to the date when such inspection occurred—whether within a day, a week, a month, or even a year preceding the explosion and the fire. In determining the possible legal effect of such evidence as it was intended to bear upon the ultimate fact of either the care of the defendant or the lack thereof by some other person in the premises, this court is impressed with the sug-

gestions made by the appellants in their brief herein with reference thereto, to wit: "We assert that such evidence falls far short of being substantial, and, in fact, is barely pertinent under the issue. True, we can speculate, or guess, that the watchman ran into the pipe, causing the damage. We can guess that, because of its break in the thread, something may have run over it. We might possibly hazard a guess that some time after installation, the gas company district man may have inspected for leaks. We can guess, because the average life of the gas pipe is from ten to fifteen years, that at all times this pipe was in perfect condition. But such speculative indulgences do not present substantial evidence so as to create a conflict justifying the finding of the trial court. * * *" In the opinion of this court, the inference of negligence of the defendant, which arose from the application of the rule of "res ipsa loquitur," was not met by any substantial evidence which was introduced in behalf of the defendant.

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

127 Cal.App. 213

BISCAY v. CITY OF BURLINGAME et al.

Civ. 8534.

District Court of Appeal, First District, Division 1, California.

Oct. 28, 1932.

Rehearing Denied Nov. 26, 1932.

Hearing Denied by Supreme Court Dec. 27, 1932.

1. Municipal corporations ⇐601.

Zoning ordinance restricting business to prescribed districts must constitute reasonable regulation of industries, in view of their relation to residential portion of community (St. 1917, p. 1419).

2. Municipal corporations ⇐601.

Zoning ordinance to be valid must be reasonably necessary and reasonably related to health, safety, morals, and general welfare of community, and free from discrimination.

3. Appeal and error ⇐909(6).

In absence of contrary showing, appellate court assumed that building permit was legally issued, and that grantee acted under lawful authority in erecting structure.

4. Municipal corporations ⇐122(2).

In absence of clear language manifesting intention that zoning ordinance should have retroactive operation, such operation will not be presumed.

5. Municipal corporations ⇐601.

Property owner could restrain enforcement of zoning ordinance, exempting existing nonconforming uses, as to business conducted by him immediately prior to enactment of ordinance.

6. Constitutional law ⇐70(1).

Determination of character of property to be included in various zones under ordinance is largely within legislative discretion.

7. Municipal corporations ⇐122(2).

Every intendment is to be made in favor of zoning ordinance.

8. Municipal corporations ⇐601.

That block immediately across street from plaintiff's property was entirely occupied by industrial plants *held* not to invalidate ordinance, including plaintiff's property in residential district (St. 1917, p. 1419).

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Frank Biscay against the City of Burlingame and others. From an adverse judgment, plaintiff appeals.

Reversed and remanded, with directions.

Fletcher A. Cutler, of San Francisco, for appellant.

John F. Davis, of San Francisco, for respondents.

LAMBERSON, Justice pro tem.

This is an action to enjoin the city of Burlingame, which is a municipal corporation of the sixth class, and its officers, from enforcing, as against the plaintiff and appellant, the provisions of a zoning ordinance of that city designated "Ordinance No. 227." By their answer the respondents seek to justify their threatened acts under authority of Ordinances No. 227 and No. 92 of the respondent municipal corporation.

On October 16, 1928, appellant made application to the city of Burlingame for a building permit covering the intended erection of a frame garage 32 by 35 feet in ground dimensions and 15 feet in height at its highest point, and on the same date was granted a building permit by the department of public works through its building inspector. The permit covered the erection of a "garage," and specified that all work done by virtue of the permit must conform to the plans and specifications filed with the building department and in accordance with the provisions of the ordinances of the city of Burlingame. The front line of the building was to be 15 feet from the property line. The garage was immediately erected upon a lot adjacent to the residence of appellant, who had, at the time of the issu-

ance of the permit, a small garage in use in connection with his dwelling house.

Whether the garage was to be a public or private garage was not specified in the application or permit, but the trial court allowed the introduction of testimony to the effect that the appellant was informed by the building inspector, city attorney, and chief of police, at the time the permit was granted, that no business could be conducted on the premises. In January, 1929, the appellant repaired three automobiles in the building, and later rented it for a paint shop. The block immediately across the street from the property of appellant, and west thereof, is entirely occupied by industrial plants, which are adjoined on the west by the main lines and industrial spur tracks of the Southern Pacific Company. Immediately south of and across the street from the block in which appellant's property is located and which is largely vacant are other industrial plants.

The trial court found that the building inspector issued a permit to plaintiff to erect a building to be used as a private garage; that thereafter, in November, 1928, the appellant erected a building, equipped it with machinery, and ever since November 1, 1928, has transacted in said premises a public garage business. The complaint in this action was filed July 24, 1929.

Ordinance No. 227 was adopted by the city council of the city of Burlingame June 3, 1929. It constitutes a complete zoning ordinance by which the city is divided into four classes of use districts: Commercial, apartment, residential, and unrestricted. The district in which appellant's garage is located was by the ordinance classed as residential. Among other things, the ordinance provides that any nonconforming uses existing at the time of the passage of the ordinance may be continued and any existing building designed, arranged, intended, or devoted to a nonconforming use may be reconstructed or structurally altered and the nonconforming use therein changed, subject to certain specified conditions. It further provided that all ordinances and parts of ordinances inconsistent with Ordinance No. 227 shall be and are repealed.

In March, 1914, the city council of Burlingame passed Ordinance No. 84, by which it was declared that certain territory of the city of Burlingame, within which the official subdivision in which appellant's property was located was included, should be thereafter known as "Burlingame Meadows." In September, 1914, the city council adopted Ordinance No. 92, which declared that the district known as "Burlingame Meadows" to its full limits, with the exception of a portion of three blocks, should be created a residence district, and that such district should be governed by such regulation as would prohibit the erection, building, or placing within said district of any structure or building other than dwelling, home, hotel, flat, or apartment house, with appurtenant buildings. It provided a penalty for the violation of its provisions, but defined nothing as unlawful.

In August, 1922, the city council passed Ordinance No. 150–A, amending Ordinance No. 92. It prohibited the carrying on, in the district described in Ordinance No. 92 as a residence district, of any business of any kind or nature, "except those of the known and accepted professions." Later, there was adopted in the city of Burlingame, at an initiative election, a zoning ordinance known as Ordinance No. 162, which was declared invalid in the case of Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 308. After the entry of the decision of the Supreme Court in that case, the city council passed in May, 1929, what has been termed by counsel an emergency ordinance, designated as Ordinance No. 226, which purported to fix certain territory in the city of Burlingame as residential territory, and which ordinance declared that it was part of a comprehensive zoning plan of the city of Burlingame.

[1] While the Zoning Act of 1917 (Stats. 1917, p. 1419) provides for the regulation of industries and business by the establishment of zones, and the courts have recognized the authority of municipalities, under the police power, to restrict certain classes of business to prescribed territories or districts for the protection of the public health, comfort, safety, morals, or welfare (Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479), such restrictions must be ordained by ordinance and be of a form designed to comprehend a reasonable regulation of industries and business in view of their relation to the residential portion of the community. In other words, such ordinance or regulation must be general, uniform, and comprehensive. With the exception of Ordinance No. 162, which was declared void, and Ordinance No. 227, none of the ordinances of the city of Burlingame which we have mentioned were calculated to be either general or comprehensive. The earlier ordinances arbitrarily established a residential district without regard to business which might be necessary in that district. Ordinance No. 150–A sought to prohibit any business except "those of the known and accepted professions," a provision that was vague, inexact, and altogether impossible of definition. It is not pretended that any of those ordinances were passed for the purpose of protecting the public health, comfort, safety, or welfare, or were to be comprehended within a general scheme or plan designed for such purpose. Respondents, therefore, even if we should disregard the repealing clause of Ordinance No. 227, which it is not possible for us to do, cannot

rely upon those ordinances in justification of their attempts to prevent the appellant from using his garage for established business purposes.

[2] The right to zone may be resorted to upon a proper invocation of the public police power, but such zoning must be reasonably necessary and reasonably related to the health, safety, morals, or general welfare of the community. Of course, it goes without saying that such zoning must either expressly or impliedly be founded upon a finding by the board of trustees, or other governing body of a municipality, that such zoning is necessary to the general welfare of the community. In re White, 195 Cal. 516, 234 P. 396. There is no indication found in the earlier ordinances of the city of Burlingame, upon which respondents are relying, that the city council, in passing those ordinances, had in mind anything other than an arbitrary setting aside of a very large part of the city for residential purposes without regard to the commercial and industrial needs of the community. Courts are required, in considering the validity of zoning ordinances, to determine, in addition to the need thereof, whether or not they are arbitrary and discriminatory in their conception and application, and whether they have any reasonable tendency to promote the public morals, health, safety, or general welfare and prosperity of the community. Miller v. Board of Public Works, supra.

[3] The ordinance or authority under which a building permit was issued upon the application of appellant, and the authority asserted by the various officers of the respondent municipality to orally limit or modify the terms of the permit, do not appear from the record before us. In the absence of a showing to the contrary, we must assume that the permit was legally issued and that the appellant acted under lawful authority in erecting the structure described in the permit. A sharp distinction must be draw between the right to erect a building according to certain prescribed structural standards or to construct a particular type of building under the customary ordinance obtaining in many municipalities and contemplated by subdivision 16a of section 862 of the Municipal Corporation Bill (as amended by St. 1931 p. 192, § 12), and the right to construct a building designed for the conduct of a particular business therein, or to carry on such business. In the first class, the governing factors may be the fire hazards involved, the height, the strength of the materials, and type of construction used, or the sufficiency of means of ingress and egress in the instance of buildings intended for the occupancy of large numbers of individuals; in short, those matters which essentially have to do with the safety of persons and property. In the second class, the chief consideration is the development of the community as a whole. From the form of application made by the appellant and the form of permit issued, both of which referred to the plans and specifications, we must conclude that the permit was issued under the provisions of a building ordinance not disclosed by the record, and that the officers of the city were more interested in the type of building from a structural standpoint than they were in its relation to the surrounding district. The construction of the garage was lawful and none of the ordinances of the city of Burlingame prior to Ordinance No. 227 operated to make its use for business or trade purposes unlawful.

Assuming, only for the purposes of this opinion, that the finding of the court that appellant has ever since the 1st day of November, 1928, transacted on the premises a public garage business, is supported by the evidence, we are of the opinion that respondents are by reason of the provisions of Ordinance No. 227, relating to the continuance of nonconforming uses existing at the time of its passage, foreclosed from taking any action against the appellant, the object of which is to prohibit or prevent the business use to which the trial court has found it was being put prior to the enactment of Ordinance No. 227, or to prevent the continuance of any other nonconforming use which had become established therein before the time of such enactment.

Exemptions of existing nonconforming uses have been generally held to be valid and necessary. Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14; Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388. In Jones v. City of Los Angeles the Supreme Court, in the course of a very complete discussion of the question of retroactive operation of zoning ordinances, spoke as follows (page 310 of 211 Cal., 295 P. 14, 17):

"As a matter of practice, also, those who have drafted ordinances have usually proceeded with due regard for valuable, vested property interests, and have permitted existing, nonconforming uses to remain. They are very generally agreed that the destruction of an existing nonconforming use would be a dangerous innovation of doubtful constitutionality, and that a retroactive provision might jeopardize the entire ordinance. 'Zoning * * * holds that an ounce of prevention is worth a pound of cure and that it is fairer to all concerned to prevent the establishment in residence districts of objectionable business than to drive them out once they were established. * * * *Zoning looks to the future, not the past*, and it is customary to allow buildings and businesses already in the district to remain, although of a class which cannot be established. If such a business constitutes a nuisance, it can still be removed under the police power, but the zoning acts in themselves do not customarily interfere with

existing conditions.' Chamberlain and Pierson, Zoning Laws and Ordinances, 10 Am. Bar. Assn. J. 185. 'Retroactive operation of the provisions of the ordinance is generally avoided. * * *' Bettman, Constitutionality of Zoning, 37 Harv. L. Rev. 834, 853. 'Retroactive zoning is not to be recommended. * * *' Young, City Planning and Restrictions on the Use of Property, 9 Minn. L. Rev. 593, 628. 'The purpose of zoning, which is said to be the crystallization of present conditions and the constructive control of future development, does not require that existing uses be changed. Hence it has been generally assumed that any attempt to make zoning ordinances retroactive would meet with the opposition of the courts and might result in their declaring the ordinance as a whole unconstitutional.' Retroactive Zoning Ordinances, 39 Yale L. J. 735, 737. 'Nonconforming uses may be required to be removed, but the majority of the cases seem to indicate that if this procedure is attempted the ordinance will be declared unconstitutional because unreasonable.' Byrne, The Constitutionality of a General Zoning Ordinance, 11 Marquette L. Rev. 189, 214." (Italics ours.) See Ryan v. Andriano, 91 Cal. App. 136, 266 P. 831.

[4] In the absence of clear and unequivocal language manifesting an intention that an ordinance shall have a retroactive operation, such operation will not be presumed. London v. Robinson, 94 Cal. App. 774, 271 P. 921.

[5] The provisions of Ordinance No. 227 as to the continuance of nonconforming uses support the conclusion that the respondents are not authorized to prosecute appellant for alleged violations of the ordinances of the city of Burlingame herein cited or to otherwise attempt to enforce the provisions of those ordinances so far as they relate to the carrying on of a business established before the enactment of Ordinance No. 227, and that appellant is entitled to an injunction restraining the defendants and respondents from instituting any action by which it may be sought to prevent appellant from carrying on the business which he was carrying on or which had been established at the time of the enactment of Ordinance No. 227, and also restraining the defendants from instituting any criminal action in prosecution of plaintiff for acts arising out of the conduct of such business; such injunction being limited, however, to any business actually carried on or established at a time immediately prior to the enactment of Ordinance No. 227.

[6-8] Appellant also asks for the judgment of the court that Ordinance No. 227 is void. While ordinances undertaking to regulate useful business enterprises are subject to investigation in the courts, with a view to determining whether the ordinance is a lawful exercise of the police power or an arbitrary interference with the right to carry on a lawful business, to make contracts, or to use and enjoy property (Del Fanta v. Sherman, 107 Cal. App. 746, 290 P. 1087; Hurst v. City of Burlingame, supra), courts are slow to exercise this power of investigation and to substitute their judgment for that of the municipal authorities in whom the determination of the character of the property to be included in the various zones is primarily placed. (Feraut v. City of Sacramento, 204 Cal. 687, 269 P. 537; Miller v. Board of Public Works, supra). Whenever a given situation presents a proper field for the exercise of the police power, the extent of its invocation and application is a matter which lies very largely in legislative discretion, and every intendment is to be made in favor of a zoning ordinance. Zahn v. Board of Public Works, supra. In Jones v. City of Los Angeles, supra, at page 309 of 211 Cal., 295 P. 14, 17, the court said: "An appellate court should not permit itself to be drawn into a minute examination of alleged discriminatory operation of such ordinances if, broadly considered, a reasonable basis of classification exists." Where a city adopts a general zoning ordinance, the fact that certain property is included in one classification while property situated directly across the street is included in another classification does not render the ordinance illegal. Feraut v. City of Sacramento, supra. The property involved in the case of Hurst v. City of Burlingame is located about one and one-half blocks in a northerly direction from appellant's property. The Hurst property is closer to the railroad and situated somewhat differently in point of proximity to other industrial properties which almost surrounded it. We are not prepared to say that the city council of the respondent municipality abused its discretion in placing the property of appellant in a residential district. We are of the opinion that the appellant is not entitled to a decree declaring Ordinance No. 227 void in so far as it prevents the use of appellant's property for commercial purposes, except to the extent hereinbefore expressed.

The objection has been made by appellant that Ordinance No. 227 is invalid for the reason that a planning commission existed in the city of Burlingame, and that the city council did not follow the provisions of section 4 of the Zoning Act of 1917, providing the mode of procedure in municipalities having a city planning commission. It appears that no ordinance was passed by the city council creating a planning commission as required by law. It does appear, however, that the city council acted in accordance with the provisions of section 5 of the same act, which provides, in substance, that, in municipalities where there is no city planning commission, the council may proceed in the manner prescribed in section 4 of the act, and make the reports and perform other acts prescribed in section 4.

We find no merit, therefore, in the objection, or in the objection that the court omitted to find upon material issues. In view of the conclusions which we have already expressed, we consider it unnecessary to discuss the last-mentioned objection.

It is ordered that the judgment be reversed, and that the cause be remanded to the trial court, with directions to enter its judgment in conformity with the conclusions herein set forth.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

127 Cal.App. 313

VERNON v. DEESY.

Civ. 7505.

District Court of Appeal, Second District, Division 1, California.

Nov. 2, 1932.

Judgment ⇐160, 161.

Refusing to vacate default judgment where motion was unaccompanied by affidavit of merits or copy of answer and notice of motion contained no statement of grounds except that motion would be made on grounds set forth in attached affidavit *held* no abuse of discretion (Code Civ. Proc. § 473).

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Elizabeth Vernon against Hilda Deesy. From the judgment and from an order denying motion to vacate default judgment, defendant appeals.

Affirmed.

Reames, Jaffray & Lake, of Los Angeles, for appellant.

Guy Lewis, of Hawthorne, and Mark E. Barth, of Los Angeles, for respondent.

HOUSER, J.

This is an appeal from a default judgment and from an order by which a motion to vacate said judgment was denied.

From the record herein it appears that the notice of motion to vacate the judgment contained no statement of the grounds thereof other than that it would be made "upon the grounds and for the reasons set forth in affidavit attached hereto." The essential facts stated in such affidavit were nearly all controverted by counter affidavits. Nor was any affidavit of merits, or "copy of the answer," as provided by section 473 of the Code of Civil Procedure, presented by the defendant to the court in connection with the said motion. In such a situation, the trial court did not abuse its discretion in the premises. County of Los Angeles v. Lewis, 179 Cal. 398, 177 P. 154; La Bonte & Ransom Co. v. Scellars, 90 Cal. App. 183, 265 P. 550; Bailiff v. Hildebrandt, 47 Cal. App. 564, 191 P. 42.

The judgment and the order from which the appeal is taken are affirmed.

We concur: CONREY, P. J.; YORK, J.

127 Cal.App. 258

KLEINSASSER et al. v. McNAMARA et al.

Civ. 8301.

District Court of Appeal, First District, Division 1, California.

Oct. 31, 1932.

1. Appeal and error ⇐1008(1).

Statute permitting reviewing court to make findings does not change rule that it is bound by trial court's findings supported by evidence (Code Civ. Proc. § 956a; Const. art. 6, § 4¾; Supreme Court and District Courts of Appeal Rule 38).

2. Appeal and error ⇐1122(1).

Statute permitting reviewing court to make findings *held* inapplicable, where purpose of producing original evidence in reviewing court is to procure reversal (Code Civ. Proc. § 956a).

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by Z. J. Kleinsasser and others against W. M. McNamara and others. From the judgment, plaintiffs appealed, and now file an application to take additional evidence.

Application denied.

Walter M. Gleason, of Oakland, H. A. Savage, of Fresno, Morgan J. Doyle, of San Francisco, and J. L. Royle, of Oakland (Henry W. Ballantine, of counsel), for appellants.

George W. Nilsson and Charles H. King, both of Los Angeles (M. F. McCormick, of Fresno, of counsel), for respondents.

PER CURIAM.

After the appeal in the above-entitled cause was placed on the calendar for oral argument, appellants filed an application under the authority of section 956a of the Code of Civil Procedure to take additional evidence.

The action was instituted in the Superior Court of Fresno county by appellants as stockholders of the Elberta Oil Company to enjoin the directors thereof from consummating a transaction whereby the properties of said company were about to be transferred to Delaney Petroleum Corporation; and the essential issues of fact upon which the action was heard and determined were whether, as appellants alleged in their complaint, the transaction was unfair to the Elberta Oil Company and was being consummated for the fraudulent purpose of furthering the private interests of the directors thereof. The trial took place before the honorable Charles R. Barnard, judge of said court, who found against appellants on all issues, and judgment in favor of respondents was entered accordingly. The main ground urged for reversal is that the evidence adduced at said trial was and is insufficient in law to support the findings. Other actions growing out of this same controversy and involving similar issues of fact were subsequently instituted by appellants or some of them in other counties, and have since been heard and determined therein. One of them, so the application herein alleges, entitled Russell et al. v. Rougeot et al., was commenced in the Superior Court of the county of Kings, and was heard and determined by the honorable Ernest Weyand, as judge thereof, who, it is claimed, reached certain conclusions on the controlling issues of fact contrary to those reached by Judge Barnard in the action heard and determined in Fresno county. In view of the foregoing situation, appellants filed the present application for the purpose of having the determination of the appeal taken from the judgment entered in the Fresno case temporarily suspended and the trial of the cause reopened before this court so as to allow them to introduce and have considered as part of the record on said appeal a large portion of the evidence introduced by appellants on the same issues at the trial of the action before Judge Weyand in Kings county, most of which, appellants assert, relates to facts "uncovered by them" subsequent to the trial of the action in Fresno county or to facts occurring thereafter, appellants' contention being that, if received, such evidence would call for the making of new findings by this court contrary to those made by the trial court in Fresno county and confirming those made by the trial court in Kings county, and thus require, not only a reversal of the judgment from which the present appeal was taken, but the entry of a directed judgment in favor of appellants.

[1] Ever since the adoption in 1926 of section 4¾ of article 6 of the Constitution and the enactment and adoption pursuant thereto of section 956a of the Code of Civil Procedure and rule XXXVIII of the Supreme Court and District Courts of Appeal, granting to courts of appellate jurisdiction the power to make findings in addition or contrary to those made by the trial court, repeated efforts have been made by appealing parties, as here, to utilize the provisions of the above enactments for the purpose of obtaining in the reviewing court a retrial of the material issues of fact, and a reversal of the judgment of the trial court on additional evidence which was not introduced before the trial court; and just as frequently it has been held that said enactments were never intended to serve such purpose, and do not confer on reviewing courts any such trial court power. In so holding the Supreme Court, in the case of Tupman v. Haberkern, 208 Cal. 256, 280 P. 970, 974, said: "Neither the constitutional amendment nor section 956a of the Code of Civil Procedure was intended to abrogate the general rule respecting the powers of the trial court in its determination of questions of fact or the rule that the reviewing court is bound by the findings of the trial court if based upon substantial evidence. It is plain that in order to transform or convert appellate tribunals into triers of fact and thus require them to pass upon the credibility of witnesses and the weight and sufficiency of the evidence the intention so to do must be clearly disclosed. The respective provinces of the trial and reviewing courts are so distinct and well defined and of such long standing that in order so to do it must clearly appear that it was the purpose of the new law to uproot the old system and supplant it with a fact-finding appellate system. This we do not believe to have been the purpose of the changes in the law." Later cases holding to the same effect are Isenberg v. Sherman, 212 Cal. 454, 298 P. 1004, 299 P. 528, and Davis v. Chipman, 210 Cal. 609, 293 P. 40, wherein it is expressly declared that the addition of said section 956a to the Code of Civil Procedure in no way changed the long-standing fundamental rule that the reviewing court is bound by the findings of the trial court based on substantial evidence.

[2] Moreover, it has been definitely held that in no case may the provisions of said section 956a be invoked where the purpose of the production of original evidence in the reviewing court is to bring about a reversal of the cause on appeal; but only in cases where the new evidence sought to be produced will lead to the rendition of such a judgment in the reviewing court as will affirm, or modify and affirm, the judgment of the trial court, thus terminating the litigation. Estate of Wirt, 207 Cal. 106, 277 P. 118; Leal v. Leal, 206 Cal. 513, 274 P. 965; First Nat. Bank v. Terry, 103 Cal. App. 501, 285 P. 336; Monson v. Fischer, 107 Cal. App. 55, 289 P. 899; Murphy v. Sheftel (Cal. App.) 6 P.(2d) 549.

For the reasons stated, the application is denied.

127 Cal.App. 290

INGERSOLL et al. v. CHAPLIN et al.

Civ. 424.

District Court of Appeal, Fourth District, California.

Nov. 1, 1932.

1. Mechanics' liens ⇐277(5).

Variance between mechanic's lien statement disclosing that husband owned property and complaint and finding disclosing that husband and wife owned property *held* not to affect validity of judgment.

2. Mechanics' liens ⇐277(5).

Variance between mechanic's lien statement stating that husband made contracts for materials either personally or through agent, and complaint and finding that contracts were made by husband and wife, *held* not fatal to judgment (Code Civ. Proc. § 1187).

3. Mechanics' liens ⇐279.

In absence of evidence to contrary, court cannot assume that materials were furnished by lien claimants after recording of lien.

4. Mechanics' liens ⇐304(1).

Where it appeared that owners of property directly employed laborers and directly purchased materials from lien claimants, deficiency judgment against owners *held* properly rendered.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Donald G. Ingersoll and others against Sidney Chaplin and others. Judgment in favor of the plaintiffs, and the defendants Sidney Chaplin, Minnie Chaplin, and Lallie de Loriere appeal.

Affirmed.

Loyd Wright and Charles E. Millikan, both of Los Angeles, for appellants.

MARKS, J.

This is an action to foreclose separate mechanics' liens upon property situated in the town of Encinitas in San Diego county. Judgment was rendered in favor of the plaintiffs, and the defendants Sidney Chaplin, Minnie Chaplin, and Lallie de Loriere are here on appeal.

[1] The liens state that Sidney Chaplin was the owner and reputed owner of the premises upon which the liens were claimed. The complaint alleges, and the court found, that Sidney Chaplin and Minnie Chaplin, as husband and wife, were the owners of the property. This creates no sufficient variance affecting the validity of the judgment. 17 Cal. Jur. 132, § 86, and cases cited. In Ah Louis v. Harwood, 140 Cal. 500, 74 P. 41, 43, it was said: "If, in good faith, the claimant states the name of a reputed owner, 'he shall not lose his lien if he shall afterward ascertain that some other person was the owner.' Corbett v. Chambers, 109 Cal. 178, 41 P. 873. It was also there said: 'The object of this statement in his claim is, as we have seen, to designate the person against whom he seeks to establish the lien, as well as to protect others in their dealing with the property. The purpose of this designation is to point out the individual who is to be affected thereby, rather than the attribute of ownership.'"

[2] The liens further state that Sidney Chaplin made the contracts either personally or through agents. The complaint alleges, and the court found, that the contracts were made by Sidney Chaplin and Minnie Chaplin. Appellants urge that this constitutes a variance fatal to the judgment. The case comes before us on the judgment roll. We may assume that the evidence showed that, while Sidney Chaplin in person actually made the contracts in question, he did so for himself and for Minnie Chaplin as her agent. This contention of appellants is answered in the case of Hammond Lumber Co. v. Richardson, 94 Cal. App. 119, 270 P. 751, 752, where it was said:

"Appellant has four specifications of error, but they are all in effect stated in the first specification, which is as follows: 'Claim of lien is insufficient in that it did not truly state the name of person to whom plaintiff furnished the materials and because there was a fatal variance between the notice of lien and the proof.' Section 1187 of the Code of Civil Procedure requires, among other things, that a lien claimant must in his claim of lien designate therein the name of the person by whom he was employed or to whom he furnished the materials. The purpose of the claim of lien, as contemplated in the Mechanic's Lien Law, in so far as it concerns the owner of the property against which the lien is claimed, is to give him constructive notice of the claimed lien, to inform him as to the nature and extent of the claim, and to facilitate investigation as to its merits. Trout v. Siegel, 202 Cal. 706, 262 P. 320; Wagner v. Hansen, 103 Cal. 104, 37 P. 195.

"The right of mechanics and materialmen to liens upon property upon which they have bestowed labor or furnished materials is constitutional. Cal. Const. art. 20, § 15. It is the function of the Legislature to provide procedure for carrying this right into effect, and the statutes relating thereto are to be liberally construed with a view to effect their objects and promote justice. McClung v. Paradise Gold Mining Co., 164 Cal. 517, 129 P. 774; Hammond Lumber Co. v. Barth Inv. Corp., 202 Cal. 601, 606, 262 P. 29, 31; Heberling v. Day, 59 Cal. App. 13, 22, 209 P. 908.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

"There is nothing in the evidence in the present case to show that the owner was misled to his injury in any way by the failure of the claimant to state precisely the name of the corporation with which the contract was made, and to which the materials were furnished. It will not be presumed, in the absence of evidence to that effect, that he was so misled. Putnam v. Ross, 46 Mo. 337. Indeed, it is obvious that he was not misled, and the trial court so found. A general statement of this phase of the Mechanic's Lien Law is given in Corpus Juris (volume 40, pp. 235, 236) as follows: 'As a rule a mistake in the statement as to the name of the person with whom plaintiff contracted or by whom he was employed * * * will not defeat the lien, where there was no intention to deceive and no one has been misled to his detriment.' First Presbyterian Church v. Santy, 52 Kan. 462, 34 P. 974; H. F. Cady Lumber Co. v. Conkling, 70 Neb. 807, 98 N. W. 42; Eberle v. Drennan, 40 Okl. 59, 136 P. 162 [51 L. R. A. (N. S.) 68]; Osborn v. Logus, 28 Or. 302, 37 P. 456, 38 P. 190, and 42 P. 997. Our own state courts have followed the general rule. Tibbetts v. Moore, 23 Cal. 208; Jewell v. McKay, 82 Cal. 144, 23 P. 139; Hazard, Gould & Co. v. Rosenberg, 177 Cal. 295, 170 P. 612.

"In Osborn v. Logus, 28 Or. 302, 42 P. 997, supra, the contract for construction was executed by the defendant Logus, owner of certain property, with C. N. Holmes & Co. The claim of lien stated that the materials were furnished to 'J. W. Holm & Bro.' It was alleged in the complaint that the materials were furnished to J. O. Holm and C. N. Holm, partners, doing business under the firm name of J. O. Holm & Bro. After referring to certain of the evidence the court said: 'But, however this may all be, it is clearly apparent that defendant Logus, who alone is contesting this appeal, has not been misled to his injury in any respect by the allegations in the complaint touching these parties or their firm name, and we are therefore not inclined to hold that there is such a disagreement between the proofs and the allegations as to constitute a variance fatal to plaintiff's case.'"

[3] The Lumber & Builders' Supply Company had two contracts and filed two liens. Appellants urge that the record shows that one of these liens was prematurely filed. That lien was recorded on November 11, 1924. The trial court found that the Lumber & Builders' Supply Company furnished materials and supplies between September 8 and November 17, 1924. November 11, 1924, is between those dates, and, in the absence of evidence to the contrary, we cannot assume that any of the supplies and materials were furnished after November 10, 1924.

[4] It is next urged that the findings do not support a personal deficiency judgment against Sidney Chaplin or Minnie Chaplin in favor of James F. Ground and the Lumber & Builders' Supply Company for the amounts remaining unpaid after the sale of the premises.

The trial court found that "the defendants, Sidney Chaplin and Minnie Chaplin, through their duly authorized agents, made and entered into a contract with and employed the plaintiff James F. Ground to furnish the labor and materials," etc. The trial court made the same finding as to one of the contracts with the Lumber & Builders' Supply Company as it did in the instance of the James F. Ground contract. As to the other, it found that Sidney Chaplin and Minnie Chaplin purchased the lumber, building materials, and supplies directly from the Lumber & Builders' Supply Company. Under this state of the record the deficiency judgment as rendered was proper. Ridens v. Economy Home Builders, Inc., 104 Cal. App. 677, 286 P. 481.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

127 Cal.App. 327

HIMES v. DANIEL.

Civ. 7453.

District Court of Appeal, Second District, Division 1, California.

Nov. 3, 1932.

1. Negligence ⇐72.

One placing himself in more dangerous position in attempt to escape perilous position is negligent, unless originally placed in danger, without his fault, through another's negligence.

2. Automobiles ⇐245(13, 79).

Question of whose negligence caused injury in collision between vehicles on highway is generally for jury.

3. Appeal and error ⇐989.

Appellate court can only inquire whether verdict, attacked for insufficiency of evidence, is supported by any substantial evidence.

4. Appeal and error ⇐930(1).

Appellate court must assume that jury resolved conflict in testimony on material point in favor of prevailing party.

5. Appeal and error ⇐1005(2).

Reviewing court cannot substitute its deductions for those of jury and trial court in

personal injury suit, though evidence was not conflicting, where reasonable minds might differ as to whether defendant was negligent.

6. Negligence ⇐93(2).

One injured because of negligence of driver of automobile in which she was riding cannot rely on rule that one placing himself in more dangerous position in attempt to escape perilous position, in which placed through another's negligence, is not negligent.

7. Automobiles ⇐168(4).

Motorist *held* not negligent in driving faster than 15 miles per hour while approaching railway crossing around curve not obstructing view of approaching automobile (St. 1923, p. 553, § 113, as amended).

California Vehicle Act (St. 1923, p. 553), § 113, as amended, limits speed of automobile to 15 miles per hour in "traversing" railway grade crossing when driver's view is obstructed and in "traversing or going around curves" of highway when driver's view is obstructed within 200 feet.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Nellie Himes against Bertram B. Daniel. Judgment for defendant, and plaintiff appeals.

Affirmed.

Henry O. Wackerbarth and Wheeler & Wackerbarth, all of Los Angeles, for appellant.

Kidd, Schell & Delamer, of Los Angeles, for respondent.

TAPPAAN, Justice pro tem.

This is an appeal by the plaintiff from a judgment entered in defendant's favor. The action is one for the recovery of damages for injuries alleged to have been sustained in a collision between an automobile, in which plaintiff was riding as a passenger and which was driven by plaintiff's husband, and an automobile driven by defendant. The facts involved are few in number, and only in one instance does there appear any material conflict in the evidence presented here. The accident, in which the injuries complained of occurred, took place on the Valley boulevard, a highway which, near the point where the accident took place, runs in a general northeasterly direction. The boulevard during its course and for a short distance turns to the east and crosses the tracks of the Southern Pacific Railway, and then again turns north or northeast. The automobile in which plaintiff was riding was proceeding northerly upon the boulevard, and had just crossed the railway tracks when the accident occurred. The night was clear, and the headlights on both automobiles were lighted and the view between the machines was unobstructed. Plaintiff and her witnesses testified that, at the time they first saw defendant's automobile, the machine in which they were riding was on the right-hand side of the roadway and near the edge of the pavement. The defendant's automobile was at or near the turn in the highway, and some fifty or one hundred feet distant from them, and approaching at a high rate of speed upon their, or the south, side of the roadway. Plaintiff's husband turned the automobile in which she was riding to the left and into the center of the roadway, where the two machines collided. The right-hand sides of both machines struck. Defendant testified that he was upon the right-hand side of the roadway as he approached plaintiff's machine and near the center line. That he was driving at about thirty-five or forty miles per hour. That plaintiff's automobile was turned into the center of and across the roadway as he approached it. The trial court found that defendant was negligent, but that the negligence did not proximately contribute to the accident, and that the driver of the automobile in which plaintiff was riding was guilty of contributory negligence, which did proximately contribute to the accident.

[1, 2] Appellant attacks the findings of the trial court, and contends that they are not supported by the evidence. Plaintiff's contention upon this appeal, as stated in her brief, is: "William Himes, the driver of the automobile in which plaintiff was driving, having been placed in a position of peril as a result of the negligence of the defendant, and being without fault, and in attempting to escape said perilous position, thereby placing himself in a more dangerous position, he was not guilty of negligence or contributory negligence in so doing."

"This rule is held to apply only where such person is placed in danger through the negligence of another, *and without fault on his part.* When two vehicles collide on the public highway, and damage results therefrom, the question of whose negligence caused the injury is generally one for the jury." (Italics ours.) Offerdahl v. Motor Transit Co., 80 Cal. App. 667, 669, 252 P. 773.

In view of the findings and judgment made and entered by the trial court, it would fairly seem that the trial court elected to believe defendant's testimony that he was driving on the right-hand or lawful side of the highway when approaching the automobile in which plaintiff was riding, and further that plaintiff's husband was negligent in turning his automobile into the center of the highway. Both these findings involve questions of fact.

[3-5] "The rule is well settled that, when a verdict is attacked for insufficiency of the evidence, our power begins and ends with the inquiry whether there is substantial evidence,

contradicted or uncontradicted, which in and of itself will support the conclusion reached by the jury. If, on any material point, the testimony is in conflict, it must be assumed that the jury resolved the conflict in favor of the prevailing party. * * * If it be conceded, for the sake of argument, that there is no conflict in the evidence, still the facts and circumstances surrounding the accident are such that reasonable minds might differ as to whether or not respondent was guilty of negligence, and in such a case a reviewing court is not permitted to substitute its deductions for those of the jury and the trial court." Comstock v. Morse, 107 Cal. App. 71, 73, 290 P. 108, 109.

[6] Under the circumstances of the instant case, the driver of the automobile in which plaintiff was riding having been found negligent (he being plaintiff's husband), plaintiff cannot avail herself of the rule of law upon which she rests her contention for a reversal here.

[7] Appellant contends that respondent was negligent, in that he was driving his automobile at a speed greater than permitted by law. Respondent admitted that his speed was 35 or 40 miles per hour. Appellant contends that, under section 113 of the California Vehicle Act (as amended), any speed in excess of 15 miles per hour was unlawful and negligent. The section provides for a limit of 15 miles per hour "in traversing a grade crossing of any steam, * * * railway when the driver's view is obstructed," and "in traversing or going around curves or corners of a highway when the driver's view is obstructed within a distance of two hundred feet. * * *" Though the evidence is that defendant's automobile was approaching the railway crossing, there is no evidence that he had reached it or was engaged in "traversing" it. The evidence as to the curve in the road upon which defendant was driving was that the view was unobstructed.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

126 Cal.App. 486

BALLARD v. SACRAMENTO NORTHERN RY. CO.

Civ. 4611.

District Court of Appeal, Third District, California.

Oct. 28, 1932.

Hearing Denied by Supreme Court Nov. 25, 1932.

Master and servant ⇐281(2).

Evidence *held* insufficient to show that deceased brakeman, who was killed while attempting to set brake with brake stick, was contributorily negligent (Federal Safety Appliance Act 1910, § 2 [45 USCA § 11]).

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 14 P.(2d) 1045.

J. Hampton Hoge, of San Francisco, Hinsdale, Otis & Johnson, of Sacramento, R. W. Jennings, of San Francisco, and Loyd E. Hewitt, of Yuba City, for appellant.

Thomas F. McCue, of San Francisco, and Rich, Weis, Coats & Carlin, of Marysville, for respondent.

PER CURIAM.

The appellant, upon petition for rehearing, challenges the accuracy of the following statement contained in the opinion of this court heretofore handed down in this cause, to wit: "There is not a scintilla of evidence set forth in the record indicating contributory negligence, or showing that the deceased committed a single negligent act. Contributory negligence, where it applies, is a matter requiring proof by the party relying thereon, unless the testimony of the plaintiff tenders that issue. The only evidence submitted on the part of the appellant was concerning the condition of the braking appliance. No attempt was made to show any facts indicating negligence on the part of the deceased."

The accuracy of the foregoing statement may be best determined by setting forth all the testimony in the case relating to this subject and answering the contention that the deceased, as a reasonable person, should have become aware of the condition of the brake before he attempted to operate the same.

The record shows that, prior to the moving of car 4467, other portions of the train were backed down and coupled thereto. Mr. Woodard, a witness for the appellant, testified as to the circumstances then occurring:

"Q. Now, did Mr. Ballard get on that car when you backed down to it? A. When the coupling was made he crawled up on the car; he got up on the brake-step here.

"Q. Do you know whether or not he took the brake off the car at that time? A. He did.

"Q. Then the two cars were moved in a westerly direction? A. Yes, sir."

Questioned as to how fast the train was moving at the time of the accident, the witness replied: "About 3 to 5 miles an hour.

"Q. Did you see him put on the brake-wheel

by operation of hand movement only? A. Yes, sir.

"Q. And what was the next operation that you saw? A. He took his club out and held it onto the brake, and looked over his shoulder to see if the cars were in the proper place he was expected to spot them. Then he inserted the club, strained on it and went over backward; his club and hands went up.

"Q. Did you notice whether or not Mr. Ballard retained his club in his left hand for a little while? A. He did.

"Q. Did you immediately make an examination of the wheel and shaft? A. I did. I tried the brake, looked at the chain and looked at the wheel to see if it was broken.

"Q. Did you find anything unusual about it? A. Nothing.

"Q. Did you observe any bend of any kind in the shaft? A. I did not.

"Q. Either above or below the brake-plate? A. I did not.

"Q. You made an examination of the entire brake? A. I did."

The witness Jerrell, appearing on behalf of appellant, testified as follows:

"Q. On how many times during that day did you operate that brake? A. One time.

"Q. Did you notice anything at all unusual in its operation? A. Not at all.

"Q. Now, was there any flare in the wheel? A. Yes, a slight flare.

"Q. What would be the greatest amount of a flare in inches? A. About 2 inches."

Mr. Hilton, a witness appearing for the appellant, testified as follows (after stating that he operated the brake):

"Q. Did you notice any bend or list in the brake shaft? A. Yes, sir.

"Q. Did that affect your operation of the wheel in the ordinary performance of your duty as a brakeman? A. No, sir.

"Q. Did you notice any flare in the wheel? A. No, sir.

"Q. Any variation of the wheel from a horizontal plane? A. No, sir.

"Q. Did you see him (referring to Bannon) with Mr. Jacobs on that day? A. I did."

The witness testified that he was present at the time pictures were being taken of the car, and testified as follows:

"Q. What was he doing (referring to Bannon)? A. Examining this 'Gondola' and taking pictures of it.

"Q. Did he point out there to you any defect in the staff? A. Yes, sir.

"Q. Where did he point out that defect? A. Right at the place the staff was bent; and asked me if I could see a bend in the staff there.

"Q. What did you reply? A. That I could.

"Q. What, if anything, was the extent of the bend? A. It was very small and not noticeable unless someone would call your attention to it particularly.

"Q. Did he call your attention to any flare in the wheel? A. No, sir."

Mr. Bryan, car inspector for appellant, testified as follows:

"Q. You inspected the braking apparatus on this car at that time? A. Yes, sir.

"Q. In what condition did you find it? A. All right.

"Q. Subsequent to Mr. Ballard's death did you inspect the braking apparatus on the car 4467? A. After his death, yes, sir, I did.

"Q. How soon after his death? A. Well, it was, I imagine it would not be over 10 or 15 minutes, or 20.

"Q. Did you measure the distance between the wheel and the top of the car? A. Later in the evening.

"Q. Did you measure the distance between the lowest point in the wheel and the top of the car? A. Yes, as best I could judge, I did.

"Q. With a rule? A. Yes, sir.

"Q. What was the result of your measurements? A. There was more than 4 inches clearance."

On cross-examination the witness further testified:

"Q. Did the brake wheel run on a perfect plane? A. No, there was a little tilt in the wheel, but not much.

"Q. How much? A. I don't believe there was more than half an inch."

The witness Keener, called by the appellant, testified that he was car inspector for the appellant, and answered the following questions:

"Q. Did you observe any bend in the staff at all? A. No, sir.

"Q. At none of these examinations did you observe any bend at all? A. No, sir.

"Q. Below the plate? A. No, sir.

"Q. Did you examine it with that idea? A. Yes, sir; that is my business."

There is no testimony in the record showing that the deceased had ever set the brake on gondola car 4467, under conditions where it was necessary for him to use a brake stick in order to hold the car in place; or that he had had any opportunity whatever to detect the defect in the braking appliances, save and except that he unloosened the brake before the car was moved up to the place where it was to be spotted. This, of course, furnishes no basis whatever for the conclusion that he was chargeable with the unsafe condition of the brake when it had to be operated by means of a brake stick.

It is apparent from the testimony which we have quoted, and which is all the testi-

mony in the case relating to the subject, that it does not show a single contributory act on the part of the deceased. In argument it is sought to charge the deceased with knowledge of defects which appellant's own witnesses claim either did not exist, or were not noticeable unless one's attention was called particularly thereto. The fact that the deceased's hands went up just prior to his fall beneath the cars is only an evidence of a movement made by the deceased after something had occurred which caused him to lose his balance and fall from the position theretofore occupied by him upon the narrow brake step.

The testimony in the case as shown by the foregoing confirms us in the opinion that there is no basis for the charge of contributory negligence, and that any argument based thereon is without foundation.

The petition for a rehearing is denied.

127 Cal.App. 299

AZEVEDO v. PIMENTEL.

Civ. 8406.

District Court of Appeal, First District, Division 2, California.

Nov. 2, 1932.

Rehearing Denied Dec. 2, 1932.

Hearing Denied by Supreme Court Dec. 29, 1932.

1. Frauds, statute of ⇐102.

Deed not subscribed by grantor or agent authorized in writing was invalid, especially where agent did not subscribe his name as attorney in fact (Civ. Code, §§ 1091, 1095).

2. Appeal and error ⇐1008(1).

Appellate court will not disturb trial court's finding that defendant did not pay plaintiff's decedent for lot as he testified.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by Mariana Azevedo, as administratrix of the estate of Maria Josefa, alias, deceased, against Sebastaio Avila Pimentel, who filed a cross-complaint. Judgment for plaintiff, and defendant appeals.

Affirmed.

Pardini & Scampini, of San Francisco, for appellant.

Charles A. Gale and Walter T. Nilson, both of Pleasanton, and Myron Harris, of Oakland, for respondent.

KING, Justice pro tem.

The action is for the possession of certain premises, consisting of a lot with two houses thereon in Pleasanton; for $1,000 damage for the unlawful holding of the same by defendant; for damages for the value of the use and occupancy thereof; and for a decree quieting the title of plaintiff to the property.

Defendant denies the ownership of plaintiff, admits the possession by defendant, but claims that his possession is that of an owner of the property, and denies plaintiff's damage. Alleges that on or about November 1, 1922, he entered into an agreement of purchase for the property with Maria Josefa, plaintiff's decedent, for $4,000; that he paid the money to decedent, then and at all times a resident of Portugal, said payment being made in Portugal; that on said date, or thereabouts, decedent executed an instrument purporting to convey to him said property, which until November 24, 1928, he believed to be a valid conveyance. That he remained in Portugal until August 2, 1927, and upon arriving in the United States he immediately entered into possession as owner, made valuable repairs on the property, and has paid taxes thereon; and alleges that by reason of the acts of decedent, and of plaintiff, plaintiff is estopped from claiming or asserting any right, title, or interest in the property.

Defendant sets up by way of cross-complaint the same facts as to the payment, the execution of the agreement, and the execution of the document purporting to convey abovementioned property, which defendant alleges to be "valid under the laws of the Republic of Portugal." Also alleges that he has not commenced any action for the specific performance of the agreement or for the procuring of a deed from decedent, or from the plaintiff, for the reason that decedent executed to cross-complainant "a document valid under the laws of the Republic of Portugal" purporting to convey to "Defendant the said real property"; and that defendant relied thereon and believed up to November 24, 1928, that said instrument conveyed to him a valid and complete title; and that neither decedent nor plaintiff in any way questioned his title up to November 24, 1928. That decedent was at all times a resident of Portugal and never personally present in California.

Defendant asks judgment that he is the owner of the property, and that plaintiff be required as administratrix to execute a deed to him.

Plaintiff answers this cross-complaint denying, for lack of information or belief, the making of any agreement, or that said contract, if made, was fair or the sum to be paid reasonable, and denies any payment; denies the execution of any document purporting to convey a title; denies defendant's belief in or reliance on the validity of the contract or the purported conveyance; denies

that decedent and/or plaintiff did not question defendant's title; alleges that decedent and the plaintiff at all times claimed title; alleges laches and unreasonable delay, and sets up the statute of limitation.

Judgment went for plaintiff, and on denial of a motion for new trial defendant appeals.

Findings were made by the court that all facts alleged in the complaint are true; that Maria Josefa at the time of her death, November 27, 1927, was the owner in fee simple and entitled to the possession of the property; that plaintiff as administratrix is entitled to possession, and the heirs of the decedent are owners. That defendant took possession October 24, 1927, as agent of decedent and immediately thereafter asserted an adverse claim. That since said last-mentioned date he has been in possession and has collected rents, etc. That defendant was, at the commencement of the action and still is, in possession; that plaintiff has demanded possession, which was refused. That defendant's possession and claim were and are without right; that he was not at any time and is not now entitled to possession; that he has not and never has had any estate or interest; that defendant never entered into any agreement to purchase the property. That he did not make any payment to decedent for the property. That he did not take possession as owner, but as agent for decedent, and thereafter asserted an interest adverse to decedent. That he did not make any valuable repairs or pay any taxes under any bona fide claim or belief that he was the owner, and did not make any repairs of a permanent or beneficial nature; that he has been guilty of laches and unreasonable delay. That plaintiff has been "damaged by the use and occupancy of said premises and the withholding thereof by the defendant in the sum of $800."

Appellant vigorously attacks nearly all the findings, and characterizes the judgment as "Harsh, inequitable and unconscionable."

The only witnesses who testified were Thomas H. Silva, a local banker, who had acted as agent for decedent from 1920 (when she acquired the property from the estate of a deceased son), down to October, 1927, and the defendant himself called by plaintiff under section 2055, Code of Civil Procedure, and later defendant's own attorney questioned him.

Silva testified he handled the property from 1920 to October, 1927, with no change in the ownership to his knowledge. That early in September, 1927, defendant came into the bank and "simply announced the fact that he was going to look after his mother-in-law's property and try to sell the property. Perhaps a week or two weeks later he showed me a power of attorney written in the Portuguese language. At that time he took up with me the matter of the sale of some outside lots, which I had agreed with Mrs. Ignacia Pimentel, wife of defendant and daughter of decedent, that I would buy. All my correspondence regarding the property while I was agent was with this same lady, who had originally placed it in my hands for her mother. She lived in the Azores and did all the correspondence for her mother, who could not write. This power of attorney gave him authority, gave him power to act for Maria Josefa. I made my last collection of rent October 20, 1927, and at that time defendant was living in one of the houses. The rental value of the two houses is about $40 a month." On cross-examination he testified that Ignacia Leal, daughter of decedent, showed him her power of attorney from decedent in 1920, and she then employed him to act. "I paid the taxes for 1927 and 1928. It was some time after October, 1927, that defendant showed me a deed for the property to himself. He has been in possession ever since."

At this point defendant's attorney stated, "I do not say that this is a legal title, but he has an equitable title." It was then stated by counsel for defendant that the paper mentioned by the witness as a power of attorney was not signed by decedent.

Defendant, called for cross-examination, testified: "I paid the $4,000 to decedent in the house in front of the daughter. This daughter is now my wife, but was not then. I was in this country from 1911 for six years. I took all my money with me to Portugal. I had very little when I first came to this country. It was more than $2,000, all in gold, which I took to Portugal in 1916. I did not get anything in writing from Maria Josefa to show that I paid this money because she could not write and the daughter went to Fayal to sign the deed. I never saw any of the rents from that property from 1922 to 1927. I never wrote to Mr. Silva that I bought the property before I came here because my mother-in-law made me her attorney in fact to come in here and sell the property and receive the moneys. I presented the papers to Mr. Silva in the same hour I arrived in Pleasanton. I sent back to the Azores a power of attorney for my mother-in-law's signature. I had a power of attorney made because they told me that power of attorney was not valid. I could not say how much rents I have collected because I have been sending the money over to my family. I have spent some on bills, too. I cannot say how much. I did not record the deed and power of attorney."

On questioning by his own counsel he testified: "I paid Maria Josefa in American paper money. I brought that document of purchase with me and tried to record it August 16, 1927, but it could not be recorded. I took the deed before the notary public in Fayal, Azores Islands. It was delivered to me by the

attorney in fact. I have made repairs on the property, have placed 'For Rent' signs on it, and 'For Sale'. I told plaintiff I had bought the property, and she knew all of this time that I had possession of it."

The witness was questioned minutely regarding when and how he acquired the money which he paid for the property, and testified that he worked while in this country, took his money to Portugal in gold, and profited largely by "negotiating" it into Portuguese money, ran a profitable mill while in Portugal, but was very vague and uncertain in his statements as to his financial transactions.

There were introduced in evidence by plaintiff: (1) The power of attorney given by decedent to her daughter, Ignacia Concalves Leal, dated October 31, 1922; (2) the document purporting to be a deed, dated November 3, 1922; and (3) a power of attorney dated April 12, 1926, from Maria Josefa to defendant. None of these papers was signed by Maria Josefa. All were certified by a notary. As to the two powers of attorney the notary certifies, "The constituent not signing because she does not know how to write." The deed is signed by the said Ignacia Concalves Leal and by the defendant, and by two witnesses. All the documents are written in the Portuguese language, with translations attached. The power of attorney to Ignacia constitutes Ignacia a "General attorney-in-fact, with power of substitution * * * for the special purpose of selling * * * the pieces of land, or a part thereof, that she possesses in the town of Pleasanton." The third paper constitutes defendant her attorney in fact and gives him power to sell, all or in parts, "All the lots or property that she may have in the United States."

[1] Evidently the deed not being "An instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing" (Civ. Code, § 1091), is not a valid conveyance to the defendant, especially as the attorney in fact did not "subscribe the name of his principal to it, and his own name as attorney in fact" (Civ. Code, § 1095).

[2] As will be seen above, no testimony was produced controverting defendant's direct evidence that he paid Maria Josefa the sum of $4,000 for the property; but the court, having seen the witness and heard him testify, clearly did not believe his testimony, for it is found that he did not make any payment to decedent.

The defendant testified squarely: "I presented the papers to Mr. Silva in the same hour I arrived in Pleasanton." The witness Silva, however, testified that defendant "simply announced the fact that he was going to look after his mother-in-law's property and try to sell the property," and that it was some time after October, 1927, that defendant showed him a deed for the property to himself. With this direct conflict in the evidence the court found: "That defendant took possession of all of said premises, * * * as agent of said Maria Josefa, and immediately thereafter asserted a claim to said premises adverse to the ownership and interest of said Maria Josefa in said premises." The trial court, having heard the evidence, evidently did not believe the defendant.

Appellant's counsel strongly urges that if the documents placed in evidence are not sufficient to constitute a conveyance yet the court should have declared that plaintiff was a trustee for the bare legal title and should have compelled her to convey to appellant.

It will be seen that the whole case of defendant and cross-complainant rests upon his claim that he paid the $4,000 to decedent for the property. If he did not make the payment, he has no claim. The court which heard the evidence finds explicitly that he did not make it. The appellate courts of California have many times held that findings by the trial courts in such circumstances will not be disturbed. We feel that such should be the holding here.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

127 Cal.App. 250

GRALL et ux. v. SAN DIEGO BUILDING & LOAN ASS'N.

Civ. 943.

District Court of Appeal, Fourth District, California.

Oct. 29, 1932.

Hearing Denied by Supreme Court Dec. 27, 1932.

1. Usury ⇨42.

Existence of usury depends on whether lender charged or received profit exceeding maximum legal rate of interest for full period of loan (Usury Law [St. 1919, p. lxxxiii]).

2. Usury ⇨42.

Note for amount, from which payee deducted interest in legal amount for full period of loan, *held* not usurious from beginning because payee agreed to accept full payment within year on additional payment of two months' unearned interest (Usury Law [St. 1919, p. lxxxiii]).

3. Usury ⇨16.

Loan, from which lender deducted interest in legal amount for full period of loan,

did not become usurious on transfer of borrower's obligation to others after seven months, even if amount deducted were paid thereby (Usury Law [St. 1919, p. lxxxiii]).

4. Usury ⇐137.

While usury depends on amount of interest agreed to be paid, suit for treble penalty must be based on amount paid (Usury Law, § 3 [St. 1919, p. lxxxiii]).

5. Usury ⇐137.

Amount deducted from loan as interest *held* not paid within treble penalty provision of usury law by lender's acceptance of new note from other parties (Usury Law, § 3 [St. 1919, p. lxxxiii]).

Appeal from Superior Court, San Diego County; V. N. Thompson, Judge.

Action by Peter J. Grall and wife against the San Diego Building & Loan Association. Judgment for plaintiffs, and defendant appeals.

Reversed, with directions.

Wright & McKee and C. M. Monroe, all of San Diego, for appellant.

Dayton L. Ault, Jos. H. Egermayer, and Herman Allen, all of San Diego, for respondents.

BARNARD, P. J.

The plaintiffs brought this action for the purpose of collecting treble the amount of alleged usurious interest, bonus or penalties claimed to have been collected from them by the defendant in violation of the Usury Law (St. 1919, p. lxxxiii). The facts are undisputed and are as follows: On February 1, 1929, the defendant made a loan to the plaintiffs, taking a note for $100,000 secured by a trust deed upon certain real property. The note provided for interest at 8.4 per cent per annum, the interest to be paid monthly in advance beginning February 1, 1929, and the principal to be paid in one hundred and twenty monthly instalments beginning February 1, 1930. At the time the loan was made the defendant deducted $700 as one month's advance interest and the further sum of $2,000 as a bonus or charge for making the loan, the actual amount paid to the plaintiffs being $97,300. On March 18, 1929, the plaintiffs paid $700 interest for that month and a like payment was made in April. No interest payments were made in May or June, but on July 12, 1929, $700 was paid on account of the interest for May, together with $100 as a penalty for delinquency. No interest payments were made for June, July or August. About September 1, 1929, the plaintiffs informed the defendant that they had sold the real property securing this obligation to Sarah E. and Lira Winn and, at the request of the plaintiffs, the defendant released them from the obligation here in question and accepted in lieu thereof a new note and trust deed from the Winns, as of September 1, 1929, by the terms of which new obligation the rate of interest was reduced and the monthly payments were extended over a period of thirteen years. In connection with this substitution of debtors the defendant demanded and the plaintiffs paid the sum of $2,300, $2,100 of which was applied and credited by the defendant upon the delinquent interest on the original note for the months of June, July and August, and $200 as a penalty for such delinquencies. It may be added that in connection with this exchange of debtors, the plaintiffs paid to the defendant an amount representing the exact amount by which the interest called for under the old note was reduced in the new note given by the Winns. However, this amount is not involved in this action, is excluded from consideration by the complaint and the plaintiffs expressly disclaim any reliance thereon.

This action was brought and prosecuted by the plaintiffs upon the theory that they actually received $97,300 through the loan in question; that they had this money for only seven months; that the interest which could legally have been charged for that time is $6,811; and that the $4,500 actually paid by them after the loan was made, together with the $2,700 originally deducted, has resulted in the defendant collecting interest in the sum of $7,200, thus constituting usury. The trial court found that the amount paid by the plaintiffs and collected by the defendant "as interest and/or bonus and/or penalties" was the sum of $7,200 and that the "maximum charge for interest and/or bonus and/or penalties legally chargeable under and by virtue of the Usury Law of the State of California was and is the sum of $6811." The amount found to have been paid was trebled and judgment entered for $21,600, from which judgment the defendant has appealed.

[1] The appellant concedes that the interest which it could legally collect must be computed upon the amount actually received by the respondents, namely $97,300. In considering whether this contract was usurious in its inception, we find the rule thus set forth in Sharp v. Mortgage Security Corporation, etc. (Cal. Sup.) 9 P.(2d) 819, 820:

"The first question is: What is the period to be considered when testing a transaction for the presence of usury? In Haines v. Commercial Mortgage Company, 200 Cal. 609, 625, 254 P. 956, 255 P. 805, 807, 53 A. L. R. 725, this court said: 'We intended to hold that the maximum rate allowed for loans coming under the act is at the rate of 12 per cent. per annum for the full period of the loan,

and that within such limit the parties may freely contract in respect thereto, if done in writing.' While this pronouncement when made may have been open to the observation that it was dictum, yet we based it upon the weight of authority and what was deemed to be the only just rule.

"The case of Easton v. Butterfield Live Stock Co., 48 Idaho, 153, 279 P. 716, 718, is an instructive case citing a great many authorities and the rule is there stated as follows: 'In determining whether usurious interest has been charged or collected under a particular contract, it is not permissible to consider only a portion of the term. The test is: Did the lender under his contract charge or receive a profit on his investment in excess of the maximum rate for the full period of the loan? If he has, there is usury; otherwise not.'

"A similar holding is found in Conservative Loan Co. v. Whittington et al., 120 Okl. 137, 250 P. 485, 487, where the court said: 'The test as to whether a contract is usurious is: Does the interest charge agreed to be paid under the terms of the contract exceed the amount of interest that would accrue for the term of the loan figured at the full legal contract rate? If it does exceed such amount, it is usurious; otherwise, it is not.' See, also, Webb on Usury, § 29.

"It is also elementary that the contract must in its inception require a payment of usury or it will not be held a violation of the statute. * * *"

[2] It is plain from an examination of the note here in question that if the $2,700 originally deducted be considered as interest and spread over the full period of the loan, and if the same was paid, the lender would not receive a profit on his investment in excess of the maximum amount permitted by the statute for the full period of the loan.

It is respondents' contention, however, that the note was usurious from the beginning, and regardless of what later occurred, since it contained a provision to the effect that the appellant agreed "to accept payment in full at the end of any month before one year from date hereof by the payment by the undersigned of all sums due and two months' unearned interest as a bonus." It is argued that this provision renders the contract usurious, since the note could have been paid a month after its execution, in which event the amount of the original deductions would have exceeded the amount of interest permitted for that time. If this contention is correct, a note for $100 for one year at 5 per cent. interest, the interest paid in advance, would be usurious if it contained a clause that the debtor might pay the note at any time after one day. And this, regardless of whether or not the note was actually paid ahead of time, and regardless of any offer to return the advance interest collected. While this point has not been directly decided in this state, other authorities do not support this contention. In 39 Cyc. 953, it is said: "As a general rule, when the terms of the contract permit the borrower to discharge himself by paying before a date specified the sum lawfully due, a provision imposing upon him in the alternative a more burdensome payment in the nature of a penalty will not render the contract usurious. * * * "

In 27 Ruling Case Law, 235, the rule is thus stated: "It is generally agreed that the acceptance of payment of a debt before maturity, with interest to the date of maturity, does not constitute usury * * * and where the borrower has an option to pay the debt before maturity, the contract is not made usurious by reason of the fact that on exercising the option to pay before maturity the borrower is required to pay more than the legal rate of interest for the time he had the use of the money."

In Cissna Loan Co. v. Gawley, 87 Wash. 438, 151 P. 792, 794, L. R. A. 1916B, 807, Ann. Cas. 1917D, 722, the court said: "But the trial court seems to have rested its decision in part on the fact that the notes were payable before maturity at the option of the borrowers at an advance rate of interest which would render them usurious if so paid. But we cannot think this fact justifies the conclusion that the notes are usurious. Such a payment would be voluntary on the part of the borrowers. They were in no way obligated to pay the loan before maturity. The agreement was thus in the nature of a penalty which the lender exacted for the privilege of paying before maturity. Not being capable of enforcement by him, it was not usurious."

In Clement Mortgage Co. v. Johnston, 83 Okl. 153, 201 P. 247, 251, we find:

"The rule that paying additional money by the lender for and in consideration of accelerating the loan, even though the amount paid may exceed the legal rate at the time the money is used, does not constitute usury, is set out in the fourth syllabus in the case of Deming Inv. Co. v. Reed et ux. [72 Okl. 112, 179 P. 35], heretofore cited:

" 'Further, that because the mortgagee under the contract by the exercise of his option accelerating the maturity of the loan was entitled to demand more than the amount of the loan with legal interest to the time the loan is called does not make the transaction usurious.'

"This rule seems to be sustained by all the authorities."

In this state, in the case of McCarty v. Mellinkoff, 118 Cal. App. 11, 4 P.(2d) 595, it was held that the collection of an additional amount upon the payment of a note before maturity does not constitute usury, even though it results in the receipt of a greater

return than the statute permits for the period the loan actually existed. While the contract involved in that case contained no option to pay before maturity, that decision was largely based upon the ground that such an additional payment is one which the borrower is not obliged to make, and which he makes only for the purpose of securing an additional benefit to himself. It would seem that similar principles should apply where an option to pay before maturity upon the payment of an additional penalty is included in the note. Not only is such an agreement one that cannot be enforced by the lender, and one in the nature of a penalty for a further privilege to the borrower, but in fact money so paid is paid not for the "loan or forbearance of money," but for an exactly opposite purpose. We think the contention that this note was usurious from the beginning, without regard to what afterward occurred, is without merit.

[3] It is next contended that this loan became usurious when it was repaid at the end of seven months, since such repayment was made in accordance with the terms of the contract. It is argued that the rule laid down in McCarty v. Mellinkoff, supra, has no application here since this loan was repaid under a right conferred by the original obligation, and not by reason of any new agreement. In addition to what we have already said as to the effect of extra payments made for the privilege of paying before maturity, under an option included in the original contract, it fully appears here that this obligation was not paid in accordance with the option clause of the note relied on. The only right given by that clause was the right to pay in lawful money, upon the payment of a bonus. The note was neither paid in money nor was a bonus of two months' interest charged or collected. Instead of exercising any right under the terms of the note, the respondents requested the substitution of other parties in their place as debtors, and obtained a transfer of the obligation to such other parties with a consequent release of liability upon their part. So far as appears, the appellant was under no obligation to make this change, which was accomplished only through a new agreement entered into by the parties concerned. If the amount originally deducted from this loan be considered as having been paid by this arrangement, and be treated as spread over the shorter period rather than the term of the original loan, such a situation has resulted not from the terms of the original note, but from the new agreement subsequently entered into, and is not usurious. McCarty v. Mellinkoff, supra.

[4, 5] A further consideration is whether the $2,700 originally deducted from the loan is to be considered as paid within the meaning of the act in question. Respondents' theory of usury is based upon the claim that this $2,700 was paid by them through the acceptance by appellant of a new note and trust deed from the other parties. Aside from any such technical payment, the only amount ever paid by respondents and received by this appellant is the $4,500 which was paid as above indicated. There is no evidence as to the worth of the new note nor that any part thereof has been or ever will be paid. If any part of this $2,700 is ever paid, it will be paid by these other parties and presumably the payment thereof will be spread over the thirteen-year period of the new loan. While the original note may be considered as having been technically paid through the substitution of other debtors, as a practical matter, the entire loan has merely been transferred to other parties, for the benefit of the respondents who have been released from their obligation in connection therewith. While the usurious character of a contract is to be determined by the amount of interest agreed to be paid (Westman v. Dye (Cal. Sup.) 4 P.(2d) 134), a suit to recover the threefold penalty must be based upon the amount actually paid. In Liebelt v. Carney, 213 Cal. 250, 2 P.(2d) 144, 146, 78 A. L. R. 405, the court said: "But section 3, by its terms, limits the suit for penalties to a debtor who has paid, against the party who is entitled to receive, and does actually receive, the payment from him." In Haines v. Commercial Mortgage Co., 200 Cal. 609, 254 P. 956, 958, 255 P. 805, 53 A. L. R. 725, the court said:

"In this connection, however, it should be observed that the 3 per cent. charge, totaling $1,020, was not actually paid and is, therefore, not a proper item of said judgment for trebling the amount thereof. * * *

"To authorize the infliction of the penalty the interest must, of course, be paid. Coulter v. Collins, 71 Cal. App. 381, 235 P. 465; 27 R. C. L., p. 275, § 78."

Not only has the amount of $2,700 originally deducted from this loan never been actually paid to the appellant, but by special and specific agreement between the parties the entire loan has been transferred to other parties, including the spreading of the payment of this very amount over a long term of years. Aside from all other considerations, we think this amount has not been paid within the meaning of the treble penalty provision of section 3 of the Usury Law.

It has been frequently held that the Usury Act should be used as a shield and not as a sword. In Haines v. Commercial Mortgage Co., supra, the court said: "It is true that in determining whether or not the transaction is usurious the court 'will disregard its form and look to the substance, and will condemn it if all of the requisites of usury are found to be present, despite any disguise it may wear.'"

The converse of this proposition should be

equally true. The actual situation here is that the respondents had a loan of $97,300 for seven months for which the maximum legal interest would have been $6,811, but for which they actually paid $4,500, and by a new agreement they have been released from their original liability. On the other hand, the appellant, after receiving only $4,500 as interest, bonus and penalties for the use of $97,300 for seven months, has by the judgment been penalized in the sum of $21,600 because, instead of standing upon its contract as originally drawn, it extended the term of the loan and accepted the substitution of another debtor, at the request of and for the benefit of the respondents. We are unable to believe that such a result is within the contemplation of this act, or that it can arise from a proper application of the law to the undisputed facts of this case. We think the loan here in question was neither usurious when made nor became so through the subsequent acts shown by the evidence. Since the facts are undisputed and the only question presented is one of law, there is no occasion for a retrial of the action.

The judgment is reversed, with directions to the trial court to enter judgment in favor of the appellant.

We concur: MARKS, J.; JENNINGS, J.

127 Cal.App. 305

BAYER et al. v. BARRETT et al.

Civ. 8657.

District Court of Appeal, First District, Division 2, California.

Nov. 2, 1932.

Hearing Denied by Supreme Court Dec. 29, 1932.

1. Appeal and error ⇨1195(3).

Ruling on appeal in former action *held* not law of case in second action, where insufficiency of complaint in former case was cured.

2. Mortgages ⇨417.

Beneficiary cannot foreclose ordinary trust deed by suit in equity, absent unusual circumstances justifying special equitable relief.

3. Mortgages ⇨209.

Trust deed beneficiary *held* not entitled to accounting where items were known to beneficiary and not shown to be disputed.

4. Mortgages ⇨414.

Facts *held* to support finding that beneficiary's demand upon trustee under trust deed to sell property was incomplete.

Facts disclosed that the demand was accompanied by request for printed forms to be executed by beneficiary and assurance that such execution would be made, and that forms were sent as requested, but were not returned to trustee, and no explanation of failure to return them executed was made, and trustee was therefore justified in assuming that letter of beneficiary's counsel was not intended as demand and declaration of default, but that a formal demand would be made upon trustee before it would be called on to make sale, and this was true, although trustee had demanded, though not authorized to do so by trust deed, that beneficiary pay certain sum in advance to cover cost of sale; trustee being justified in assuming that demand for sale was either withdrawn or waived when beneficiary's counsel took position that trustee was not legally competent to execute trust.

5. Mortgages ⇨346.

Trust deed *held* not to entitle trustee to demand payment of fees and costs of sale from beneficiary before sale.

Deed of trust provided that trustors should pay to trustee or beneficiary all sums due and payable under trust, and that trustee should apply proceeds of sale to payment of costs of sale, and of all other costs, fees, and expenses. Deed also declared that trustee's fee for making sale should become due and payable upon receipt of demand for sale, but this was nothing more than declaration as to time when fee should become due, and did not change express provision making charge an obligation of trustors payable out of proceeds of sale.

6. Mortgages ⇨342.

In California, where state bank is consolidated with national bank, latter succeeds to trusteeship of former under trust deed (Deering's Gen. Laws 1931, Act 652, § 31b, subd. 5, par. b; 12 USCA § 34a).

7. Mortgages ⇨386.

Where state bank, trustee under trust deed, was consolidated with national bank, state bank's failure to appear and defend foreclosure action *held* not to entitle beneficiary to foreclosure decree (Deering's Gen. Laws 1931, Act 652, § 31b, subd. 5, par. b; 12 USCA § 34a).

Such fact did not entitle beneficiary to demand decree of foreclosure on theory that principal party in interest had defaulted, since consolidation terminated all rights under trust which had been vested in original trustee, national bank was entitled to appear and defend for all purposes of trust, and original trustee could not limit or effect powers of substituted trus-

tee by action or nonaction in such proceeding.

8. Mortgages ⇐417.

Before trustee under trust deed could be charged with refusal to act so as to entitle beneficiary to sue for foreclosure and judicial sale, there must be valid demand upon trustee to make sale.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Otto Bayer and others against Marion Barrett, the Security-First National Bank, and others. From a judgment in favor of defendants, plaintiffs appeal.

Affirmed.

Max Schleimer, of Los Angeles, for appellants.

O'Melveny, Tuller & Myers, of Los Angeles, and Frank S. Balthis, Jr., of Glendale, for respondents.

NOURSE, P. J.

Plaintiffs sued for an accounting, for an adjudication of the default of the trustors under a certain deed of trust, and for a judicial sale of the property covered by the deed. The defaults of the defendants Barrett and Hoagland were entered and the cause was tried on the issues raised by the complaint and by the answer of the defendant Security-First National Bank of Los Angeles. Judgment went against the plaintiffs and in favor of all the defendants, including those whose defaults had been theretofore duly entered. The plaintiffs appeal upon typewritten transcripts.

On February 24, 1924, plaintiffs, as owners, conveyed certain real property to defendants Marion Barrett and Mary Hoagland. The latter gave plaintiffs their promissory note for $4,000, payable in monthly installments, and secured by a deed of trust in which the Pacific-Southwest Trust & Savings Bank was named as trustee. On September 1, 1925, the purchasers were in default in their monthly payments under the note and also refused to reimburse plaintiffs for fire insurance premiums and taxes advanced by the latter. Plaintiffs orally informed the trustee of the default and demanded a sale under the deed. The trustee refused and plaintiffs commenced an action to foreclose the deed as a mortgage. In that action the plaintiffs were nonsuited because they failed to plead or prove that they had recorded a written notice of default and election to sell, and that judgment was affirmed on appeal. Bayer v. Hoagland, 95 Cal. App. 403, 273 P. 58.

On March 18, 1929, plaintiffs executed a written notice of default and election to sell. This notice was recorded on March 19, and, at that time, a copy of the notice and a written demand to sell was delivered to the original trustee. On April 1, 1929, the defendant Security-First National Bank of Los Angeles, claiming to have succeeded to the right and duties of the trustee, replied to plaintiffs' request to sell, demanding payment in advance by plaintiffs of $250 on account of trustee's fees and disbursements in connection with the sale. The plaintiffs protested this demand of the Security Bank and commenced a new action on August 14, 1929, pleading the facts heretofore stated and praying for an adjudication that the trustors had breached the deed of trust and were in default because of their failure to reimburse plaintiffs in the sums paid for taxes and insurance, and also alleging that the plaintiffs were in doubt whether there existed a trustee who could lawfully sell the real property, because of the consolidation of the original trustee with the National Bank, and asking for a determination of plaintiffs' rights thereunder, and also praying for a money judgment against the trustors, for the quieting of title, and for general relief.

The trial court found as a fact that plaintiffs were entitled to judgment against the trustors as prayed in the complaint and later amended its findings by striking out that portion and awarding plaintiffs judgment against the trustors for costs only. The trial court found that the plaintiffs duly executed and recorded a notice in writing of the default and of their election to sell under the deed, and that they served a copy thereof upon the trustee, but found that it was not true that they delivered to the trustee "an unqualified demand to sell." It was then found that the Security-First National Bank of Los Angeles had succeeded to all the rights and duties of the original trustee; that, when the written demand to sell under the deed was made by plaintiffs' attorney, the trustee "requested" the plaintiffs to first deposit with it the sum of $250 on account of its fees and expenses of sale, but its refusal to sell was not conditioned upon plaintiffs' refusal to pay such sum. It then found that the plaintiffs had duly performed "every one of the terms, covenants and conditions of the deed of trust on their part to be kept and performed"; but that they did not deposit with the trustee "the sum of two hundred and fifty dollars demanded by it"; that plaintiffs were obligated under the deed to make such deposit, and that the trustee herein had not failed in its duties under the trust in making such demand. Finally, it was found that, though a written demand to sell was made upon the trustee, it was subsequently withdrawn by

plaintiffs' attorney, who questioned the right of the Security Bank to act for the original trustee by reason of the consolidation.

[1] The respondents insist that the appeal must be governed by the decision in the former case of Bayer v. Hoagland, 95 Cal. App. 403, 273 P. 58. In that case it was held that the right to foreclose and to compel a judicial sale under a deed of trust did not lie unless special reasons were pleaded which would justify a court of equity in exercising its peculiar powers. Instances of such special reasons were given, as where there are accounts to be settled or where the trustee fails or refuses to act or breaches or repudiates his trust. The insufficiency of the complaint in the former case, as pointed out in that opinion, was cured by the pleadings in this case; hence the ruling in the former case cannot be taken as the "law of the case" upon this appeal. Millsap v. Balfour, 158 Cal. 711, 714, 112 P. 450.

[2] The former opinion must, however, be taken as authority for the rule of law, which has become definitely settled, that, under the California law, a beneficiary cannot foreclose an ordinary deed of trust and have a judicial sale in lieu of a trustee's sale in the absence of unusual circumstances justifying special equitable relief.

[3] At this point it is necessary, therefore, to determine whether, upon the facts, this case presents such unusual circumstances as might justify such special equitable relief. That the complaint sufficiently pleads such a case is not denied. But the respondent argues that the evidence fails to meet the test and that there was no need for an accounting because the items were all matters capable of easy proof. This is true, not because of the facility of proof (made so because those defendants from whom an accounting was demanded defaulted), but it is true because there was no showing that any of these items were in dispute. The default of the trustors was merely an admission that the items set forth in the complaint were due and were correct. But these items were known to plaintiffs, hence there was no need for an accounting. Kinley v. Thelen, 158 Cal. 175, 183, 110 P. 513.

The trial court found that the appellants failed to make a proper demand for sale as required by the deed of trust. It would seem self-evident that such a demand is necessary before the trustee can be charged with a refusal to act. The deed stipulated that when the holder of the note elected to declare a default he "shall execute and deliver to the trustee a written declaration of default hereunder and demand for sale" and thereafter record a notice of default and election to sell. The latter notice was duly recorded and appellants' counsel addressed a letter to the trustee inclosing a copy of that notice and stating: "I, on behalf of my said clients, hereby demand that you foreclose the said Deed of Trust. If you have any printed blanks or forms which you desire my clients to execute to supplement their demand, or to make such demand, please send them to me by return of mail and I will have them executed." The trustee replied, inclosing printed forms to be executed by the beneficiaries, and demanding payment by them of $250 to cover "costs, fees, charges, and expenses of these trusts, and in addition thereto the trustee's fee for making said sale." To this letter appellants' counsel replied, asking if the letter meant "that you demand the $250 be paid to you immediately in advance." The respondent replied that the trust deed provided that these costs should become due and payable upon receipt of the written declaration of default and demand for sale and that "of these amounts we ask that a deposit of $250.00 be forwarded to us with the written declaration of default and demand for sale." In this letter, dated April 25, 1929, the respondent informed appellants that it had, during the course of the correspondence, succeeded to the rights and duties of the original trustee through a consolidation of the banking interests. Counsel for the appellants then shifted the correspondence to a discussion of the capacity of respondent to succeed to the trusteeship, arguing that this right did not exist. No further demand to proceed with the sale was made.

[4, 5] The trial court found that the demand to sell was qualified and incomplete and we are satisfied that this finding was sound. The demand was accompanied by a request for printed forms to be executed by the beneficiaries and an assurance that such execution would be made. The forms were sent as requested but were not returned to the trustee and no explanation of the failure to return them executed was made. The trustee was therefore justified in assuming that the letter of appellants' counsel was not intended as a demand and declaration of default but that a formal demand would be made upon it before it would be called on to make the sale.

The finding that the trustee was entitled to demand payment of its fees and costs from the beneficiaries before it proceeded with the sale is not supported by the evidence. The deed of trust provided that the *trustors* should pay to the trustee or beneficiary all sums due and payable under the trust and that the trustee should apply the proceeds of a sale to the payment of the costs of sale and of all other costs, fees, and expenses. It also declared that the trustee's fee for making the sale "shall become due and payable" upon receipt of the demand for sale; but this is nothing more than a declaration as to the time when the fee should become due. It does not in any manner change the express

provisions of the deed making this charge an obligation of the trustors to be paid out of the proceeds of the sale. But, though the trustee could not legally demand the payment of these fees as a condition precedent to the sale, it was justified in assuming that the demand was either withdrawn or waived when appellants' counsel took the position that it was not legally competent to execute the trust.

[6] Appellants earnestly argue "that the respondent has not succeeded to the fiduciary capacity of the original trustee, that there was no legally qualified trustee to act and hence, that they could not have a valid sale under the deed." Ex parte Worcester County National Bank, 279 U. S. 347, 49 S. Ct. 368, 73 L. Ed. 733, 61 A. L. R. 987, is cited to the point. The case is not controlling. The rule of it is that where a state bank is consolidated with a national bank the latter does not succeed to the fiduciary relations of the former where such succession would be contrary to the law of the state in which the consolidation was effected. The McFadden Act (USCA, title 12, § 34a) provides that, when such a consolidation is made, the national bank shall succeed the state bank "as trustee, executor, or in any other fiduciary capacity," but that "no such consolidation shall be in contravention of the law of the State under which such bank is incorporated." In the Worcester Case the Supreme Court held that under the law of Massachusetts where the case arose it was necessary for the national bank to petition the proper state court for a substitution as executor, etc., and that a succession to the fiduciary relations of the state bank did not become complete upon the consolidation. Section 31b, subd. 5, par. b of the Bank Act of this state (Deering's Gen. Laws, Act 652) provides that when a state bank is consolidated with a national bank, the latter shall ipso facto and by operation of law succeed to "court and private trusts, * * * and other relations to any person * * * trustee, principal or beneficiary of any court or private trust. * * *" Hence, under our statutes, there is no conflict between the McFadden Act and the Bank Act and the succession to the trusteeship became effective upon the consolidation. In accord with these views are Mercantile Trust Co. v. San Joaquin Agr. Corp., 89 Cal. App. 558, 265 P. 583, and Estate of Barnett, 97 Cal. App. 138, 275 P. 453.

[7] Because of this succession the respondent was entitled to appear herein and defend for all purposes of the trust, and the failure of the original trustee to appear and defend did not entitle appellants to demand a decree of foreclosure on the theory that the principal party in interest had defaulted. The consolidation terminated all rights under the trust which had been vested in the original trustee and this trustee could not limit or effect the powers of the substituted trustee by action or nonaction in this proceeding.

[8] None of the other points raised requires consideration because, irrespective of any claimed errors during the trial, the appellants were not entitled to a foreclosure and judicial sale until they had made a valid demand upon the trustee, and having failed to make such demand, they could not be heard in this proceeding.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

127 Cal.App. 1

MINNICH v. MINNICH (two cases).

Civ. 8687.

District Court of Appeal, First District, Division 1, California.

Oct. 15, 1932.

1. Divorce ⇐150(2).

Finding in divorce action "that all and singular the allegations of the complaint herein are true" *held* sufficient.

2. Appeal and error ⇐994(3), 1012(1).

Conclusions of trial court as to credibility of appellant's witnesses, and weight to be given their testimony, cannot be disturbed (Code Civ. Proc. § 1847).

3. Divorce ⇐127(4).

Absent collusion, divorce may be granted on plaintiff's testimony, where corroborated in the main by defendant's, which in turn was corroborated in certain respects by other evidence (Civ. Code, § 130).

4. Divorce ⇐171.

Former judgment denying both husband and wife divorce on ground of cruelty *held* conclusive, though not pleaded in subsequent action, that alleged acts of cruelty antedating former judgment did not exist.

5. Appeal and error ⇐969.
Trial ⇐18.

Trial court has large discretion in regulation of trial, and unless discretion is abused judgment will not be reversed.

6. Evidence ⇐461(4).

Where realty purchased with separate property of one spouse was taken in names of spouses as joint tenants, true intention as to ownership may be shown by parol, absent written agreement creating joint estate.

7. Husband and wife ⇐249.

Property does not lose its character as separate or community by change in form or identity.

8. Husband and wife ⇐262(1).

Realty acquired by either spouse raises presumption that it is community property and imposes burden of proof on party claiming contrary (Civ. Code, § 164).

9. Husband and wife ⇐263.

Failure to permit wife to adduce proof in support of her allegations that property awarded husband as separate was community property *held* error.

10. Divorce ⇐252.

Though divorce is granted husband for wife's desertion, she is entitled to equal division of community property (Civ. Code, § 146).

Appeals from Superior Court, Los Angeles County; Myron Westover, Judge.

Action for separate maintenance by Gladys R. Minnich against Jesse C. Minnich, and separate suit for divorce by Jesse C. Minnich against Gladys R. Minnich, which were tried together. From adverse judgment in each case, Gladys R. Minnich appeals.

Affirmed in part, and reversed and remanded in part.

See, also (Cal. App.) 15 P.(2d) 808.

James Donovan, of Los Angeles, for appellant.

Hulme, Hastings & Bartlett, William B. Himrod, and Gerald Bridges, all of Los Angeles, for respondent.

PER CURIAM.

Gladys R. Minnich, the appellant in the above actions, is the wife of respondent, Jesse C. Minnich. On November 19, 1928, she filed in the superior court of Los Angeles county an action for divorce from respondent on the ground of cruelty. This action was numbered D70334 and will be hereinafter referred to as the first action. She also asked for a division of the community property of the parties. Respondent answered, denying the allegations of cruelty and the existence of any community property, and at the same time filed a cross-complaint for a divorce on the ground of cruelty, and also prayed for a decree quieting his title to certain property described in his complaint which he alleged was his separate property. Appellant by her answer traversed the issues raised by the cross-complaint.

The action was tried, and the court found that the conduct of neither party constituted cruelty to the other; it determined that neither be granted relief on the issue of divorce, and further adjudged "that neither party herein do have or recover anything as against the other with reference to any issue raised by any pleading herein as to property rights, without prejudice to the right of said parties or either of them to litigate any or all such matters in another action or actions." This judgment was entered on November 26, 1929, and no appeal was taken therefrom.

On April 12, 1930, appellant instituted in the same court one of the actions in which this appeal was taken, being action numbered D84241. This was an action for separate maintenance on the ground of cruelty. In her complaint she described portions of the property mentioned in her first action; alleged the same to be community property and sought a division thereof. Respondent denied the allegations of this complaint, and at the same time filed a separate suit, numbered D84562, for a divorce from appellant on the ground of desertion. In his complaint respondent alleged the property mentioned to be his separate property. Following the filing of her action appellant obtained an order requiring respondent to pay the sum of $80 each month as temporary alimony. The two actions were by stipulation tried together. The trial resulted in the entry of an interlocutory decree by which it was adjudged that the respondent should be granted a divorce; that the real and personal property described in the pleadings was his separate property; and that appellant take nothing by her action for separate maintenance except that she recover judgment for $500 attorney's fees, and costs.

A motion for a new trial was made in each case and denied, and appeals were taken from the judgments.

[1] In action No. D84562 the court found "that all and singular the allegations of the complaint herein are true." It is appellant's view that this finding is insufficient; but findings in this form have been upheld in numerous cases, and the same is true of a finding that the denials of an answer are untrue. 24 Cal. Jur., Trial, § 214, and cases there cited.

Appellant cites Turner v. Turner, 187 Cal. 632, 203 P. 109, and Holt Manufacturing Co. v. Collins, 154 Cal. 276, 97 P. 516, where it was held that a finding of the truth of all the material allegations of a pleading was insufficient, and this for the reason that it could not be ascertained what averments were deemed material by the trial court. This defect is not found in the case at bar.

[2] In addition to her denials appellant pleaded matters in recrimination, and the court found specifically that these allegations were untrue. The court also found that certain averments of acts of cruelty by respond-

ent, which were alleged by way of recrimination had been adjudicated against appellant in the first action, the judgment in which had become final. The evidence supports this finding as well as specific findings against other acts of cruelty alleged by appellant. There was, as she contends, testimony supporting her allegations, but the credibility of her witnesses and the weight to be given their testimony were questions for the trial court (Code Civ. Proc. § 1847), and its conclusions cannot be disturbed.

It is also urged that the finding that appellant deserted respondent is unsupported and that the judgment in the first action was not a final adjudication of the facts therein alleged, for the reason that relief was denied to both parties.

[3] It is the rule that a divorce cannot be granted on the uncorroborated admission or testimony of the parties (Civ. Code, § 130); but it has been held that the principal object of the rule requiring corroboration is to prevent collusion; and where it is clear that there was no collusion, and defendant's testimony, although conflicting with that of the plaintiff in many details, in the more important matters was corroborative of plaintiff's testimony, which was also corroborated in certain respects by other testimony, the evidence is sufficient. Smith v. Smith, 119 Cal. 183, 48 P. 730, 51 P. 183; Andrews v. Andrews, 120 Cal. 184, 52 P. 298; McMullin v. McMullin, 140 Cal. 112, 119, 73 P. 808. So the fact that defendant has vigorously contested the suit dispels any idea of collusion. Hill v. Hill, 106 Cal. App. 309, 289 P. 227. Such was the case here; and without reviewing the voluminous record it will be sufficient to say that the corroborated testimony fairly supports the finding.

[4] The defense of res adjudicata was alleged in the answer to the complaint in appellant's action for separate maintenance, but upon her motion was stricken therefrom. The former judgment was, however, admitted in evidence in respondent's action for divorce on the ground of desertion. Appellant had denied the alleged desertion, and averred acts of cruelty by respondent as justification for leaving him. The alleged acts occurred before the entry of the judgment mentioned which determined these allegations to be untrue. Such an adjudication was conclusive between the parties when the same facts came again in issue although the same was not pleaded. Wixson v. Devine, 67 Cal. 341, 7 P. 776; Estate of Clark, 190 Cal. 354, 212 P. 622; Civille v. Civille, 22 Cal. App. 707, 136 P. 503; Stansbury v. Frazer, 46 Cal. App. 485, 189 P. 495; Glockner v. Palace Amusement Co., 47 Cal. App. 597, 191 P. 46; Sallee v. Sallee, 63 Cal. App. 54, 218 P. 69. Moreover, the judgment was admitted in evidence by stipulation between the parties: and having been admitted the court might consider it for any purpose for which it was competent and relevant. Sears v. Starbird, 78 Cal. 225, 20 P. 547.

Appellant further complains that she was prejudiced by the order of proof followed by the trial court, and that she was not given an opportunity to present evidence on the issues respecting the character of the property described in the pleadings.

[5] It appears to have been agreed between counsel at the trial that while the two actions were to be tried together the divorce action should be heard first. However, as is not unusual in such cases, this order was not followed strictly, and in this course appellant's counsel appears to have acquiesced—at least there was no objection made by him. In the regulation of trials the court has a large discretion, and unless the same be abused its course is not ground for reversal. 2 Cal. Jur., Appeal and Error, § 352, p. 902; 24 Cal. Jur., Trial, § 45, p. 764. Here neither abuse of discretion nor prejudice has been shown. Moreover, appellant's counsel stipulated at the trial that the evidence introduced upon the issues presented in the divorce action should be considered in the action for separate maintenance, it being stated in effect that if respondent as plaintiff in the divorce action established grounds for the same, and appellant's defense by way of recrimination—which was based upon alleged acts of cruelty by respondent—was found against her, the court was bound to deny her prayer for separate maintenance. It is clear from the statements of her counsel at the close of the hearing that all her evidence in support of this complaint was adduced at the trial. This being true, the court, in view of its conclusions as to the effect of the evidence, could not under the following cases, in which the facts were similar, do otherwise than deny a decree for separate maintenance: Volkmar v. Volkmar, 147 Cal. 175, 81 P. 413; Kessler v. Kessler, 2 Cal. App. 509, 83 P. 257; Tayian v. Tayian, 64 Cal. App. 632, 222 P. 377.

Appellant insists, however, that she was denied the right to present evidence showing the property described in the pleadings to be community property.

[6] At the close of the trial the court asked if the parties were ready to submit the matter, to which appellant's counsel replied:

"We understand, your Honor, this is on the merits of the divorce action. We haven't gone into the property matters. I believe that was your Honor's desire, wasn't it, to go into the merits of the case before we proceed with the property matters?

"The Court: I don't think there is anything to proceed on other than we have been

over. The decree will be for the husband in the divorce action, and against the wife and for the husband in both actions."

The parties were married on November 5, 1919, in Ohio, where they were residing. It is undisputed that respondent then owned separate property, both real and personal, of the approximate value of $75,000. Later the larger part of the property was sold and the proceeds brought to California. Respondent testified that several parcels of real property situated in California were purchased with money from this fund, and title to the same taken in the name of the spouses as joint tenants, and the deeds in evidence so show. It appears that these properties were subsequently sold or exchanged and other property acquired, title to which was taken in respondent's name. Appellant claimed an interest in this property, alleging it to be community property. In Siberell v. Siberell (Cal. Sup.) 7 P.(2d) 1003, certain real property was purchased with community funds and deeded to a husband and wife as joint tenants. It was held that the taking of the title thereto in the names of the spouses as joint tenants was an expression on the face of the conveyance of the intention not to hold the property thereafter as community property but in joint tenancy, and that the equal interest of the spouses should thereafter be classed as their separate but joint estate in the property. The same conclusion would be supported where, as here, the property was purchased with the separate funds of one of the spouses. In such case, however, except where there is a written agreement between the spouses creating the joint estate, the true intention may be shown by parol (Estate of Gurnsey, 177 Cal. 211, 170 P. 402; Parsons v. Robinson, 206 Cal. 378, 274 P. 528; Siberell v. Siberell, supra; Ives v. Connacher, 162 Cal. 174, 121 P. 394; Crowley v. Savings Union, etc., Co., 30 Cal. App. 144, 157 P. 516; Potter v. Smith, 48 Cal. App. 162, 191 P. 1023; Vandervort v. Godfrey, 58 Cal. App. 578, 208 P. 1017; Conneally v. San Francisco Savings & Loan Society, 70 Cal. App. 180, 232 P. 755; Estate of Nelson, 104 Cal. App. 613, 286 P. 439), and such evidence has been held admissible in cases where the transfer was from the husband to the wife. Estate of Bruggemeyer, 115 Cal. App. 525, 2 P.(2d) 534; Osborn v. Mills, 20 Cal. App. 346, 128 P. 1009.

[7, 8] In the case at bar while it appears that the property held in joint tenancy was sold, and other property acquired in the name of the husband, nevertheless it is the rule that property does not lose its character as separate or community property by a change in form or identity (Estate of Brady, 171 Cal. 1, 151 P. 275; Estate of Jolly, 196 Cal. 547, 238 P. 353; Simonton v. Los Angeles Trust, etc., Bank, 205 Cal. 252, 270 P. 672); and if it was respondent's intention—which the deeds indicated—to make a gift to his wife of an interest in the property, this interest was not lost by reason of its exchange or sale, notwithstanding the title acquired as the result thereof was taken in respondent's name. Estate of Bruggemeyer, supra. Moreover, the latter fact raised a presumption that the property acquired was community property (Civil Code, § 164; Estate of Nickson, 187 Cal. 603, 203 P. 106), and placed the burden of proving the contrary on respondent. Estate of Fellows, 106 Cal. App. 681, 289 P. 887.

[9, 10] Respondent testified that the conveyances in joint tenancy were made for the convenient handling of the property, and that no gift to his wife was intended. However, appellant had an apparent interest by virtue of these conveyances. Whether she had more than this and afterwards agreed to commute her interest into community property, it being alleged that the property subsequently acquired was of this character, were questions to be determined from evidence. The circumstances and presumption mentioned tended to support her claim; and in view of her allegations she should have been afforded an opportunity to adduce evidence on this issue. The divorce was granted on the ground of desertion; and if it appeared that any of the property was community in character she would, of course, be entitled to an equal division of such portion. Civ. Code, § 146.

It will consequently be necessary to reverse the judgments appealed from in so far as they adjudge Jesse C. Minnich to be the sole owner of the property and that his wife has no interest therein. Accordingly, those portions of the judgments adjudging the property described in the pleadings to be the separate property of Jesse C. Minnich and that Gladys R. Minnich has no claim, right, title, or interest therein and that she take no part thereof, are reversed, and the cause is remanded for a new trial on the question whether said property is separate or community property. The judgments in all other respects are affirmed.

And it is further ordered that appellant recover her costs on appeal.

127 Cal.App. 180

MINNICH v. MINNICH (two cases).

Civ. 8688.

District Court of Appeal, First District, Division 1, California.

Oct. 26, 1932.

1. Divorce ⇐182, 286.

While trial court may make provision for prosecution of wife's appeal, his decision is reviewable only for plain abuse of discretion.

2. Witnesses ⇐397.

Impeachment of witness by party calling her to contradict opposite party would not, as against such opposite party, be proof of truth of witness' alleged prior statements contrary to those testified to.

3. Divorce ⇐182.

Where wife had been allowed $500 attorneys' fees and costs, and judgments against her were reversed with costs, order denying allowance for appeal *held* not abuse of discretion.

Appeals from Superior Court, Los Angeles County; Myron Westover, Judge.

Action for separate maintenance by Gladys R. Minnich against Jesse C. Minnich, and separate suit for divorce by Jesse C. Minnich against Gladys R. Minnich, which were tried together, and adverse judgment in each case was rendered against Gladys R. Minnich. From order denying motion for allowance to cover cost of preparing appeals, together with alimony pending the appeals and attorneys' fees, Gladys R. Minnich appeals.

Affirmed.

James Donovan, of Los Angeles, for appellant.

Hulme, Hastings & Bartlett, William B. Himrod, and Gerald Bridges, all of Los Angeles, for respondent.

PER CURIAM.

An appeal from an order denying the motion of Gladys R. Minnich for an allowance to cover cost of preparing her appeals from the judgments entered in the above actions, together with alimony pending the appeals, and attorneys' fees.

The first action was for separate maintenance brought by appellant, and the second was an action by which respondent sought a divorce from appellant on the ground of desertion. Judgment was entered against appellant in her action except that she was allowed the sum of $500 attorneys' fees, and costs; but in the action by respondent judgment was entered in his favor.

Appellant upon filing her appeals from the judgments moved the court for an order requiring the payment of the further sums of $750 for attorneys' fees, and $150, the estimated cost of preparing the record and her briefs on appeal. After a hearing, at which affidavits were read and witnesses sworn and examined, the motion was denied.

The appeals in the two actions were heretofore decided (Cal. App.) 15 P.(2d) 804. The judgments in so far as they denied a decree of separate maintenance and adjudged that respondent was entitled to a divorce on the ground of desertion, were affirmed; but those portions thereof by which it was adjudged that appellant had no interest in the property described in the pleadings, were reversed and the causes remanded for a retrial of the latter question. It was further ordered that appellant recover her costs of appeal.

[1] While the trial court is authorized to make provision for the prosecution of an appeal by a wife (Sheppard v. Sheppard, 161 Cal. 350, 119 P. 492; Locke Paddon v. Locke Paddon, 194 Cal. 73, 227 P. 715) nevertheless such allowances are discretionary, and only a plain abuse of discretion is subject to correction on appeal. Smith v. Smith, 147 Cal. 143, 81 P. 411; Newlands v. Superior Ct., 171 Cal. 741, 154 P. 829. Here the evidence—which the trial court believed—tended to show that respondent's property was incumbered to such an extent that the payments asked for were beyond respondent's power to make. Counsel for appellant sought to contradict the evidence adduced by respondent in this respect, and called a witness for the purpose of proving that respondent had made statements contrary to his testimony. This witness denied that such statements were made, and it was then sought to impeach her by showing that she had made statements at variance with her testimony. The offered evidence was rejected by the court, and appellant complains of the ruling.

[2] Whether the ruling was correct or not, the inconsistent statements, if any, made by the witness would not have been competent as evidence against respondent of the truth of the witness' previous statement. It would have had the effect merely of discrediting the witness (Albert v. McKay, 174 Cal. 451, 163 P. 666).

[3] After an examination of the testimony and affidavits we cannot say that the conclusions of the trial court are unsupported. As stated, there had already been allowed the sum of $500 as attorneys' fees; and, as appears from the records above referred to, the appeals have actually been taken and decided. Appellant will recover her costs in these proceedings, and doubtless an allowance will, if proper, be made in connection with the further proceedings in the two cases. We are

satisfied that no abuse of discretion has been shown, and that considering all the circumstances the order resulted in no miscarriage of justice.

The order is affirmed.

127 Cal.App. 269

PEOPLE v. BELLI.

Cr. 1669.

District Court of Appeal, First District, Division 1, California.

Nov. 1, 1932.

1. Poisons ⇐9.

In prosecution for possessing morphine, whether defendant threw package on sidewalk and another picked it up as prosecution claimed *held* for jury.

2. Criminal law ⇐1159(4).

There being nothing inherently improbable in testimony of state's witnesses, which jury accepted as true, appellate court is bound thereby on appeal.

3. Poisons ⇐9.

In prosecution for possessing morphine, whether package found on another person was identical package dropped by defendant *held* for jury.

4. Criminal law ⇐404(4).

Where state claimed defendant dropped package of morphine for another person to pick up, package *held* admissible in evidence in prosecution for possessing morphine.

5. Poisons ⇐9.

To establish crime of illegally possessing morphine, proof of possession at very time of arrest is not essential.

6. Poisons ⇐9.

Evidence *held* sufficient to support conviction for illegally possessing morphine, which defendant had thrown on sidewalk and another had picked up immediately before arrest.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Attilio Belli was convicted of illegally possessing morphine, and he appeals.

Affirmed.

William J. Gloria, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

KNIGHT, J.

Appellant was found guilty by a jury of having in his possession illegally a quantity of morphine; and from the judgment of conviction he has appealed, urging as ground for reversal insufficiency of the evidence to sustain the conviction.

The case of the prosecution rested mainly on the testimony given by three state narcotic agents. They testified in substance that, while stationed on Fell street between Steiner and Pierce streets in San Francisco, about 2:30 o'clock in the afternoon, they saw appellant walk westerly along the south side of Fell street between the intersecting streets mentioned and drop a small white package on the sidewalk; that at the same time they observed another man, who proved to be one Harry Wilson, approaching appellant in the opposite direction on the same side of the street and within the same block; that immediately after appellant dropped the package on the sidewalk Wilson picked it up and continued on; that he was closely followed for a short distance by one of the agents and then placed under arrest; that, upon being searched, a small white package similar to the one appellant had thrown on the sidewalk was found on his person, which contained an illegal quantity of morphine. Thereupon appellant was placed under arrest by the other agents and taken to his home, which was searched for narcotics, but none were found. He was then taken to the office of the state narcotic division and questioned by the chief inspector, but he declined to make any statement regarding the matter other than to say that he had been a user of narcotics for some nine years. He did not testify at the trial. Wilson, however, was called as a witness for the defense, and denied having any acquaintanceship whatever with appellant or that he had seen appellant that day or at any other time; furthermore, he denied ever having been on Fell street, stating that he had purchased the morphine found in his possession from a Mexican in a poolroom on Fillmore street, and that, when arrested, he was waiting on the corner of McAllister street to board a street car. He further stated that he had been a narcotic addict for more than eighteen years.

[1-4] As will be noted, the evidence was sharply conflicting upon the question of whether, as the prosecution claimed, appellant threw a package on the sidewalk and Wilson picked it up. Therefore the truth of the matter was for the jury to decide, and, it having accepted as true the testimony given by the narcotic agents, and there being nothing inherently improbable in such testimony, this court is bound thereby on appeal. It was also a question of pure fact for the jury to determine from all the circumstances present whether the package found on Wilson's person was the identical package dropped by appellant; and, in view of the testimony given upon the subject by said narcotic agents, it can-

not be said that the conclusion reached by the jury on this point is unsupported, or that the trial court erred in receiving said package in evidence.

[5, 6] Appellant contends, however, that even conceding the truth of the testimony of said agents and the soundness of the jury's conclusion as to the identity of the package, the evidence as a whole is legally insufficient to establish possession on the part of appellant, within the meaning of the State Polson Act (Stats. 1927, p. 105, § 1), because it affirmatively shows that no narcotics were found in the appellant's possession, but that they were taken from the person of Wilson. As held in People v. Herbert, 59 Cal. App. 158, 210 P. 276, in order to establish possession within the meaning of said act, it is necessary to prove that the possession was immediate and exclusive and under the dominion and control of the person charged with such possession. But nowhere do the terms of the act require, nor, so far as our attention has been called, do any of the decisions interpreting the act hold as appellant seems to contend, that proof of possession at the very time of arrest is essential. Here, as shown, it appears from the evidence adduced in support of the prosecution's case that immediately preceding his arrest appellant had the narcotics in his immediate and exclusive possession and under his dominion and control, and that, upon divesting himself thereof, the same were picked up immediately by Wilson, which, in our opinion, is legally sufficient to establish possession on the part of appellant within the meaning of said act.

The judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

127 Cal.App. 263

BAGWILL et al. v. SPENCE.

Civ. 4393.

District Court of Appeal, Third District, California.

Oct. 31, 1932.

Rehearing Denied Nov. 30, 1932.

Hearing Denied by Supreme Court Dec. 29, 1932.

1. Sales ⇐52(5).

In action for sale price of automobile, evidence *held* to support finding of sale and delivery.

Evidence disclosed that shortly after the execution of the purchase order plaintiffs received shipment of automobiles containing one answering description of one set forth in defendant's order; that this automobile was inspected by defendant and found to correspond with specifications contained in order of purchase, and was an automobile of the kind desired; that defendant took automobile home and two days later made a trip to raise money with which to pay for it; and that defendant signed an application blank for a state license.

2. Sales ⇐479(1).

Under conditional sale contracts, seller may, upon buyer's default, retake and sell property and sue for difference between contract sale price and amount received, or sue for purchase price.

3. Appeal and error ⇐1170(3).

That complaint in action for price of automobile was defective in setting forth the amount due as and for the sale of goods did not require reversal (Const. art. 6, § 4½).

Such defect did not require reversal under Const. art. 6, § 4½, where entire record showed that action was substantially one for the purchase price of an automobile.

4. Sales ⇐89.

That order blank specified date of delivery did not prevent sellers and buyer from agreeing upon earlier date for delivery.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Charles B. Bagwill and another, copartners doing business under the firm name and style of Bagwill McShane Company, against E. T. Spence. From the judgment for plaintiffs, defendant appeals.

Affirmed.

Butler, Van Dyke, Desmond & Harris, of Sacramento, for appellant.

Wallace Shepard, of Sacramento, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiffs had judgment for the sale price of an automobile based upon a complaint containing two counts, one charging an open book account, and one charging the indebtedness arising from the sale and delivery of the automobile as and on account of the sale of goods, wares, and merchandise sold and delivered by the plaintiffs to the defendant, upon which there was due and unpaid the purchase price thereof.

Upon this appeal the appellant contends that the evidence is insufficient to support the findings of the court, and that no action could be maintained for the purchase price of the automobile; that the action should have been only for the breach of an executory contract and damages resulting therefrom.

On or about the 12th day of July, 1930, the defendant, after some negotiations had taken place relative to the sale and purchase of a certain "Hupp" automobile, signed the following order blank:

"Order Blank

"Bagwill-McShane Co.

"Dealer's No. 2760 Sacramento, Calif.
"Date 7–10–30

"This will be your authority to enter my order for one Hupp Sedan according to the following description and specifications, the total price of which, F. O. B. Sacramento, Cal., is 2217.00 dollars, and on which has been paid a deposit of ——— dollars. Balance of purchase price amounting to $2217.00 dollars I agree to pay to your order on delivery of car at Sacramento.

Knox.	Carry out price of car ordered Into this column
Name and Model C6 Wood wheels	
Extra equipment Sedan	$2167.00
Dark blue	
1 trunk	50.00
	$2217.00

Cash on Del.
Terms
Accepted for Bagwill-McShane Co.
Total.
By Deposit.
Balance due.

"It is distinctly understood that this order is complete in itself and the seller shall not be bound by any agreement or representation not contained herein.

"New cars sold under the guarantee of the manufacturer as published in current catalog. Used cars as is.

"It is understood and made a part of this agreement that title of ownership of car as above described does not pass to me until final cash payment is made.

"It is also understood and agreed that Bagwill-McShane Co.'s liability upon this order is for the amount of deposit paid thereon only, and when the deposit is an allowance for a used automobile, Bagwill-McShane Co.'s liability then is for the amount of the price received for the used car if sold. Should the used car not be sold, then Bagwill-McShane Co.'s liability ceases on the return of used car to owner.

"[Signed] E. T. Spence
"Delivery date September, 1930.
"Address: Fair Oaks."

Whether this instrument be considered simply as an order or a conditional sales contract, it satisfactorily appears therefrom that the description of the automobile under consideration is specifically set forth, and that payment therefor was to be made in cash, coincident with the delivery of the automobile. The delivery date was fixed as of September, 1930.

We do not need to follow or review the argument of the appellant relative to the open book count contained in the complaint, for the simple reason that if the count for goods, wares, and merchandise sold and delivered is sufficient to support the judgment, no reversal can be had.

The record shows that shortly after the execution of the purchase order which we have set forth herein, the plaintiffs received a shipment of automobiles containing one answering the description set forth in the order, and thereupon this automobile was inspected by the defendant and found by him to correspond with the specifications contained in the order of purchase, and was an automobile of the kind that he desired. Upon receiving the automobile just mentioned, an agent of the plaintiff repaired to the residence of the defendant, brought him to the salesroom conducted by the plaintiffs, following which there was some conversation as to terms of payment, and finally it was agreed that the defendant should take the automobile and drive to Chico for the purpose of raising money to pay for the automobile. At the same time the defendant signed an application blank for a state license. The defendant took the automobile, drove to his home in Fair Oaks, and two days later drove to Chico for the purpose of attempting to borrow money on real estate owned by him, but did not succeed in raising the money with which to pay for the automobile. Upon returning to Sacramento the plaintiffs were advised of the defendant's failure to raise money in Chico, and an attempt was made to borrow money from a bank in Sacramento. The defendant was informed that the necessary amount would be advanced upon the security of certain stock owned by him, but not upon the security of any real estate owned by him in Chico. The money, however, was not borrowed. In the meantime, according to the testimony of the plaintiffs, the automobile had been returned by the defendant to the plaintiffs for the purpose of having placed thereon a trunk, which was a part of the equipment originally ordered. After the trunk had been placed upon the automobile it was again delivered to the defendant at his home in Fair Oaks. While the automobile was in Fair Oaks the defendant, in a conversation with one of his neighbors, stated that he had purchased the automobile. After keeping the automobile for a few days, the defendant wrote to the plaintiffs, purporting to cancel his order for the automobile, and advising the plaintiffs that he had stored the same in Fair Oaks, subject to their order. Thereupon, this action was begun.

The testimony of the defendant is to the effect that when he took the automobile from the salesroom conducted by the plaintiffs, for the purpose of driving to Chico and making

arrangements to pay the purchase price, nothing was said about returning the automobile in the event that he did not succeed in obtaining the money in Chico. His further testimony also is to the effect that nothing was said about returning the automobile in the event that he did not borrow the amount of the purchase price from a bank in Sacramento. The testimony of the plaintiffs is to the effect that they made delivery of the automobile, which is corroborated to some extent by the testimony of the witness stating that the defendant informed him that he, the defendant, had bought the automobile involved in this action.

[1] Without setting forth the testimony further, we may state the record contains sufficient testimony to support the finding of the court as to delivery.

[2] The question still remains as to whether appellant's contention that the action should have been prosecuted only for a breach of the contract, and the judgment entered for the difference between the value of the automobile at the time of bringing the action and the selling price thereof, is tenable. The law seems to be pretty well settled that under conditional contracts of sale that the seller has two remedies, either to retake the property, make sale thereof, and bring action for any difference between the sale price mentioned in the contract and the amount received from a subsequent sale of the property, or to bring an action for the purchase price of the property agreed to be sold. In the case of Johnson v. Kaeser et al., 196 Cal. 686, 239 P. 324, 327, the authorities on this subject are fully set forth and considered. In the opinion in that case it is said: "It is settled by an unbroken line of decisions that, as to such a contract, it is optional with the seller, upon default by the purchaser in complying with any of the vital terms of the agreement, either to treat the contract as involving a conditional sale and retake possession of the property or ratify the contract as one involving an absolute sale of the property and so sue for the recovery of all moneys then payable thereunder. In other words, the seller in such case is vested with the right to exercise an election as between the two remedies suggested. See Parke & Lacy Co. v. White River L. Co., 101 Cal. 37, 40, 35 P. 442; Elsom v. Moore et al., 11 Cal. App. 377, 379, 105 P. 271; George J. Birkel Co. v. Nast, 20 Cal. App. 651, 654, 129 P. 945; Pacific, etc., Co. v. Haydes & Son, 26 Cal. App. 607, 609, 147 P. 988; Holt Mfg. Co. v. Ewing, 109 Cal. 353, 356, 42 P. 435; Van Allen v. Francis, 123 Cal. 474, 480, 56 P. 339; Harter v. Delno, 49 Cal. App. 729, 735, 194 P. 300, 303; Boas v. Knewing, 175 Cal. 226, L. R. A. 1917F, 462, 165 P. 690. The text-writers lay down the same rule. See 1 Mechem on Sales, § 615; Williston on Sales, § 579." See, also, 55 C. J. 1268, and 22 Cal. Jur. 1102, where the same rule of law is set forth, citing numerous authorities.

[3, 4] If the count in the complaint setting forth the amount due as and for the sale of goods, wares, and merchandise, is defective, we think that such defect is cured by section 4½ of article 6 of the Constitution, specifying that no reversal can be had on account of error in the pleadings unless there has been a miscarriage of justice. The whole record in this case shows that it was substantially an action for the purchase price of the automobile. The fact that the order blank specified September as the date of delivery does not alter the situation and did not preclude the plaintiffs and the defendant from agreeing upon an earlier date of delivery, when an automobile complying with the specifications of the purchase order had been received by the plaintiffs.

The testimony being sufficient to support the finding of the trial court as to sale and delivery of the automobile, it follows that the judgment should be affirmed. And it is so ordered.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

216 Cal. 667

In re DARGIE'S ESTATE.

ST. MARY'S COLLEGE OF OAKLAND, CAL., et al. v. CHANDLER et al.

S. F. 14267.

Supreme Court of California.

Nov. 1, 1932.

1. Wills ⇐179.

Whether will revoked, or was codicil to, earlier one depends on wording of documents, and circumstances viewed in light of rules of construction.

2. Wills ⇐179.

That testatrix entitled will "Continuation of my last will" *held* insufficient to overthrow plain intent to revoke earlier will.

3. Appeal and error ⇐891.

Appellants' request in Supreme Court to introduce additional evidence required denial, where additional evidence was insufficient to compel judgment in their favor if case were reversed for new trial.

4. Wills ⇐179.

Record sustained finding that later will was intended to revoke, not to be codicil to, earlier will.

Although later will was headed "Continuation of my last will and testament," it was complete in itself and contained no reference to any other will, except clause revoking all prior wills, and made complete testamentary disposition of all testatrix' property.

LANGDON, J., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

In the matter of the estate of Hermina Peralta Dargie, deceased. Upon petition of Jefferson Chandler and others, a writing was admitted to probate as the last will and testament of decedent, over the objections of St. Mary's College of Oakland, Cal., and others, legatees named in an earlier instrument, and the petition of such legatees to have the earlier instrument also admitted to probate was denied, and, from such order objecting legatees appeal.

Application of appellants to produce and introduce additional evidence denied. Order affirmed.

For prior opinion, see 10 P.(2d) 741.

Garret W. McEnerney and Andrew F. Burke, both of San Francisco, and Albert T. Shine, of Oakland, for appellant St. Mary's College of Oakland, Cal.

Philip C. Boardman, of San Francisco, for appellants Leonore F. Tripler and Panchita Dibblee Summers.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent Josefa Peralta Wilson.

Jefferson P. Chandler and Chandler, Wright & Ward, all of Los Angeles, and Francis A. O'Connell, of San Francisco, for respondents Jefferson Chandler, William T. Summers, and Alexander Doig, executors, and Antonio Rodriguez Martin.

PER CURIAM.

After further consideration of this cause, we are satisfied to readopt the opinion of Mr. Justice PRESTON, formerly rendered herein, which is as follows, to wit:

Appeal from order admitting to probate a purported will of decedent dated March 27, 1929, and denying admission to probate of a purported will dated December 13, 1928. The question is whether the testatrix intended the later instrument to be a codicil to the earlier one, or whether she intended it to stand alone as her last will and testament.

The testatrix, Hermina Peralta Dargie, a resident of Alameda county, passed away on December 8, 1929, at the age of seventy-one years, leaving an estate consisting of real and personal property of an estimated value of $1,400,000. For many years she had been a widow, and she left no children. Her sister, Josefa Peralta Wilson, and the five children of said sister, survived her and were her next of kin. A Spaniard, Captain Antonio Rodriguez Martin, who had made his home with her from about the year 1920, handling her affairs, and, apparently enjoying her full confidence and trust, produced, after her death, the documents above mentioned, both of which are wholly written, dated, and signed in the handwriting of the deceased, and on their face purport to make complete testamentary disposition of her properties.

The writing of March 27, 1929, upon petition of the executors therein named, was admitted to probate as the last will and testament of decedent, over the objections of certain legatees named in the earlier instrument; their petition to have that instrument also admitted being denied. The court stated that it was convinced that the testatrix did not intend the March will, which expressly revokes all previous wills, to be a codicil to, supplement to, or part of the December will; hence it found that the December will, having been revoked, was not the last will and testament of the deceased, but that the March will was her last will and testament, and as such entitled to be admitted to probate.

The document of December 13, 1928, denied probate, opens with the declaration that it is to serve as the last will and testament of the testatrix; all previous testamentary

documents signed by her being declared void. It then provides that the sister of the testatrix receive an income of $1,000 a month from the estate, also certain real property and the sum of $150,000 to be paid her over a period of time; that the sister's children each receive the income from $50,000; that Captain Martin receive $250,000; that appellant Tripler receive $25,000; that appellant Summers receive $50,000, and that appellant St. Mary's College receive, in memory of decedent's brothers, $20,000. After providing for some ten additional legacies, aggregating about $106,000, the instrument names as executors, Captain Martin, Wm. T. Summers, and Alexander Doig, and, as attorney for the estate, Mr. Jefferson Chandler. Following the signature of the testatrix appears this provision: "Should Mr. Joseph R. Knowland continue as a partner in my estate affairs—I hereby demand that all rights be accorded me, after all is in order I order now, that this large Estate I am leaving back of me—be placed, into a competent Trust Co. to which my executors will agree for the benefits of my family (signed) Hermina Peralta Dargie."

The instrument of March 27, 1929, is entitled and first provides as follows: "Continuation of my last will and Testament. I. I hereby revoke any and all wills previously made by me. II. I desire that my executors as soon as they have sufficient funds in their hands pay my funeral expenses, * * *" etc. Then follow paragraphs numbered 3 to 30, naming some 37 legatees and providing for total cash bequests aggregating about $239,000 to be paid out of dividends and accumulations from the estate. Decedent's sister is left $50,000 and her children $5,000 each. Paragraph 28 appoints as a board of executors Captain Martin, Alexander Doig, Jefferson Chandler, and Wm. T. Summers. Paragraph 29 provides that said executors pay to said sister $1,000 per month from dividends derived from the assets of the estate. Paragraph 30 provides that all smaller bequests be paid as soon as possible from accumulations of dividends from the estate. The will then closes as follows: "The residuary legatees, Captain * * * Martin, to whom I give, devise & Bequeath the full half of my Estate, as I would have done had he been my son—The other half as Residuary Legatee—to my sister Josefa Peralta Wilson. It is my wish, that my Estate be kept intact, for at least twenty years after I pass from life."

An analysis of these documents shows that thirty-seven legatees are named in the March will, twenty or whom are not mentioned in the December will; twenty-one legatees are named in the December will, eleven of whom are carried over in the March will for less amounts each, four for the same amount, two for greater amounts, and the remaining four are not mentioned at all; they are appellant St. Mary's College, which would receive $20,000 under the December will, John Peralta, who would receive $1,000, "Any poor relation," etc., $10,000, and Mrs. Peralta, $1,000. Appellants here are St. Mary's College, Leonore F. Tripler, left $25,000 by the December will and but $10,000 by the March will, and Panchita Dibblee Summers, left $50,000 by the December will and but $5,000 by the March will.

[1] The controlling factor on this appeal is, of course, the intent of the testatrix, in so far as we are able to ascertain it from the wording of the documents and the circumstances under which they were made, viewed in the light of the well-established rules on the subject of interpretation of wills, which are summarized in Re Estate of Coleman, 189 Cal. 612, 620, 209 P. 571, and many other cases.

[2] The document of March 27, 1929, is in itself a complete will, disposing of all decedent's properties. Other than use of the word "continuation" in the title, there is not a shred of evidence to support the view that the testatrix might have intended it as a codicil to her former will. But for the use of that word, no one would attempt to make such a claim. But appellants do make this claim, and to support it they place great reliance upon the fact that the testatrix entitled the instrument: "Continuation of my last will and testament." In what sense the testatrix used the word "continuation," it is impossible to say, but it seems plain that she did not use it in the sense of "Codicil," as the character of the instrument refutes such a view. The word is not a part of the body of the writing, but only of the heading. It is possible that, having given grave thought to her last will during the period from December to March, the testatrix, again taking pen in hand, had in mind setting forth the final result of her continued and matured consideration of the subject and so wrote the word "continuation" in the heading, immediately thereafter taking the precaution, as shown by paragraph 1, to first revoke all previous wills. No doubt she realized that the December will omitted many whom she wished to remember, and failed to make satisfactory disposition of her residuary estate. There is evidence that she had been warned that care should be taken in drawing trust clauses and she may have feared that some defect or ambiguity existed in the so-called trust clause appended to her December will. Be this as it may, we cannot say that the mere use of the word "continuation" in the heading is sufficient to show an intent at variance with, and to overthrow, the intent plainly indicated by the character of the instrument and the wording in the body thereof.

[3] Appellants have sought to introduce in evidence a will prepared in 1916 by an attorney for the testatrix, which she apparently used as a model in drafting part of her March will and across the top of which she wrote, "Void March 27—1929 San Leandro." Appellants argue that, as she did not cancel this 1916 will until March, 1929, she had in mind until then that her December, 1928, will was incomplete, and, believing that the March continuation completed it, she then wrote said cancellation clause. But on the 1916 will lines were drawn through the signature of the testatrix at the bottom of each page and her signature at the end was removed; there is nothing to show that the will, though preserved for use as a model, was not canceled prior to addition of the quoted clause in March, 1929, which confirmed the cancellation theretofore made; furthermore, the testatrix knew that her December will canceled all prior wills. In short, while this additional evidence might afford further grounds for speculation, it contains no convincing proof to sustain appellants' contentions, and certainly it is insufficient to compel a judgment in favor of appellants, were a reversal made and a new trial permitted (Tupman v. Haberkern, 208 Cal. 256, 280 P. 970); hence the request to introduce additional evidence will be denied.

Appellants cite the following circumstance in support of their contentions. Captain Martin testified that in October, 1929, on the eve of his departure for a short trip to Mexico, the testatrix gave him an envelope, with directions that he place it in his deposit box for safe-keeping. She passed away soon after his return, and, upon examination, the envelope was found to contain the December will. Why, appellants ask, was decedent so anxious in October, 1929, to preserve the will of December, 1928, if she had theretofore revoked it by the will of March, 1929? The March will was then presumably where it was found after her death, in a closet of her home in a tin box, to the value of the contents of which she called attention during her last illness. Crediting the above evidence, many explanations may be made of decedent's conduct, all of which are based upon pure conjecture. It would be no more than guess work to accept this incident as showing that decedent intended that both documents should serve as her last will and testament. Respondents ask these counter questions: If decedent considered both documents as her last will, why did she not hand both of them to Captain Martin to be placed in the deposit box? Why did she separate them? Why did she let the December will go out of her hands but carefully place the March will in a box for valuables in the closet of her own home? Did she perchance believe the envelope she handed Captain Martin contained both documents, or only the March document? To speculate upon the significance of this incident is an idle act in the determination of this cause.

Appellants claim that the two documents may consistently be interpreted as one will, and that decedent so planned; they point out that the December will (leaving out of consideration the so-called trust clause thereto appended) did not dispose of even half of her properties. But in making this contention appellants have had to place in the mind of decedent the understanding and insight of a trained lawyer as to the legal effect and probable result of construing the various conflicting provisions of the two instruments as one. It is not reasonable to believe that this aged woman so knew the law that she could foresee the manner in which these provisions might be legally harmonized in order to dispose of her entire estate under both documents.

Appellants also point out that the St. Mary's College bequest is the only remembrance made by decedent of her brothers, and that she would not have omitted it from the March will, had she intended that will to stand alone. Decedent's thought of making this bequest may have changed, or she may have inadvertently omitted it from the later will. Any weight given to appellants' observation in this behalf is also grounded upon speculation.

[4] The fact of the matter is that the wording of the instruments themselves, more than any other thing, convinces us that the March will is and was intended to be the last, separate, and complete testamentary disposition by the testatrix of all her properties, made after revocation of all her former wills. Other than the revocation clause, the March instrument contains no word of reference to any other will. It is complete in itself. It needs no outside support to carry out the testamentary scheme therein expressed. It provides, without uncertainty or ambiguity, a reasonable, rational, and entire method for the distribution of all decedent's properties. It provides for almost all of those remembered in the earlier will, and for many who were not mentioned therein. It sets forth a new and complete scheme, better worked out and showing greater thought for the care of those most dear to the deceased. For instance, although it reduces the cash bequest to her sister from $150,000 to $50,000 and makes no cash provision for Captain Martin, yet it greatly increases the value of the residuary estate, half of which is given to each of these persons. It also provides for conservation of the estate over a period of time, and for payment of cash bequests from income rather than principal. In other words, the entire plan of the March will is such as to induce the conviction that it was an effort on the part of decedent to make a

more considered and sounder disposition of her properties, and to remedy possible imperfections in the earlier instrument; hence it must stand as her last will and testament.

Nothing will be gained from further discussion or citation of authorities. It is our conclusion that the court below properly disposed of this cause, and its findings have ample and abundant support in the evidence.

The application of appellants to produce and introduce additional evidence is denied. The order appealed from is affirmed.

LANGDON, J.

I dissent.

Before proceeding to a discussion of the issue, I think it is proper to point out that the will of 1916 is entirely relevant and material, and should have been admitted as part of the record herein, for reasons which will hereinafter appear.

The general rules which should guide the determination of this appeal are well established. The intent of the testator is the object of all construction of testamentary instruments. Several testamentary instruments executed by the same person are to be construed together as one instrument; and all the parts of a will are to be construed in relation to each other to form, if possible, a consistent whole. See Cal. Probate Code, §§ 101, 103; Estate of Peabody, 154 Cal. 173, 97 P. 184; Estate of Coleman, 189 Cal. 612, 209 P. 571.

The problem is not simple, and speculation as to the actual state of mind of the decedent is not helpful. Our task is, by the rules of law and sound policy, to determine her intention from the facts, and in accordance with reasonable inferences from these facts. The first and undeniable fact is that the two instruments, while they differ considerably in some respects, and cover much the same ground in other respects, are not wholly irreconcilable. Both can be given effect. Inconsistent provisions of the earlier one may be omitted, and those not inconsistent may be permitted to remain, without injury to the basic scheme of the testatrix. The assertion that the March instrument makes a new and complete disposition of all the property is true, but only for the reason that it contains a residuary clause. Any instrument having a residuary clause completely disposes of the property. But the general residuary clause cannot be deemed irreconcilable with prior gift provisions, and hence the presence of such residuary clause in the March instrument does not give rise to the inference that it is the sole valid testamentary instrument. We must look elsewhere for our inferences.

The second fact is the designation of the March instrument as "Continuation of my last will and testament." This statement is so clear that it defies misinterpretation. No inference is needed to add to its meaning, and it is both unnecessary and dangerous to speculate upon the possible senses in which the term "continuation" was used. "It is undoubtedly settled law relative to the interpretation of wills that the intent of the testator must be extracted from the express terms of his will, and that courts are not permitted to indulge in conjecture or surmise, for the purpose of arriving at an intent which is not reasonably to be drawn from the language of the document itself." Estate of McKay, 42 Cal. App. 361, 362, 183 P. 574, 575. "The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained." Cal. Probate Code, § 106. The testatrix has expressly stated that the writing executed in March is a part of some other and prior instrument, and that the other and prior instrument is her last will and testament. The only instrument which fits that description is the instrument executed in December.

The third fact is that eight months after the making of the March instrument the testatrix directed that the December instrument be placed in a bank vault for safe-keeping. Captain Martin testified that in October, 1929, as he was about to leave on a short trip to Mexico, the testatrix gave him an envelope and directed him to place it in his safe deposit box. This envelope contained the December instrument. If, as respondents contend, the March instrument had already revoked it, it is difficult to understand why its preservation should be important. Respondents say that the explanation for such conduct on her part must be purely conjectural and hence useless; and they ask why, if she regarded both instruments as constituting her last will, she chose to separate them, giving one to Captain Martin for deposit, and leaving the other in a box of valuables in her own home. However, eliminating all inferences, the fact remains that she took pains to preserve a document at a time many months after the supposed revocation thereof; and this affords some indication of a belief on her part that the document was still operative.

The final fact of importance centers about the will of 1916, to which reference has already been made. It is contended by respondents that the revocation clause at the beginning of the March instrument was necessarily directed at and effective against the December instrument. That this is inconsistent with the heading of the March instrument—"Continuation of my last will and testament"—is plain; and the weakness of the contention becomes still more obvious when the 1916 will is examined. This appears to be an organized and complete disposition of

all her property at the time it was drafted. It is covered with corrections, interlineations, sections crossed out and canceled; the signature at the bottom of each page is crossed out, and the signature at the end is removed. The important fact, however, is that at the top of this instrument appear these words in the handwriting of the decedent: "Void March 27—1929 San Leandro." It is a reasonable inference from this fact that the revocation clause in the March instrument was directed at the 1916 will. We may assume, as respondents contend, that that revocation clause was intended to revoke some prior will, either the 1916 will or the December instrument. It is perfectly reasonable to infer that the 1916 will was intended, for it is clear that she had it in her hands at the time, and took pains to state expressly on the document that from that time on it was void. This statement, it should be remembered, was written on the 1916 will on the very day the March instrument was executed. She made no similar statement at that time or at any other time about the December instrument. On the contrary, months later she committed it to her trusted friend for safe-keeping.

My conclusion is that the instrument executed by the decedent in December, 1928, with all the necessary formalities of a holographic will, was never canceled or revoked, either by the express revoking clause in the March instrument or by the provisions of the March instrument. The March instrument, while it might have been a sufficient testamentary disposition and a valid will if standing alone, should, in view of the circumstances, be regarded as a codicil.

The order should be reversed, with directions to the lower court to admit to probate the instruments of December 13, 1928, and March 27, 1929, as the last will of the decedent.

216 Cal. 639

WESTERN CANAL CO. et al. v. RAILROAD COMMISSION.

S. F. 14560.

Supreme Court of California.

Oct. 31, 1932.

Rehearing Denied Nov. 29, 1932.

1. Public service commissions ⇐35.

Existence of public utility within meaning of law is fact question.

2. Evidence ⇐83(1).

Presumption of regularity must be indulged with respect to orders of Railroad Commission (Const. art. 12, § 23, as amended in 1914; St. 1915, p. 161).

3. Public service commissions ⇐35.

Findings of fact by Railroad Commission must be accorded similar weight to that given jury verdicts (St. 1915, p. 161).

4. Public service commissions ⇐35.

Railroad Commission's order cannot be annulled if there is substantial evidence justifying its decision (Const. art. 12, § 23, as amended in 1914; St. 1915, p. 161).

5. Waters and water courses ⇐217.

Corporation's appropriation of water for public use, construction of canal system for same purpose, offer to public of water service as utility, and making of contracts obligating it to serve water, completed dedication to public service (St. 1913, p. 84; St. 1919, p. 493).

6. Waters and water courses ⇐217.

Public use having attached to water company's rights and system, its existence was not ended by transfer of assets to mutual water company (St. 1913, p. 84; St. 1919, p. 493).

7. Waters and water courses ⇐217.

Power company selling water for irrigation even to bona fide mutual water company became utility for sale of water for irrigation (St. 1913, p. 84; St. 1919, p. 493).

8. Waters and water courses ⇐216.

It was competent for Legislature to enlarge by statute definition of public utility.

9. Waters and water courses ⇐257(1).

In proceeding against power company and subsidiary water company to have them file rates covering irrigation water service with commission, commission *held* warranted in looking beyond corporate forms clothing acts of corporation and in declaring purported mutual water company to be but agent of power company.

In Bank.

Application by the Western Canal Company and another against Railroad Commission for certiorari to review and annul an order of the respondent.

Railroad Commission's order affirmed.

Thomas J. Straub, W. H. Spaulding, and Chaffee E. Hall, all of San Francisco, and W. R. Dunn, of Sacramento, for petitioners.

Ware & Ware, of Chico, for complainant Sarah E. Ludy.

Arthur T. George, Ira H. Rowell, and Roderick B. Cassidy, all of San Francisco, for respondent.

D. A. Winship, Dist. Atty., of Yuba City, Milton Hogle, Dist. Atty., of Willows, Loyd E. Hewitt, of Yuba City, A. L. Cowell, of Stockton, Homer J. Hankins, of San Francisco, Charles L. Childers, of El Centro, and Thomas C. Boone, of Modesto, amici curiæ.

PER CURIAM.

Petitioners ask this court to review and annul an order of respondent Railroad Commission directing them to file with it "rates and regulations covering irrigation water service." The term "power company," where hereinafter used, will designate the Great Western Power Company of California, a corporation, and its predecessors.

Petitioners contend that the finding upon which said order is based, to the effect that they are public utility water service corporations, is entirely unsupported by the evidence, which shows conclusively that petitioner Western Canal Company is a mutual water company and that petitioner Great Western Power Company of California is a public utility electric power company, not engaged in furnishing water save as a by-product of its public electric power business, and then only in a private capacity to Western Canal Company alone under special contract. Petitioners therefore claim that the order, if enforced, will violate their constitutional rights and deprive them of their respective properties without due process of law.

Petitioners allege that in 1915 Western Canal Company was organized under the laws of this state as a mutual water company and as such has operated continuously since said time; that the proceedings here involved were not commenced until March 31, 1930, after nearly $1,000,000 had been expended in the construction of the canal system of said company and nearly $600,000 had been invested by landowners in the purchase of its capital stock of which 21,715 shares, out of an issue of 200,000 shares, appurtenant to an equal number of acres of land under irrigation, are now outstanding.

Petitioners further allege that Great Western Power Company of California was also organized under the laws of this state in 1915 and has since been continuously engaged in the generation of electric energy and sale thereof to the public; that during this period it has also sold to Western Canal Company, under special contract, as a by-product of its electric power business, and subject to prior and paramount use for generation of electric power, certain water delivered at the intake of the Western Canal Company canal on the Feather river, three miles below the city of Oroville, Cal.; that Great Western Power Company of California is the successor in interest of the properties and assets of Great Western Power Company, the successor in turn of Western Power Company, none of which sold water save to Western Canal Company and then only as a by-product as aforesaid.

The order complained of was rendered on December 21, 1931, after an extended consideration on rehearing of two consolidated proceedings entitled, respectively, Sarah E. Ludy v. Great Western Power Company of California and Western Canal Company, No. 2847, and In the Matter of the Investigation on the Commission's Own Motion into the Operations, Practices, Rates, Rules, and Regulations, Services, Service Area, Contracts, Intercorporate Relations, Classifications, or Any of Them, of Great Western Power Company of California and Western Canal Company in the Distribution and Sale of Water in the Counties of Butte, Glenn, Sutter, and Colusa, State of California, case No. 2858. The original decision was rendered by the commission on December 19, 1930, after extensive hearings, and ordered the dismissal of these proceedings. The order on rehearing which is here under consideration rescinded the said order of December 19, 1930, and, as above stated, commanded petitioners to immediately file with respondent rates and regulations covering irrigation water service within the area in the Sacramento Valley served under their canal system, including service to the lands of complainant Ludy.

The substance of the findings and opinion of the commission on rehearing will now be set forth: Complainant Ludy, the owner of about 1,000 acres of land in eastern Glenn county, desired delivery by petitioners of water for irrigation purposes. She alleged that her lands were formerly served with water by Western Canal Company, but that said company refused to deliver further water unless she purchased stock from it to the extent of one share for each acre irrigated, at a price of $20 per share. She alleged that said company was serving other lands in the vicinity as a public utility and had facilities and water supply adequate to serve her lands; further that Great Western Power Company of California, from which Western Canal Company obtained its water supply, had likewise devoted its waters to the public use, and, through the medium of Western Canal Company, as its subsidiary, was operating as a public utility water company. Petitioners answered that Western Canal Company was purely a mutual concern created to supply its stockholders with water purchased under contract from Great Western Power Company, which latter company held all its waters available for irrigation for private use only, unaffected by the public interest. Upon these issues various arguments and hearings were had before the commission.

Complainant Ludy presented her case upon three theories: (1) That petitioners were public utilities, supplying irrigation water to large areas in Sutter, Butte, and Glenn counties, including her lands, by virtue of their succession to the canal system and water rights of the Feather River Canal Company, which had previously dedicated its property to the same public use; (2) that Great Western Power Company of California was a pub-

lic utility for supplying water for irrigation within said areas by reason of its succession to the properties of Great Western Power Company, successor to Western Power Company, both of which were water utilities by virtue of their acquisition of lands and water rights through the exercise of the power of eminent domain for domestic or irrigation uses; (3) that petitioners themselves, since their acquisition of the properties of the old Feather River Canal Company and the beginning of service through its canal system, have so conducted their water operations as to constitute a dedication of their properties and water rights to the public use.

The commission found that the Feather River Canal Company was organized in 1908 after an appropriation by its promoter Norris of 300 second feet of water from the Feather river for irrigation purposes, and that an adequate canal system was planned through the operation of which water would be available for sale to any one; that, however, a stock sales and also a water rights sales campaign by Norris was unsuccessful, and he was finally forced to seek a purchaser for his interest; meanwhile he and his associates had acquired practically all the stock of the company and 5,000 so-called "water rights"; that in 1911 a sale was negotiated whereby the Brown-Walker concern became the owner of nearly all the stock of the company, together with 3,000 of Norris' "water rights," and he continued as an engineer and officer of the company. In 1912, under the new ownership, the company at once made contracts with several landowners for delivery of water in perpetuity at fixed rates. There was organized also at this time the Feather River Mutual Water Company for taking over the Feather River Canal Company, but it played an inconspicuous role and perhaps did not function at all. Thereafter and in 1915 there was completed a sale of the Feather River Canal Company properties to Great Western Power Company. The contract of sale was executed by Feather River Canal Company and also by the Feather River Mutual Water Company. It contained no provision for the disposition of the above-mentioned outstanding "water rights" or water delivery contracts; apparently they remained outstanding obligations of the old corporations, both of which agreed to hold the new purchasers harmless from any claims arising therefrom.

After reviewing the voluminous evidence, the commission concluded that it was the intent of the incorporators of Feather River Canal Company to serve water as a public utility within an area of at least 30,000 acres, for which purpose it had an adequate water supply, and that by its subsequent acts in issuing "rights" for the purchase of water and by the execution and delivery of water contracts expressly conditioned upon the right of the state, through the Railroad Commission, to alter such contracts, said company dedicated its property and water rights to the use of all those within the area of its canal system. This public servitude, the commission found, was not relieved by the subsequent transfer of the properties to the Feather River Mutual Water Company. Thus to the extent of the appropriation made by promoter, Norris, the commission, under complainant's first theory, disposed of petitioners' obligation to continue the service of water in the public use.

Complainant, however, contended further that all of the water flowing from the tailrace of the power plant of the Great Western Power Company was likewise devoted to irrigation purposes in the same general area, and evidence was offered to show that its predecessor power companies acquired some of their lands and water rights by exercise of the power of eminent domain for such purposes as well as for the generation of electricity, thus proving a dedication to the public use, especially when followed by the institution of the water service. There were placed in evidence copies of complaints in six condemnation suits brought by the Western Power Company or Great Western Power Company, all of which alleged, in consonance with its articles of incorporation, that plaintiff was engaged in the business of furnishing and supplying water for the public use for domestic and irrigation purposes in addition to the generation of electric power and that it was necessary to take the lands and water rights of the several defendants for each of such uses. Some of these cases were settled; others went to judgment and either the relief, as prayed for, was granted or the judgments expressly specified that the rights taken were to be applied by plaintiff to public purposes and uses. From this and other evidence, the commission concluded that the predecessors of Great Western Power Company of California intended to and did devote to the public use for irrigation the waters released after serving their function in the generation of electric power.

From a detailed and exhaustive review of still further evidence, the commission concluded that petitioners, Western Canal Company and Great Western Power Company of California, although one of them was organized as a mutual water company, nevertheless operated as public utilities in the sale and distribution of water for irrigation purposes, which fact is apparent from the acts of the companies themselves. A more extended reference to this phase of the subject follows at a later point in this discussion.

Thus, after a full and complete résumé of the evidence, the commission announced that Great Western Power Company of California holds its property and water rights

subject to the public use for irrigation and domestic purposes and is primarily responsible for the continuance of that public service; that Western Canal Company is not a mutual water company as defined in the act for regulation of water companies (St. 1913, p. 84, as amended), but is wholly a creation of the power company and a device by which the latter has sought to escape public regulation; that the said complainant is entitled to the relief prayed for; that petitioners are "water corporations" within the definition and meaning of that term as used in the Public Utilities Act (St. 1915, p. 115, as amended), and the act for the regulation of water companies of the state of California, and that an appropriate order should be entered directing them to file tariffs, rules, and regulations governing the performance of the service in question. The order first herein discussed followed, and petitioners thereupon instituted this proceeding, wherein they reiterate their claims as above set forth.

[1-4] The briefs in this proceeding are thorough and exhaustive but, at the outset, we must observe that the existence of a public utility within the meaning of the law is in its essence a pure question of fact, and we are mindful that under section 23 of article 12 of the Constitution, and under section 67 of the Public Utilities Act (St. 1915, p. 161), adopted pursuant thereto, we are circumscribed in our power of review over the orders of the Railroad Commission. Live Oak W. U. Ass'n v. Railroad Commission, 192 Cal. 132, 138, 219 P. 65. The presumption of regularity is to be indulged with respect to its orders as is done with respect to judgments of courts. Likewise, findings of fact by it are to be accorded similar weight to that given verdicts of juries. Pacific Gas & Electric Co. v. Devlin, 188 Cal. 33, 203 P. 1058. Therefore, if in the record before us there is to be found any substantial evidence to justify the decision of the Railroad Commission that petitioners are public utilities, its order cannot be annulled. Richardson v. Railroad Commission, 191 Cal. 716, 218 P. 418; Butte County W. U. Ass'n v. Railroad Commission, 185 Cal. 218, 196 P. 265; Limoneira Company v. Railroad Commission, 174 Cal. 232, 162 P. 1033; Traber v. Railroad Commission, 183 Cal. 304, 191 P. 366. We fail to see a necessity for lengthy discussion of the evidence, which is set out at some length in the opinion of the learned Railroad Commission and summarized above. The mere review of the facts above set forth, which are undisputed, reveals a case where this court cannot interfere with the ruling of the commission. We may say further that in our judgment these undisputed facts are in accord with the findings of the commission on all three of the propositions discussed by it and upon which it rested its decision.

[5, 6] The sole ultimate question is whether petitioners are corporations "owning, controlling, operating or managing any water system" which "sells, leases, rents or delivers water to any person, firm, private corporation, municipality or any other political subdivision of the state whatsoever * * *" (St. 1913, p. 84), or are utilities covered by section 2 (dd) of the Public Utilities Act as amended in 1919 (St. 1919, p. 493), or whether they come within the exception mentioned in the act of 1913 above quoted, which reads as follows: "Section 2. Whenever any private corporation or association is organized for the purpose solely of delivering water to its stockholders or members at cost, and delivers water to no one except its stockholders or members at cost, such private corporation or association is not a public utility, and is not subject to the jurisdiction, control or regulation of the railroad commission of the State of California." Under this section come mutual water companies.

The record is replete with facts from which it might be concluded that the water rights and water system of the Feather River Canal Company were intentionally dedicated to a public service. The appropriation of the water for the avowed public use, the construction of the canal system for this same purpose, the offer to the public of water service as a utility, and the making of contracts which obligated it to serve water to the contractees completed the dedication. Byington v. Sacramento, etc., 170 Cal. 124, 148 P. 791; Butte County W. U. v. Railroad Commission, supra; Traber v. Railroad Commission, supra. This public use having attached, its existence was not ended by the organization of the Feather River Mutual Water Company and the transfer of the assets of the utility to it. Consent of the Railroad Commission was necessary for abandonment of a public use so created. Van Hoosear v. Railroad Commission, 184 Cal. 553, 194 P. 1003.

[7-9] The undisputed facts also warrant the conclusion that for public use for irrigation, as well as for power, the present power company, through its predecessors, sought and obtained its storage privileges on the Feather river. A fair construction of the eminent domain proceedings, both those that went to judgment and those settled by the passing of deeds prior to judgment, leaves no doubt that the company had this active purpose in mind and sought and obtained a reservoir site for irrigation as well as for power purposes. This too was confirmed by the answer filed by it in an eminent domain proceeding against it, in which it set up the fact that these waters "about to be stored" were dedicated to irrigation as well as power uses. When, under these circumstances, water was sold for irrigation, even to a bona fide mutual water company, the power com-

pany became a utility for the sale of water for irrigation. Moreover, it is a natural process to impound water for power purposes and then dispose of it after such use for irrigation purposes. It takes but little evidence to show that reservoired waters used for the generation of power for public sale are impressed with a public use for all other available purposes. As an agency of the state, the company gets the right to condemn and to store. From whence comes the right in the utility to claim these waters, after use, as its personal and private property as against the state, whose agent it is in impounding and using them? It would seem that, when these stored waters have been used and released to the original stream channel, they should still be impressed with a public use or else they should be open to the use of claimants on the stream below. In other words, we suggest the question: Is it not within the jurisdiction of the commission to require that these waters, impressed with a public use, be continued as such for all available purposes in the hands at least of the utility in charge of them?

This brings us to the third and last proposition upon which the commission based its action, as noted above, which seems to be of enough future importance to warrant a more extended consideration. As already noted, in 1914 negotiations were begun by the power interests to acquire the properties of the Feather River Canal Company and its allied corporation, the Feather River Mutual Water Company. An agreement of purchase was executed in October of that year, and the sale was not consummated until August 17, 1915. The Western Canal Company was brought into existence on January 28, 1915, but even prior thereto and as early as January 1, 1915, it was engaged in making contracts with the power company. It is not disguised that the canal company was so organized as a subsidiary of, and, in fact, it was the alter ego of the power company itself. To the power company was given a deed to the water rights of the Feather river companies and to the Western Canal Company was given a conveyance of the canal system and rights of way and franchises of said companies. All the consideration for the purchase was paid by the power company. There were left outstanding, to be taken care of by the purchasers, 5,000 water rights, some of which had already become appurtenant to certain lands.

The object of organizing the Western Canal Company was stated by the president of the power company to be as follows: Because the power company had been incorporated originally having as one of its objects the utilization of waters for irrigation and had constructed a dam and thus made captive a great volume of water and was confronted with the imperative necessity of causing it to be utilized for irrigation and was in a hurry to do this to prevent claimants on the stream below the dam from asserting an interest therein; that accordingly they discovered a large area needing irrigation and they found the Feather river companies had made an unsuccessful attempt to meet this need; that an appraisal of the properties was made, and they were found to be of a value of $250,000, and because, among other things, they had several miles of canal constructed and other rights of way obtained, the purchase was made. Following this, a series of contracts was entered into between the power company and the canal company. These contracts appear in some five exhibits in the record, to wit, Nos. 68 to 72, inclusive, which exhibits counsel for the complainant has summarized correctly, as follows:

"First, comes Exhibit 68, dated January 1, 1915, an agreement in which the Power Company agrees to furnish water for irrigation to the Canal Company, when 'in its uncontrolled discretion' it has the water to spare, and subject to termination at any time for failure of the Canal Company to perform its obligations. The water is to be used 'by the Canal Company for sale to its consumers.' The Power Company reserves the right at any time to stop stock sales and thus limit water use. The maximum use in any event is to be 200,000 acres. The price is to be $150,000.00 per year until water sale revenues of the Canal Company equal $150,000.00 per year, the same to be a cumulative charge, at 6%, upon gross revenues. All gross revenues are to be paid to the Power Company until such indebtedness is paid in full. A minimum water rate is established, viz., $6.00 per acre for rice; $3.00 for alfalfa; $2.00 for other irrigation; but rates are to be always not less than $1.00 per acre-foot for any purpose. A standby minimum of $2.00 is to be collected, whether water is used or not. After the cumulative $150,000.00 per year at 6% has been fully paid, the Power Company is to receive all gross revenues, less 50 cents per acre for land irrigated. The Canal Company is limited to the use of Power Company water. Accounting is to be made monthly. All accounts, bills and claims for water are assigned to the Power Company as security and the Power Company is made attorney in fact to sue or otherwise collect them. The Power Company agrees to extend and develop the system, and to maintain and repair the canal until the cumulative debt is paid. The effect of this agreement is to establish the Canal Company as the name under which the Power Company could sell water without regulation.

"Second, Exhibit 69 is an agreement dated November 21, 1917, between the Power Company and the Canal Company, modifying and construing the contract set forth as Exhibit 68, to the end that the cumulative

obligation therein set up shall be payable only out of gross revenues and 'out of any other moneys received by and belonging to the Canal Company.' In effect, it means and very properly says that the agent shall not be required to turn into the principal more than it is able to collect.

"Third, Exhibit 70, is an agreement dated March 5, 1915, between the Canal Company and the Power Company, witnessing the fact that the former is transferring to the latter all its capital stock, less 5050 shares, in exchange for the properties of the Feather River Mutual Water Company, plus additions to be made by the Power Company; and further providing that the Power Company will sell the stock upon demand to landowners at not less than $15.00 per share.

"Fourth, Exhibit 71, dated July 2, 1915, is an agreement between the Western Canal Company and the Feather River Canal Company and Feather River Mutual Water Company, in which the Canal Company agrees to issue 5000 shares of stock without cost to the second parties or their assigns to cover outstanding 'water rights,' or commitments of second parties. This was the stock reserved at the time of sale to cover the various 'rights' originally issued to Norris. It is a recognition that such rights existed and provides a means of meeting them.

"Fifth, Exhibit 72 is an agreement, dated July 2, 1915, between the same parties, providing that Feather River Canal Company and Feather River Mutual Water Company would save the Canal Company harmless from any demands for 'shares of stock or water rights' outstanding, save as they might be satisfied by the 5000 shares of Canal Company stock."

The canal company thus is made but an outlet for the sale of the stored waters of the power company at a profit, first, in the sale of the stock, and, secondly, in the sale of the water. The canal company has no possible chance of independent existence at any time, not even after a sale of all its stock by the power company, which fixes the price. Then, too, its obligation to pay for water it may never sell will keep it in serfdom for an untold period of time. Sixteen years of struggle finds it more deeply enthralled than in the beginning. In practical operation, its status as an independent ego is even worse than these contracts would indicate. Practically all its officers have come from the administrative force of the power company and get their salaries from the latter company. The office equipment and location of both companies is the same. The home and fortune of the canal company, in short, is within the keeping of the power company. The canal company has no bank account apart from the power company. The power company owns 84 per cent. of the stock of the canal company and, as such owner, dictates the latter's every act. This stock, too, is pledged as an asset of the power company to secure its own indebtedness. The canal company has no independent bookeeping system recording its sales or the status of its contract or water accounts. No land-owning stockholder has ever been notified of or attended a meeting of the stockholders; only about four regular stockholders' meetings have been held in sixteen years. No stockholder without interest in the power company in some form has ever been on the board of directors of the canal company. The stock used to qualify the directors of the canal company is indorsed in blank to the power company. While the canal company has an appropriate set of by-laws, suitable for the management of a mutual water company, these by-laws have been in disuse. Instead of giving the canal company some voice over the price of its own stock, the power company provided a minimum and not a maximum price of $15 per share and some stock has been sold for as high as $35; the canal company being entirely and supinely helpless in this important matter. In short, the canal company has no voice in anything, and its obligations to the parent company are increasing, with no signs of emancipation. Much further evidence of impotency of the canal company could be cited.

But it is claimed that the holding of this court in Thayer v. California Development Company, 164 Cal. 117, 128 P. 21, would justify the conclusion that the canal company exists as a mutual water company. It is true that there are some points of superficial similarity in the two cases, but there are at the same time marked differences in the organizations under consideration. In the Thayer Case the court found as a fact, contrary to the situation here, that the mutual company had not been controlled or dominated by the development company. The domination here is complete. In the Thayer Case the stock of the mutual company was sold for its own benefit; here the stock is sold for the exclusive benefit of the power company. In that case the mutual company did not, as here, give the parent company its whole capital stock and allow said company to pledge and traffic in it at will. Neither in the Thayer Case, as here, was the power company authorized to stop the sale of stock at any time and thus be relieved pro tanto of the duty to furnish water. Neither in that case was the mutual company required to make water contracts at rates fixed by the parent company, as is the case here, nor did the mutual company there surrender bodily its management to the power company.

Moreover, the definition of a public utility has been somewhat enlarged by statute since the decision in the Thayer Case. See section 2 (dd), Public Utilities Act, supra, as amended. This it was competent for the Legisla-

ture to do. San Diego Land, etc., v. National City, 174 U. S. 739, 753, 19 S. Ct. 804, 43 L. Ed. 1154.

Cases showing the requirement of mutuality among the membership of a mutual water corporation and the apportionment of its operating costs among them are numerous. We cite a few. Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 72 P. 395; Copeland v. Fairview Land & Water Co., 165 Cal. 148, 131 P. 119; Edwards Associates v. Railroad Commission, 196 Cal. 62, 235 P. 647.

We think the Railroad Commissioner was well warranted in looking beyond the corporate forms which clothed the acts of petitioners and in declaring the canal company to be but the agent of the power company. Chicago, etc., Co. v. Minneapolis, 247 U. S. 490, 38 S. Ct. 553, 62 L. Ed. 1229; Ohio Mining Co. v. Public Utilities Commission, 106 Ohio St. 138, 140 N. E. 143, 147, where it is said: "The facts disclose that the division of this whole property into three separate parts is a division by denomination only; that, while the ownership of the three plants is designated by such owners as separate, ownership is in fact the same; that the owners seek by resort to the fiction of corporate ownership to limit the effect of the dedication of the properties of their distributing companies to those companies alone; that, by reason of the fact that the whole is but one commonly owned property engaged in a single enterprise, the act of one nominal division thereof is attributable to all; and that the Southern Ohio Power Company, through its commonly owned associated corporations, the Athens Electric Company and the Hocking Power Company, is engaged in the selling of electric energy to consumers within the provisions of sections 614-2 and 614-2a, General Code, and is a public utility subject to the jurisdiction of the Public Utilities Commission of Ohio."

The position of the water using stockholders is treated in separate opinions this day filed. Albin et al. v. Railroad Commission (Cal. Sup.) 15 P.(2d) 860; Carlson v. Railroad Commission (Cal. Sup.) 15 P.(2d) 859.

The order of the Railroad Commission is affirmed.

216 Cal. 653

CARLSON et al. v. RAILROAD COMMISSION.

S. F. 14543.

Supreme Court of California.

Oct. 31, 1932.

Rehearing Denied Nov. 29, 1932.

1. Waters and water courses ⇐257(1).

That landowners had invested large sums in stock of purported mutual water company did not affect Railroad Commission's determination of facts in rate proceeding.

2. Waters and water courses ⇐257(1).

If equity required adjustment of water rates to compensate stockholders for their contribution to capital of public utility, commission could make adjustment.

3. Public service commissions ⇐35.

Stockholders' failure to petition Railroad Commission for rehearing before its order against corporation became effective precluded relief in reviewing court.

In Bank.

Application by Louis D. Carlson and others against Railroad Commission to review and annul an order of the respondent Commission.

Order of Railroad Commission affirmed.

Edson Abel, of San Francisco, for petitioners.

Arthur T. George, Ira H. Rowell, and Roderick B. Cassidy, all of San Francisco, for respondent.

D. A. Winship, Dist. Atty., of Yuba City, Milton Hogle, Dist. Atty., of Willows, Loyd E. Hewitt, of Yuba City, A. L. Cowell, of Stockton, Homer J. Hankins, of San Francisco, Charles L. Childers, of El Centro, and Thomas C. Boone, of Modesto, amici curiæ.

PER CURIAM.

This is a companion case to Western Canal Company and Great Western Power Company of California v. Railroad Commission of the State of California (Cal. Sup.) 15 P.(2d) 853, wherein we have this day rendered a decision, to which reference is made for a full and complete statement of the facts and issues here involved. The petitioners in this proceeding are stockholders and purchasers of stock of the Western Canal Company. They seek, by writ of review, an annulment of the order of the Railroad Commission considered in the above-mentioned case, upon all the grounds stated therein, and upon the additional ground that they have obtained or are obtaining their stock in said Western Canal Company at a cost to them in excess of $500,000, in order to obtain a supply of water for irrigating purposes at cost, and, if the order of the Railroad Commission is permitted to stand, it will wholly nullify said investment and will compel these petitioners to pay rates far in excess of the actual cost of service; that the properties of the Western Canal Company are extremely valuable, and the rates which would be required to earn a reasonable return upon the fair value thereof would far exceed the present cost to petitioners of their required irrigation service, plus any interest

on their investment which they might reasonably expect to receive as stockholders; that therefore said order takes from them their private property for public use without prior compensation therefor and impairs the obligation of the contracts between them and the Western Canal Company.

[1, 2] In its opinion and order, the Railroad Commission had in mind the above contention and considered the inequality of petitioner's position as large investors in the stock of the canal company should the commission fix a rate for water use applicable to stockholders and nonstockholders alike. But the commission concluded that this situation could not affect its determination of facts in the proceeding before it, although, in a proceeding for the fixing of rates, it might consider the equities advanced by every consumer. The opinion further stated that, if there were any doubt as to the rights of petitioners as stockholders to share in the profits of the utility's operations, that matter was for the civil courts to determine, but that, if equity required an adjustment of rates to compensate for their contribution to capital, the commission would, no doubt, be empowered to make such an adjustment. Live Oak Water Users' Ass'n v. Railroad Commission, 192 Cal. 132, 219 P. 65.

[3] This position of the Railroad Commission is sound. Moreover, failure to petition the commission for a rehearing before its order became effective precludes relief here.

The order of the Railroad Commission is affirmed.

216 Cal. 655

ALBIN et al. v. RAILROAD COMMISSION.

S. F. 14561.

Supreme Court of California.

Oct. 31, 1932.

Rehearing Denied Nov. 29, 1932.

1. Waters and water courses ⇐217.

State *held* not estopped to assert public utility character of water company transacting business as mutual company for fifteen years.

2. Constitutional law ⇐298(3).

Commission's compelling company to file water rates as public utility would not deprive shareholders who invested in company as mutual company of property without due process of law.

3. Public service commissions ⇐35.

Shareholders' failure to ask rehearing of commission's order against corporation before order became effective precluded relief in reviewing court.

In Bank.

Application by F. A. Albin and others against the Railroad Commission for certiorari to review and annul an order of the respondent Railroad Commission.

Order of Railroad Commission affirmed.

Jerome D. Peters, of Chico, for petitioners.

Arthur T. George, Ira H. Rowell, and Roderick B. Cassidy, all of San Francisco, for respondent.

D. A. Winship, Dist. Atty., of Yuba City, Milton Hogle, Dist. Atty., of Willows, Loyd E. Hewitt, of Yuba City, A. L. Cowell, of Stockton, Homer J. Hankins, of San Francisco, Charles Childers, of El Centro, and Thomas C. Boone, of Modesto, amici curiæ.

PER CURIAM.

This is a companion case to Western Canal Company & Great Western Power Company of California v. Railroad Commission of the State of California (Cal. Sup.) 15 P.(2d) 853, wherein we have this day rendered a decision, to which reference is hereby made for a full and complete statement of the facts and issues here involved. It is also a companion case to Carlson et al. v. Railroad Commission (Cal. Sup.) 15 P.(2d) 859, to which reference is also made for a further statement of issues here involved. These petitioners are shareholders in the Western Canal Company and owners of 16,490 shares of its capital stock. They seek, by writ of review, an annulment of the order of the Railroad Commission considered in the above-mentioned cases upon all the grounds stated therein.

They further assert that, even conceding that Western Canal Company is a public utility in the sale and distribution of water for irrigation, because its water rights were dedicated to a public use prior to their acquisition, nevertheless the state and the general public are estopped from asserting such public utility character of the company. In this behalf they call attention to the fact that Western Canal Company was organized and existed for a period of some fifteen years prior to the institution of the proceedings in question and transacted business as a mutual company; that shareholders invested money therein on the assumption that said company was a mutual company; that during all of said time the state permitted investments to be made and business transacted on said assumption; that enforcement of the order of the commission will cause petitioners and lienholders on their lands great financial damage and this bad effect will extend through the entire community in which the lands are situated, an area in excess of 23,000 acres; that appurtenant wa-

ter rights will be wiped out and the financial affairs of petitioners, now in a turmoil, will be thrown into chaos; and that it is unconscionable and inequitable that such a decree be upheld.

[1-3] We see no ground for estoppel against public right of regulation, nor do we see the deprivation of property without due process. At most these stockholders have paid their money to get a fixed amount of water at a fixed rate for use upon their lands. Under the order of the commission, they will get the needed amount at a regulated cost. Whether they will gain or lose by the process does not appear, but there is no reason to suspect that they will fare worse. Moreover, they can be heard at the rate-making hearing when their right to preferential consideration can be considered. Again, failure to ask a rehearing of the commission's order before it became effective precludes relief in this court.

The order of the Railroad Commission is affirmed.

126 Cal.App. 241

BUENA VISTA WATER STORAGE DISTRICT, a Water Storage District, Duly Organized and Existing under and by Virtue of the California Water Storage District Act, Petitioner, v. J. P. SHIELDS, County Treasurer of the County of Kern, State of California, Respondent.

S. F. 14720.

Supreme Court of California.

Nov. 22, 1932.

In Bank.

Application for a writ of mandate.

For opinion of the District Court of Appeal, see 14 P.(2d) 559.

J. E. Woolley, of San Francisco (Vincent J. McGovern, of San Francisco, of counsel), for petitioner.

Ray Bailey, Dist. Atty., and W. A. McGinn, Deputy Dist. Atty., both of Bakersfield, for respondent.

Myrick & Deering and Scott, Thornton & Watt, and John Ralph Wilson, all of San Francisco, amici curiæ.

PER CURIAM.

Hearing denied.

SEAWELL, J. (dissenting).

I am in accord with the conclusion of the appellate court, that the entire loss due to the alleged robbery cannot be cast upon the petitioning water storage district. My decision that a hearing should be granted is based on the proposition that, when moneys in the custody of the county treasurer in his office are taken from him by robbery it cannot be said that any particular funds have been stolen, but rather it must be held that the sum total of funds in the custody of the treasurer is reduced pro tanto by the robbery. The total of funds in the legal custody of the county treasurer consists in part of funds which are the property of the county, and in part of the funds of the water storage district, which is petitioner herein, and of irrigation and other districts, if such there be, which under the law deposit moneys with the county treasurer of Kern county. When the sum total of all funds in the custody of the treasurer is reduced by robbery, I am of the view that the loss affects the entire fund in the treasury, and should be borne proportionately by all who have an interest in the fund. The treasury, in which all funds are in the custody of the treasurer by law, sustains the loss, and not any particular unit or special fund, equally entitled with all others, to protection. The error of the appellate court's decision, in my opinion, is that it seems to relieve the petitioning water storage district from bearing its proportionate share of the loss, and to throw the entire loss upon the county and other districts which may have funds on deposit in the county treasury.

It may be that, after charging to the water storage district its proportionate share of the loss alleged to be due to robbery, sufficient funds would still remain to the credit of the district to pay the particular warrant involved in the instant mandamus proceeding. But, if this is the situation, the decision should be placed upon that ground.

The answer sets up the defense of robbery. No finding of fact was made as to that issue. Such evidence as was introduced was purely hearsay and entirely inconclusive to establish such a defense. In fact, the question of robbery or no robbery seems to have been subordinated to the questions of law to which the District Court of Appeal directed its attention.

The foregoing reasons constitute the grounds upon which I disagree with the majority of the court.

BALL v. RAILROAD COMMISSION.

L. A. 13782.

Supreme Court of California.

July 25, 1932.

PER CURIAM.

Petition for writ of review herein is denied.

127 Cal.App. 433

In the Matter of E. R. BALL, for a Writ of Habeas Corpus.

Cr. 2246.

District Court of Appeal, Second District, Division 2, California.

Nov. 10, 1932.

Application for writ of habeas corpus prayed to be directed to the Sheriff of Los Angeles County, to secure release of petitioner from custody under a commitment by the Railroad Commission for contempt for failure to comply with an order of the commission.

Writ discharged; petitioner remanded.

Leland S. Bower, of Los Angeles, for petitioner.

Arthur T. George, Ira H. Rowell, and Roderick B. Cassidy, all of San Francisco, for respondent.

IRA F. THOMPSON, J.

The petitioner was adjudged by the Railroad Commission of the state of California to be guilty of contempt for failure to obey an order of that body rendered April 27, 1931, requiring him to desist from engaging in the freight transportation business as a common carrier thereof. It is alleged in the petition that petitioner was not engaged in that business as a common carrier, but only as a private carrier. However, it was found by the commission that the petitioner has "continued to operate and conduct the business of operating automobile trucks for the transportation of property as a common carrier, for compensation, over the public highways of this state, and specifically between Los Angeles and contiguous territory, on the one hand, and certain oil fields in the San Joaquin valley, on the other hand, between September 15 and December 31, 1931, inclusive, and subsequent thereto." It is to be noted in this connection that the Supreme Court of California denied the petition of E. R. Ball for the writ of certiorari to review the action of the commission in punishing him for this contempt. 15 P.(2d) 862. Hence it is apparent that the decision has become final and the law of the case has been established. Since petitioner's entire argument is built upon the assumed foundation that he was operating as a private carrier, nothing further remains to be said.

Writ discharged. Petitioner remanded to the custody of the sheriff of Los Angeles county.

We concur: WORKS, P. J.; STEPHENS, Justice pro tem.

127 Cal.App. 401

SALVETER v. SALVETER.

Civ. 8656.

District Court of Appeal, First District, Division 2, California.

Nov. 9, 1932.

Execution ⇐301.

Judgment debtor's complaint, in action against judgment creditor and purchaser on execution sale, for accounting of rents received by creditor after sale, though alleging creditor's excuse for failure and refusal to give information demanded, *held* not demurrable (Code Civ. Proc. § 707).

Complaint, brought under Code Civ. Proc. § 707, was not demurrable, although it alleged that in response to debtor's demand for the information, creditor, in favor of whose children a support order had been entered in divorce action, replied that all rents collected by creditor had been received pursuant to such court order, whereby creditor claimed she was given control and management of property and was given all rents, issues, and profits therefrom to be used by her for support and maintenance of herself and children. It did not appear on face of complaint that creditor had right to withhold such information, but merely that she claimed such right.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Harry D. Salveter against Maud E. Salveter. From a judgment of dismissal, plaintiff appeals.

Reversed, with directions.

Goodspeed, Pendell & McGuire, of Los Angeles, for appellant.

Hugh A. McNary, of Los Angeles, for respondent.

SPENCE, J.

Plaintiff was the judgment debtor and defendant was the judgment creditor and purchaser on an execution sale. Plaintiff brought this action under section 707 of the Code of Civil Procedure for an accounting of the rents received by defendant subsequent to the sale. This appeal is taken on the judgment roll from the judgment of dismissal entered after the demurrer to plaintiff's second amended complaint had been sustained without leave to amend.

Said section 707 of the Code of Civil Procedure provides in part that after a sale on execution, the purchaser is entitled to receive the rents but that the amount of such rents "shall be a credit on the redemption-money to be paid"; that if the judgment debtor, before the expiration of the time for redemption, demands in writing of the purchaser a "written and verified statement of the amounts of such rents" received, the period of redemption is extended five days after "such sworn statement is given"; and that if the purchaser for a period of one month from and after the demand fails or refuses "to give such statement," the debtor may bring an action "to compel an accounting" of such rents and the right of redemption is extended until fifteen days after the final determination of such action.

Plaintiff's complaint was in two counts which were quite similar except in one particular. We shall first briefly set forth the allegations of the second count. It was there alleged that plaintiff and defendant were formerly husband and wife and that a divorce action was instituted by defendant against plaintiff in 1925; that in said action defendant obtained an order requiring plaintiff to pay to defendant $20 per week for the support of herself and two minor children; that thereafter an interlocutory and a final decree of divorce were entered; that by the terms thereof a 99-year leasehold interest in certain real property was adjudged to be the community property of the parties, but that the court did not make any division or disposition thereof; that subsequently, upon affidavit of defendant herein showing an unpaid balance of $2,068 upon the above-mentioned order, the court ordered a writ of execution to issue; that said writ was issued and on July 15, 1929, all of the right, title, and interest of plaintiff in and to said leasehold interest was sold on execution to defendant for the sum of $1,000; that defendant has been at all times since July 15, 1929, in possession of said premises as purchaser under said execution sale and has collected all rentals therefrom; that plaintiff does not know the exact amount, but alleges on information and belief that defendant has collected as rentals between July 15, 1929, and June 25, 1930, the sum of $5,667 and further sums subsequent to said last-mentioned date; that none of said rentals have been paid to or credited to plaintiff; that within one year after said execution sale, to wit, on June 25, 1930, plaintiff did, for the purpose of redeeming said property, make and serve upon defendant a demand that defendant render to plaintiff her verified statement of all rentals collected subsequent to July 15, 1929 (a copy of this demand is attached to the complaint as Exhibit A and incorporated therein by appropriate reference); that defendant has failed and refused for a period of more than 30 days subsequent to said demand and still refuses to render such statement showing such rentals, but for the purpose of defeating the efforts of plaintiff to redeem and of depriving him of his interest in said property, defendant had denied that she has received any rents and claimed that plaintiff is not entitled to credit for any rents.

The first count of said complaint is the same except in its allegations relating to defendant's response to plaintiff's written demand. It is there alleged that defendant has refused to render plaintiff "a full, true or correct verified statement, or any statement, of the amount of said rentals"; that defendant "pretending to comply with said demand of plaintiff did on the 26th day of June 1930, cause to be served on plaintiff a verified statement" (a copy of this statement is attached to the complaint as Exhibit B and incorporated therein by appropriate reference), "but that the statements and each of them, therein set forth, excepting the statement and admission that said Maud E. Salveter had collected rents from said premises, were false and untrue and known by her to be false and untrue and were made for the purpose of hindering, delaying and defrauding the plaintiff and preventing plaintiff from making a redemption of said property"; that defendant has never at any time given plaintiff a verified statement regarding said rents except as stated.

Defendant's statement given in response to plaintiff's demand as shown by Exhibit B was as follows:

"Pursuant to demand heretofore made by you in the matter of the above entitled action for a disclosure by the plaintiff of rents and profits received from property purchased by her at execution, which said property is described in your demand, and in answer thereto plaintiff and purchaser replies as follows:

"That the undersigned purchaser has received nothing from said property to be applied upon the amount necessary to redeem said property from said execution sale; that rents have been received by the undersigned from the property described in your said demand, but that all the said rents have been received by the undersigned pursuant to the order of court in the above entitled action, contained in the interlocutory decree of divorce therein, wherein and whereby the undersigned

was given the control and management of the property described in your demand, and was given all the rents, issues and profits therefrom over and above the amount of the taxes and costs of upkeep of said property, to be used by her for the support and maintenance of herself and her two minor children as described in said decree.

"That the undersigned has received nothing from said property to be applied by her upon the amount necessary to redeem the property described in your demand from the execution sale thereof."

Appellant contends that the trial court erred in sustaining the demurrer to appellant's second amended complaint without leave to amend. In our opinion this contention must be sustained. The allegations of said complaint were sufficient to show that appellant was entitled to an accounting under section 707 of the Code of Civil Procedure unless, as contended by respondent, the above response by respondent to appellant's written demand was a sufficient compliance with said section. It is at once apparent that said response did not purport to give the information demanded. Appellant demanded "a written and verified statement of the amount of rents" received. Respondent's response merely purported to state an excuse for her failure and refusal to give the information demanded. It does not appear on the face of the complaint that respondent had a right to withhold such information. It merely appears that she claimed such right. If upon the trial respondent establishes such right then appellant will not be entitled to an accounting, but otherwise he will. This issue, however, could not be determined from the face of the complaint and respondent's demurrer should have been overruled.

The judgment is reversed, with directions to the trial court to overrule the demurrer to plaintiff's second amended complaint.

We concur: NOURSE, P. J.; STURTEVANT, J.

127 Cal.App. 368

ELIAS v. ELIAS.

Civ. 8026.

District Court of Appeal, First District, Division 2, California.

Nov. 4, 1932.

Divorce ⇐161.

Wife's violation of alleged promise not to seek decree determining property rights in her divorce action *held* not such fraud as justified setting aside default of husband and interlocutory divorce decree.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Divorce action by Myra Elias against John Elias. From an order setting aside the default of defendant and an interlocutory decree of divorce, plaintiff appeals.

Reversed.

Edmund J. Holl, of San Francisco, for appellant.

Holloway Jones and Hugh K. McKevitt, both of San Francisco, for respondent.

STURTEVANT, J.

This is an appeal from an order setting aside the default of the defendant and setting aside an interlocutory decree in a divorce action. The transcript shows that the action was commenced June 10, 1930; that a summons issued and was personally served on the defendant by delivering him a copy of the summons and a copy of the complaint on the 11th day of June, 1930; that he did not appear; that his default was entered June 23, 1930; and that on June 25, 1930, the default case was tried and on that date an interlocutory decree of divorce was entered. Thereafter the defendant served a notice that he would move to set aside the default and interlocutory decree because the decree was taken against him "through defendant's mistake, inadvertence, surprise and excusable neglect, and on the further ground that said default was taken and said interlocutory decree made through the fraud and misrepresentation practiced on said court and said defendant by the plaintiff. * * *" On the hearing of the motion the defendant introduced in evidence the notice, the complaint, the summons and the return thereon, the interlocutory decree, his own affidavit, and a copy of the answer and cross-complaint which he desired to be allowed to file. The plaintiff introduced her own affidavit. After hearing arguments, the court granted the motion. Later the plaintiff appealed from the order. In support of her appeal, she has filed a brief and a supplemental brief. The defendant has filed no briefs, but, on the contrary, the attorneys who represented him in the trial court have stated that they did not expect to file any briefs because their client had left the state and neglects and refuses to give them any authority.

In her brief, the plaintiff asserts that the defendant introduced no evidence showing "mistake, surprise, inadvertence or excusable neglect." As to fraud, she asserts that the entire showing rested on the charge that the plaintiff had stated to the defendant that she would not ask for a decree determining the property rights of the parties, and that, after the decree was obtained, the parties would

divide their properties between them. Continuing, she shows that on the hearing of the motion it was the contention of the defendant that in violation of the plaintiff's promise she asked for a decree determining the property rights of the parties. Thereupon she contends that on the hearing of the motion she filed an affidavit in which she denied that she ever made the promise complained of. Be that as it may, she continues by arguing that the fraud, if any, was intrinsic and not extrinsic. We think the contention is sound. Furthermore, as we have shown above, the defendant knew the nature of the plaintiff's complaint as early as the 11th day of June, 1930, but failed to take any action whatever. If for the purpose of this decision it be assumed that the plaintiff had made the promise attributed to her, the defendant had timely warning that she was not going to abide by the promise, and he was not entitled to assert approximately three months thereafter that he was taken by surprise. Under these circumstances we think the defendant made no showing that entitled him to have the interlocutory decree set aside.

The order appealed from is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

127 Cal.App. 383

POLK et al. v. BRADBURY et al.

Civ. 8761.

District Court of Appeal, First District, Division 1, California.

Nov. 7, 1932.

1. Statutes ⇐183.

In construing statute, intention governs letter of law.

2. Venue ⇐21.

Statute allowing trial elsewhere than county where defendant resides when defendant is about to "depart" from state applies to imminent departure without intention to return or reasonable likelihood of early return, not when defendant intends only temporary absence (Code Civ. Proc. § 395).

[Ed. Note.—For other definitions of "Depart," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by I. H. Polk and another against Lewis Bradbury and another. Defendants' motion for change of venue was granted, and plaintiffs appeal.

Affirmed.

Hahn & Hahn and Joseph G. Pyle, all of Pasadena, and Orrick, Palmer & Dahlquist, of San Francisco, for appellants.

Joseph T. O'Connor, of San Francisco (Christopher M. Jenks, of San Francisco, of counsel), for respondents.

PER CURIAM.

The plaintiffs, as stockholders of defendant Bradbury Estate Company, a corporation, acting for themselves and other stockholders and for the company, brought the above action for an accounting against Lewis Bradbury, one of the company's officers. The complaint was filed in the superior court of Los Angeles county, and although the corporation was joined as a defendant no judgment was asked against it. Upon motion of both defendants an order was made changing the place of trial to the city and county of San Francisco. The grounds of the motion were that at the time the action was commenced and at all times thereafter the corporation had its principal place of business in the said city and county, and that Lewis Bradbury was a resident thereof. Plaintiffs—who have appealed from the order—opposed the motion on the ground that defendant Bradbury was a resident of Los Angeles county and was about to depart from California. In the latter connection it was alleged that he intended to go to the state of Mazatlan, Mexico. This intention was not denied, but it was alleged that his stay in Mexico was not to be permanent or prolonged, and, according to affidavits filed by him, the corporation owned property in Mexico and Canada which he visited periodically for the purpose of inspection and in the transaction of its necessary business.

[1, 2] That defendant Bradbury resided and the corporation had its principal place of business in San Francisco are sufficiently shown by the affidavits; but under section 395 of the Code of Civil Procedure one of the exceptions to the rule that an action must be tried in the county where the defendant resides at the commencement of the action is that "the defendant is about to depart from the state." The facts bring defendant Bradbury literally within the exception, but the letter of the law does not always govern. The primary rule of intention is to be first applied. This is particularly true when the result of a literal interpretation would be contrary to what appears to be the true intent and meaning of the statute. 23 Cal. Jur., Stats., § 113, pp. 734, 736. Similar phrases in statutes and contracts have been construed in the following cases:

Pezzoni v. Pezzoni, 38 Cal. App. 209, 175 P. 801; Warner v. Dockendorff, 180 App. Div. 72, 167 N. Y. S. 247; Blodgett v. Utley, 4 Neb. 25, 28; Webster v. Citizens' Bank, 2 Neb. (Unof.) 353, 96 N. W. 118; and it is our conclusion that the provision quoted means that a defendant is about to depart from the state without intending to return or that there is no reasonable likelihood of his early return. The affidavits show that defendant Bradbury intended but a temporary absence, and sufficiently support the order appealed from.

The order is affirmed.

127 Cal.App. 399

LOPES v. LEMOS.

Civ. 8562.

District Court of Appeal, First District, Division 2, California.

Nov. 9, 1932.

Master and servant ⇐80(10).

Conflicting evidence *held* to sustain trial court's findings regarding amount of wages owing dairyman's employee for services rendered dairyman under various contracts.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Antone Lopes against D. R. Lemos. Judgment for plaintiff, and defendant appeals.

Affirmed.

Chester Ross, of Hollister, for appellant.

Louis Oneal and Arthur G. Shoup, both of San Jose, for respondent.

SPENCE, J.

Upon a trial by the court sitting without a jury plaintiff had judgment against defendant in the sum of $354.90. This amount was reduced to $342.49 upon motion for new trial and said motion was denied. Defendant appeals from the judgment.

The following statement found in appellant's brief shows the general nature of the controversy:

"Defendant is a dairyman operating near Gilroy, California, and employed plaintiff as a laborer at a wage of 40 cents per hour for a 10-hour day, or $4 per day and $24 per week. The date the employment started is in conflict, defendant contending it was on March 31, 1930, and plaintiff contending it was March 4, 1930, and the court found for the plaintiff.

"The employment continued on this basis until in July, 1930, when an agreement was entered into by which plaintiff earned $118.50 on a contract for storing baled hay in a barn, at the rate of $.50 per ton. Defendant contends that this occupied from August 2nd, 1930, to August 30th, while plaintiff contends, and the Court apparently found that it occupied from July 28th to August 16th. The month of September 1930 was on a daily wage of $4.00 per day. A change from day wages to a monthly wage was made, and plaintiff was placed on the 'Ellis' ranch as foreman. Defendant contends that the employment on the monthly basis started on October 1st, 1930 at the rate of $80.00 per month, defendant to furnish plaintiff and his family with groceries, and with a proviso that if the grocery bill was under an average of $60.00 per month the pay would be $90.00 per month, while plaintiff contends that the monthly wage started on November 1st, at $90.00, and that nothing was said about the amount of groceries defendant would supply, and that he was earning wages at $4.00 per day during October. The agreement was purely oral, and the Court found in accordance with plaintiff's contention.

"The employment continued on the above basis until May 1st, 1931, at which time a further arrangement was entered into, by which it is agreed that defendant was to pay plaintiff $80.00 per month, plaintiff to pay for his own groceries, and defendant to pay plaintiff $20.00 per month for the board of each man in addition to the plaintiff who was employed on the said Ellis Ranch. The only controversy in this connection is as to the date of termination of the employment, defendant contending it was terminated on July 10th, 1931 while plaintiff contends, and the Court found that it continued throughout July, with 5 days out for which a deduction of $20.00 was made."

The issues indicated above, together with other issues, were before the trial court for determination. There was a conflict in the testimony regarding the total amount of respondent's earnings and the amount remaining unpaid. In his opening brief appellant challenged the trial court's findings on both of these issues. In his reply brief appellant states that he "is not attacking the trial court's findings as to the amount of the earnings of the respondent," but he does contend that the evidence is insufficient to sustain the findings relating to the amount remaining unpaid. We find no merit in this contention. Upon the trial respondent testified that there was $374.90 remaining unpaid, while appellant introduced numerous checks given to respondent and contended that respondent had been paid more than the total amount which appellant claimed respondent had earned. He

now endeavors by a series of mathematical computations to show that the balance due was $175.28. Appellant's argument, which ignores what appellant terms respondent's "unsatisfactory evidence," could well have been addressed to the trial court, but the evidence found in the record, although conflicting, sustains the trial court's findings.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

127 Cal.App. 223

CITY OF BEVERLY HILLS v. ANGER et al.

Civ. 4574.

District Court of Appeal, Third District, California.

Oct. 28, 1932.

Rehearing Denied Nov. 26, 1932.

1. Eminent domain ⇐262(4).

Judgment for damages in condemnation proceeding supported by substantial evidence may not be set aside, unless award clearly was result of jury's prejudice or trial judge abused discretion.

2. Eminent domain ⇐202(1).

In condemnation of lots for park, zoning ordinance limiting use of lots to single family residences *held* admissible to show market value.

3. Eminent domain ⇐202(1).

In determining market value of realty, all circumstances, either advantageous or detrimental thereto, should be considered.

4. Eminent domain ⇐200.

In city's condemnation proceeding, court may not assume, in absence of evidence to contrary, that zoning ordinance reduced value of condemned land.

5. Municipal corporations ⇐601.

Zoning ordinance is valid exercise of police power.

6. Eminent domain ⇐41.

Where zoning ordinance authorized "public playground" within residential district, city was not estopped to condemn lots therein for public park not specifically authorized.

City was not estopped to condemn lots in such district on ground that zoning ordinance did not specifically authorize public park within residential district, since "public playground" is comprehensive enough to include public park.

[Ed. Note.—For other definitions of "Public Use (In Eminent Domain)," see Words and Phrases.]

7. Eminent domain ⇐262(4).

Owners of condemned lots could not question court's finding that public interest, convenience, and necessity required acquisition of lots for public park.

8. Eminent domain ⇐262(5).

In determining market value of condemned lots, admitting deeds to other lots containing restrictions similar to those of zoning ordinance affecting lots condemned wherein grantor retained reversionary interest *held* harmless.

Admitting such deeds was harmless, where no one except the grantor could complain of failure to fulfill the restrictive provisions of the deeds, and grantor was not complaining of the failure to allow damages to it on account of the asserted reversionary interest, no forfeiture had occurred, and there was no evidence that one was likely to occur.

9. Evidence ⇐558(8).

In condemnation proceeding, cross-examination of defendant's witnesses if they knew price recently paid for property in immediate vicinity, but not within condemned strip, *held* competent as affecting qualifications of expert witnesses.

10. Eminent domain ⇐262(5).

Permitting testimony regarding market value of lots condemned without including in witness' estimation possible future removal of zoning restrictions *held* harmless.

11. Eminent domain ⇐240.

Court sitting without jury in condemnation proceeding presumptively considered all possibilities in determining market value of condemned lots.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Condemnation proceeding to acquire land for public park purposes by City of Beverly Hills against Arthur Anger, Petra P. Hardwick, and others. From the judgment for plaintiff, second named and certain other defendants appeal.

Affirmed.

See, also, 110 Cal. App. 626, 294 P. 476.

J. Wiseman Macdonald and Walter T. Casey, both of Los Angeles, for appellants.

Richard C. Waltz, of Beverly Hills, and Hill, Morgan & Bledsoe, of Los Angeles, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal on the part of certain defendants from an interlocutory decree of condemnation of a strip of land consisting of thirty-two lots adjacent to the northerly border of Santa Monica boulevard in the city of Beverly Hills, to be used as a public park.

The appellants contend the awards are grossly inadequate to compensate them for the values of the condemned properties, and that the court erred in the admission of evidence respecting the market value of these lots. The chief attack is directed toward the admission in evidence of a zoning ordinance which restricts the use of these lots to the construction of one-family dwelling houses.

The city of Beverly Hills is a thriving municipal corporation. Santa Monica boulevard intersects the city in an easterly and westerly direction. The industrial and business portion of the city is situated south of this avenue. In 1922 the city adopted a zoning ordinance restricting that portion which lies north of Santa Monica boulevard as an exclusive residential district, with the exception of certain schools and churches which were sanctioned therein. An electric street car line traverses this boulevard. The respondent city of Beverly Hills brought suit to condemn for use as a public park the entire tier of lots adjacent to the northerly side of Santa Monica boulevard and extending from its intersection with Doheny drive westerly to its intersection with Wilshire boulevard and up the last-mentioned street to Benedict Canyon drive, excepting therefrom four blocks of lots located near the center of this strip of land between Crescent drive and Camden drive. The condemned tract of land consists of thirty-two lots, among which are included three parcels belonging to the appellants. The three lots which were owned by the appellants are designated as tracts numbered 26, 27, and 28. Several competent witnesses testified that the values of these lots at the time of the commencement of this action ranged from $8,400 to $32,500 apiece. The court found that tract No. 26 was worth $9,714, and that the other two tracts were each worth the sum of $9,240. Judgment was rendered accordingly. From this judgment the owners of these three lots have appealed.

[1] While a judgment for damages which is rendered in a condemnation proceeding may be set aside on the ground that it is grossly inadequate to compensate the owner for the value of the property, this may not be done when there is substantial evidence to support the judgment, unless it clearly appears that the award is the result of passion or prejudice on the part of the jury, or that the award clearly indicates an abuse of discretion on the part of the trial judge. 20 Cal. Jur. 104, § 67; Phillips v. Lyon, 109 Cal. App. 264, 292 P. 711. In the present case there is ample evidence to support the awards which were made to the respective appellants. There is no evidence of an abuse of discretion on the part of the trial judge in ascertaining and fixing these awards. The record on appeal is devoid of evidence upon which this court is warranted in reversing the judgment on the ground of inadequacy of the awards.

[2-6] It is contended the court erred in admitting in evidence the zoning ordinance of the city of Beverly Hills, for the reason that the market value of the land, for condemnation purposes, may not be confined to the mere restricted use to which it is limited by the terms of the ordinance. It is asserted the city may not take advantage in condemnation proceedings of the decreased valuation of lots which is caused by the enacting of a zoning ordinance, but, upon the contrary, that the market value should be estimated on the basis of any reasonable use to which the land may be adapted.

The zoning ordinance was properly admitted in evidence. It tends to show conditions and restrictions actually affecting the use of the property. Even though these restrictions are for a limited period of time, and may be waived or rescinded, still they do affect the temporary use and market value of the property. Some witnesses testified they took into consideration the possibility that the restrictions might be waived or rescinded. The cross-examination of witnesses was unlimited in that regard. The use to which property may be devoted has a direct bearing upon its market value. In determining the market value of real property, all circumstances and conditions which become either an advantage or a detriment to the property should be considered. We are pointed to no evidence in the present record indicating that the restricting of the use of lots to the construction of dwelling houses for single families has the effect of depreciating the value of the property. These very restrictions tend to create and preserve exclusive residential districts free from objectionable industries and business enterprises. The value of property in such restricted districts is frequently increased rather than diminished. In the absence of evidence to the contrary, a court may not assume that the market value of real property is decreased merely because it is affected by the limitations of its use as provided by a zoning ordinance. The question as to whether a zoning ordinance has the effect of increasing or reducing the value of land included within its provisions is one of fact to be established by evidence. Regardless of whether the value of real property is increased or diminished as a result of the application of a zoning ordinance, the ordinance is competent evidence to be considered in a suit for condemnation of property located within the district which is affected thereby, for the purpose of determining the actual market value thereof. The or-

dinance is competent evidence for or against the city which enacted it, when the municipality is a party to the condemnation proceeding. Zoning ordinances are uniformly sustained as valid exercise of the police powers of a municipality. The enacting of a zoning ordinance which is adopted by a city in good faith and which actually does affect the market value of real property is nevertheless competent evidence in behalf of the city in a subsequent suit for condemnation of the property for public use. The city is not estopped from proving the actual market value of the property merely because its enforcement of police regulations may have affected the value of the property. Nor is the city estopped from condemning the property for public park purpose because the zoning ordinance failed to specifically authorize the use of property within the restricted district for that particular purpose. The ordinance, however, does authorize the use of land within the restricted district for the purpose of "public playground." This is comprehensive enough to include public parks. The zoning ordinance reads in part:

"Section 3. Zone 'A.' Residential. Except in this ordinance otherwise provided, no building, structure or improvement shall be erected, constructed, established, altered or enlarged in Zone A upon any lot, or parcel of land which is designed, arranged or intended to be used or occupied for any other purpose other than a church, public school, public library, public playground. * * *"

[7] The appellants may not question the finding of the court that "public interest, convenience and necessity require the acquisition" of these lots by the city of Beverly Hills for use as a public park.

In ascertaining the market value of real property, any evidence which tends to show the physical condition of the property, the purpose for which it is employed, or any reasonable use for which it may be adapted, is competent.

In 22 C. J. 177, § 118, it is said: "The location and physical condition of real estate, and the use to which it is put may be placed before the jury, and evidence is admissible to show any probable use to which the land could reasonably be put. * * * In general any elements of value not merely speculative may be shown. On the other hand, it is permissible to show any elements legitimately tending to depreciate intrinsic value, such as flaws in the title, restrictions on the use of the premises. * * *"

In 2 Lewis on Eminent Domain (2d Ed.) 1052, § 479, it is said: "The proper inquiry is, what is its market value in view of any use to which it may be applied and of all the uses to which it is adapted."

In the case of Los Angeles City H. S. Dist. v. Hyatt, 79 Cal. App. 270, 249 P. 221, 222, a zoning ordinance was admitted in evidence without objection. On appeal it was insisted this ordinance caused the owners of the land to suffer "an unjust handicap * * * in fixing the award of damages." The court said: "There might be many considerations which if removed would enhance the value of real property, but when they exist they should be observed. It was the duty of the trial court to consider all conditions having any bearing upon valuations."

Regarding the rule with respect to a consideration of all circumstances and conditions which may reasonably affect the market value of real property, the court said in Spring Valley Water-Works v. Drinkhouse, 92 Cal. 528, 533, 28 P. 681, 683: "The rule is, that the owner is entitled to the market value of his land, to be determined in view of all the facts which would naturally affect its value. * * * 'Any existing facts which enter into the value of the land in the public and general estimation, and tending to influence the minds of sellers and buyers may be considered.' "

It has been held the owners of lots in a subdivision of a city which is included in a district subject to residential building restrictions have an easement in all of the lots of that district entitling them to insist upon the fulfillment of the restrictive conditions, and that the ignoring of the terms of such restrictions in assessing damages in proceedings in eminent domain is erroneous. Peters v. Buckner, 288 Mo. 618, 232 S. W. 1024, 17 A. L. R. 543. The admission of the zoning ordinance in the present case was therefore not erroneous.

[8] The appellants contend the court erred in admitting in evidence certain deeds to lots within the subdivision in which their land is situated, which deeds contain building restrictions similar to those contained in the zoning ordinance, limiting the use to the construction of single family dwelling houses to cost not less than a specified sum. It was stipulated that: "Each and every deed constitutes a separate and distinct contract between the original purchaser and the Rodeo Land & Water Company, in which no one else shares or has an interest. * * * They give no right to any other owner in the same tract to enjoin any violation of them. * * * The Rodeo Land & Water Company (is) the only one that can force a forfeiture." The Rodeo Land & Water Company was a party defendant in the present condemnation proceeding, but failed to appeal from the judgment. It is asserted by these appellants that the restrictions created a reversionary interest in the land in favor of the Rodeo Company and a right to declare a forfeiture of title for failure to fulfill the restrictive provisions of the deeds. The court found that the Rodeo

Company owned a reversionary right in these lots subject to forfeiture for failure to fulfill the covenants, but that the grantor "has no interest or right in any of said parcels of any value." The appellants contend this finding that the reversionary rights are without value is not supported by evidence.

There is no merit in this contention. There is no evidence that any deeds to lots were received in evidence, with the exception of those affecting the strip of land which is involved in the condemnation proceeding. Even if deeds to lots which were not included in the condemned strip were received in evidence, they were harmless. It was stipulated that no one except the Rodeo Company could complain of a failure to fulfill the restrictive provisions of the deeds. No such forfeiture ever did occur. There is no evidence that a forfeiture is likely to occur. Even if a failure to fulfill the restrictive terms of the deeds should occur entitling the grantor to declare a forfeiture, still the same restrictions were included in the zoning ordinance and could be enforced as a violation of that ordinance. The Rodeo Company is not complaining of the introduction of the deeds or the failure to allow damages to it on account of the asserted reversionary interest. Those interests are speculative and uncertain. Even though the court did determine without evidence that these reversionary interests were valueless to the Rodeo Company, that finding is harmless to the appellants. If the reversionary interests added any value to the land of these appellants, it must be assumed the court included that element of value in its award to them. The appellants, however, assert that the reversionary interests were without value. In that event, the appellants may not complain of a finding which is harmless to them. The acceptance in evidence of these deeds was neither prejudicial nor erroneous.

[9-11] There was no error in permitting the plaintiff on cross-examination to ask defendants' witnesses if they did not have knowledge of prices recently paid for property in the immediate vicinity, but not included in the condemned strip of land. These questions were competent as affecting the qualifications of the expert witnesses. East Bay Municipal Utility District v. Kieffer, 99 Cal. App. 240, 278 P. 476, 279 P. 178; 10 Cal. Jur. 364, § 70. It was also harmless to permit certain witnesses to testify to the value of the lots without including in their estimation the possible future removal of restrictions in their use. There is no satisfactory evidence of the probability of the removal of these restrictions. It appears to be speculative to assume that a change in the provisions of the zoning ordinance is likely to occur. That possibility was an issue in the case. It must be assumed the court, sitting without a jury, took in consideration all such possibilities in rendering its award.

The appellants appear to have secured a fair award of damages for the condemnation of their lots. The record discloses no reversible error.

The judgment is affirmed, appellants to recover costs.

We concur: PULLEN, P. J.; PLUMMER, J.

127 Cal.App. 315

ROSENBERG v. BULLARD et al.

Civ. 8645.

District Court of Appeal, First District, Division 2, California.

Nov. 3, 1932.

Hearing Denied by Supreme Court Dec. 29, 1932.

1. Attachment ⇐245.

Verified complaint may be treated as affidavit in ascertaining real nature of action in determining right to attachment (Code Civ. Proc. § 537).

2. Attachment ⇐7.

Cause of action for procurement of judgment by extrinsic fraud in use of false affidavit of service sounded in tort as respects right to attachment (Code Civ. Proc. § 537).

3. Attachment ⇐6.

Plaintiff, by waiving tort and suing upon implied contract, cannot, for purpose of procuring attachment, convert nature of action from tort to contract (Code Civ. Proc. § 537).

4. Attachment ⇐111.

Amended affidavits *held* to state defectively valid ground for attachment under statutory provision regarding action against nonresident defendant or one departing from state, which facts pleaded in complaint would authorize (Code Civ. Proc. § 537, subd. 3).

Amended affidavits stated that defendant was indebted to plaintiff in certain sum, amount of judgment recovered, that defendant did not reside in state and could not after due diligence be found within state, and that action was to recover sum of money as damages arising from injury to property in state in consequence of fraud and/or other wrongful acts of defendant, and that defendant was indebted upon an implied contract for direct payment of money, to wit, for moneys had and received for use and benefit of plaintiff.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

5. Attachment ⇐122(1).

Affidavit for attachment is amendable to same extent as complaint.

6. Pleading ⇐249(1).

Change of complaint by amendment from one form of action to another is not change in cause of action if based upon same transaction, and is permissible.

7. Attachment ⇐122(1).

Addition in affidavit of new ground for attachment was proper, where based upon same transaction as supported the former ground (Code Civ. Proc. §§ 537, 558).

8. Attachment ⇐229.

Where writ of attachment directed to sheriff was for sum in excess of debt claimed in either original or amended affidavit, it was properly dissolved (Code Civ. Proc. § 537).

9. Attachment ⇐232.

Writs of attachment *held* properly vacated because both amended affidavits were fatally defective in alleging different grounds of attachment in disjunctive or alternative (Code Civ. Proc. § 537).

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Jennie Rosenberg against Kate A. Bullard and others, in which writs of attachment were issued. Plaintiff recovered judgment, and defendants subsequently moved to quash the writs and to vacate the judgment, and, from an order granting both parts of the motion, plaintiff appeals.

Affirmed.

Goldman & Lieberman, of Los Angeles, for appellant.

Guy Knupp and William Ellis Lady, both of Los Angeles, for respondent.

GRAY, Justice pro tem.

Two writs of attachment, one for a demand of $27,850 and the other for a demand of $110,690, were, respectively, directed to and levied by the sheriffs of Los Angeles and Tulare counties. Thereafter a personal judgment for $65,350 was rendered against respondent, a resident of the state of Iowa, upon her default, after constructive service of summons. Heretofore respondent unsuccessfully attempted, by certiorari, to have reviewed an order denying her motion to quash service of summons and, by prohibition, to prevent further proceedings. Bullard v. Superior Court, 106 Cal. App. 513, 288 P. 629. Subsequently, respondent moved to quash the writs and to vacate the judgment upon the grounds that the issuance of the writs were unauthorized by section 537 of the Code of Civil Procedure, and that, without the levy of a valid writ, no jurisdiction was acquired to render a personal judgment against a nonresident. This appeal is taken from the order, granting both parts of the motion. Since, if the writs were issued without statutory authority, the judgment was properly vacated (Merchants' Nat. Union v. Buisseret, 15 Cal. App. 444, 115 P. 58), it is only necessary to decide whether their issuance was authorized.

The record, as certified by the trial judge, consists of the judgment roll, appellant's "affidavit for attachment against resident," two statements of her attorneys, one filed before the issuance of each writ, the two writs of attachment with the sheriffs' returns, respondent's notice of motion to quash writs and vacate judgment, the affidavit of respondent's son in support of the motion, two "amended affidavits for attachment against nonresident" of appellant, filed on day of hearing, and the order granting the motion. Respondent's preliminary objection to consideration of the amended affidavits, because their filing marks do not show their filing prior to the hearing is untenable in view of the trial judge's certificate that they form part of the record used in the proceedings.

Appellant's first affidavit stated that respondent was indebted to her in the sum of $27,850 upon an implied contract for the direct payment of money, to wit, for moneys had and received by respondent for the use and benefit of appellant and that such contract was made or is payable in this state. Both statements recited that appellant had commenced this action upon a contract for the direct payment of money, claiming in the first statement that there was due $27,850 and in the second $110,690. Clearly, appellant sought the writs under the authority of subdivision 1 of said section 537, upon the claim that the action was in contract. In his affidavit, respondent's son said that he, as his mother's agent, handled all her business in this state, including that with appellant; that the only business between the parties consisted of an exchange of properties, a loan to appellant, and a foreclosure of a mortgage securing such loan; that respondent never received any money for appellant's use and benefit; that the sixth cause of action in the complaint was a different way of pleading the fifth cause of action, but that any claim appellant has against respondent is for damages by reason of an alleged tort, as set forth in the fifth count. This affidavit squarely raised an issue as to the nature of the action, whether in contract or in tort.

In an obvious attempt to justify the writs under subdivision 3 of said section, both amended affidavits of appellant stated that respondent was indebted to her in the sum of $65,350 (the amount of the judgment); that respondent does not reside in this state and

cannot, after due diligence be found within this state; and that this action is to recover a sum of money as damages arising from injury to property in this state in consequence of fraud and/or other wrongful acts of respondent. One affidavit further stated that respondent was indebted upon an implied contract for the direct payment of money, to wit, for moneys had and received for the use and benefit of appellant. The common part of these affidavits is a clear abandonment of the first claim that the action is in contract and a substitution therefor of a claim that the action is in tort.

[1] The verified complaint, which may be treated as an affidavit, in ascertaining the real nature of the action (San Francisco Iron, etc., Co. v. Abraham, 211 Cal. 552, 296 P. 82), is unnecessarily divided into six counts. The first alleges that respondent, by use of an affidavit of personal service of summons upon appellant, known by her to be false, and, without appellant's knowledge, obtained, in the superior court of Tulare county, by default, a decree foreclosing a mortgage for $8,965.25; that, under that decree, the mortgaged property was sold to respondent for an amount which left a deficiency of $4,157.64; that a writ of execution, for such deficiency, directed to the sheriff of Los Angeles county, was levied by him upon two parcels of land owned by appellant; that the sheriff sold to respondent one parcel for $2,000 and the other for $500 and returned the writ unsatisfied in the sum of $1,500; and that respondent recorded an abstract of judgment, showing the first deficiency, in Los Angeles county. Each of the next five counts realleges the allegations of the first count. The second count further avers damages, because of the sheriff's sale of the second parcel in the sums of $20,000 (its value), $10,000 additional actual damages (the basis for which is not stated) and $5,000 punitive damages (no facts to warrant alleged). The third count, without allegations to support the same, claims damages, by reason of the sheriff's sale of the first parcel, in the sum of $10,000, plus $5,000 additional actual damages, plus $5,000 punitive damages. The fourth count, likewise without allegation of fact to support such claims, alleges damages of $10,000, by virtue of the wrongful decree, $5,000 for legal expenses in the foreclosure action, $15,000 additional actual damages and $15,000 punitive. Additionally, the fifth cause of action alleges that appellant was induced to exchange her property, located in Los Angeles county for that of respondent, situated in Tulare county, by the latter's false representation that her Tulare property was worth $30,000, whereas its real value was $3,500, thereby damaging appellant in the sum of $26,500; that respondent breached her agreement to install on the Tulare property, a pipe line of the reasonable value of $1,350, thereby damaging appellant in the sum of $1,350. The only new matter in the sixth cause is a common count for money had and received in the sum of $27,850 based upon a written agreement claimed to have been alleged in the fifth count.

[2-4] The first cause of action sounds in tort, not in contract, for its gist is plainly the procurement of a judgment by extrinsic fraud in the use of a false affidavit of service. The next three counts, by realleging all of the first count and adding only items of damages flowing from the original wrong, pleads the same cause of action. The fifth count, by way of reallegations, again sets forth the same tort, but adds thereto a cause of action in tort for fraudulent representations and a cause of action in contract for the breach of an agreement. The sixth count, also, reiterates the original tort and adds the common count which it alleges is based upon the written contract pleaded in the fifth count. But no such contract is pleaded in the preceding cause. The only contract there pleaded is an agreement to install a pipe line worth $1,350. The claim in the son's affidavit that the sixth cause is but another way of pleading the fifth and that the real nature of the action is in tort appears to be correct, especially in view of appellant's failure to deny such claim. Sparks v. Bell, 137 Cal. 415, 70 P. 281. This conclusion is further fortified by the addition, in appellant's amended affidavits, of a new ground in tort for attachment and, by the failure to rely upon the breach of agreement as to the pipe line. Appellant, by waiving the tort and suing upon an implied contract, cannot, for the purpose of procuring an attachment, convert the nature of the action from tort to contract. San Francisco Iron, etc., Co. v. Abraham, supra. Her amended affidavits state defectively a valid ground for attachment under subdivision 3 of said section 537 which the facts pleaded in the complaint would authorize. Ponsonby v. Sacramento Suburban Fruit Lands Co., 210 Cal. 229, 291 P. 167.

[5-9] Inquiry will next be made as to whether appellant's last affidavits, adding a new ground for attachment and increasing the amount of the debt claimed, are amendments, authorized by section 558 of the Code of Civil Procedure. This question seems not to have been expressly decided in this state, although "the preponderance of authority supports the view that a new ground for attachment may be substituted or added by way of amendment." 6 C. J. 158. An affidavit, which is a nullity, because of illegal administration of the oath, cannot be amended. Fairbanks, Morse & Co. v. Getchell, 13 Cal. App. 458, 110 P. 331. A bond, signed only by plaintiffs, as sureties, is void and cannot be amended. Alexander v. Superior Court, 91 Cal. App. 312, 266 P. 993. An affidavit, in an ac-

tion against two defendants, which recited that the attachment was not sought and the action was not prosecuted to hinder, delay, or defraud any creditor or creditors of the "said defendant," may be amended by changing "defendant" to "defendants" and by adding the phrase "or of either of them." Nichols v. Davis, 23 Cal. App. 67, 137 P. 41, approved in Nichols v. Davis, 168 Cal. 570, 143 P. 758; Peterson v. Beggs, 26 Cal. App. 760, 148 P. 541. It is error to dissolve an attachment upon the ground that the affidavit omitted to state that the defendant was a nonresident, where, with the court's permission, an amended affidavit supplying such omission, had been filed. Hamburger v. Halperm, 28 Cal. App. 317, 152 P. 61. A writ of attachment may be amended, by decreasing the demand so as to conform to the amount of the debt claimed in the affidavit. Tyson v. Reinecke, 25 Cal. App. 696, 145 P. 153. The affidavit of justification of the sureties, attached to undertaking, may be amended to supply an omission to state whether they were freeholders or householders. Bone v. Trafton, 31 Cal. App. 30, 159 P. 819. An affidavit, which recited that the debt was due upon an express contract for direct payment of money, to wit, for a balance due on a note and deed of trust, may be amended to show that the deed of trust had become valueless. Corum v. Superior Court, 114 Cal. App. 741, 300 P. 837. In Anaheim National Bank v. Kraemer (Cal. App.) 7 P.(2d) 765, a failure to negative the existence of any security, other than a mortgage, alleged to have become valueless, was held to be a defect remediable by amendment. Not only have faulty or defective allegations been cured, but entire omissions of essential allegations have been supplied by amendment. An affidavit is amendable to the same extent as a complaint. A. W. Busby & Son v. Elliott, 22 Ga. App. 391, 95 S. E. 1014. See, also, Republic Truck Sales Co. v. Peak, 194 Cal. 492, 507, 229 P. 331. A change of the complaint, by amendment, from one form of action to another is not a change in the cause of action, if based upon the same transaction, and is permissible. Rosemead Co. v. Shipley Co., 207 Cal. 414, 278 P. 1038; Big Boy Drilling Corporation v. Rankin, 213 Cal. 646, 3 P.(2d) 13. The addition of a new ground for attachment was proper because it was based upon the same transaction as supported the former ground.

Since the writ directed to the sheriff of Tulare county was for a sum in excess of the debt claimed in either the original or the amended affidavits, it was properly dissolved. Finch v. McVean, 6 Cal. App. 272, 91 P. 1019. Both writs were also properly vacated because both amended affidavits were fatally defective in alleging different grounds of attachment in the disjunctive or alternative. 3 Cal. Jur. 436; 6 C. J. 136; 2 R. C. L. 833. Subdivision 3 of section 537 of the Code of Civil Procedure authorizes a writ in an action against a nonresident to recover damages for injury to property caused either by (1) negligence or (2) fraud or (3) other wrongful act. Each of these three causes of injury is a separate ground. The amended affidavits state that the injury is "in consequence of fraud and/or other wrongful act." Obviously this is uncertain and ambiguous as to whether the injury is due to either or both causes.

The order is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

127 Cal.App. 365

SAN LUIS OBISPO COUNTY v. HART et al.

Civ. 8796.

District Court of Appeal, First District, Division 2, California.

Nov. 4, 1932.

1. Appeal and error ⇐1010(1).

Trial court's findings on fact questions, supported by evidence, are conclusive on appeal.

2. Appeal and error ⇐1071(6).

Court's failure to find whether accretions were subject to easement in public *held* not error, where court found public had no easement and evidence showed no appreciable accretions.

3. Appeal and error ⇐1071(6).

Failure to make special finding regarding accretions could not be complained of, where such finding would have been against complaining party, and court found complaining party had no interest in disputed premises, including accretions, if any.

4. Adverse possession ⇐13.

Adverse holder, to prevail, must establish that his possession was exclusive, hostile, and under claim of right.

5. Adverse possession ⇐68.

County, not having asserted claim to beach lots in dispute, could not claim adverse ownership thereof on ground public generally used lots for travel and picnicking.

6. Quieting title ⇐30(1).

County in action to quiet title could not represent people of state generally.

Appeal from Superior Court, San Luis Obispo County; Maurice T. Dooling, Jr., Judge.

Action by San Luis Obispo County against John E. Hart and others. From an adverse judgment, plaintiff appeals. On motion to affirm judgment.

Judgment affirmed.

A. H. Brazil, Dist. Atty., and H. J. Dubin, both of San Luis Obispo, for appellant.

Randall J. Hood, of Los Angeles, for respondents.

NOURSE, P. J.

This is a motion to affirm a judgment on the grounds that the appeal was taken for delay only and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Rule 5, § 3, Rules of Supreme Court and District Courts of Appeal.

[1] The litigation involves the title to nine blocks of land lying between Strand avenue and the mean high tide of the ocean at Oceano Beach in San Luis Obispo county. The action was one brought by the county to quiet title; the county claiming title to the disputed strip through dedication of the defendants and by adverse possession. The trial court found adversely to the county on all issues, and the sole burden of this appeal is that these findings are not supported by the evidence. The first and second points raised by appellant are related to the appellant's theory that the predecessor in interest of the respondents and certain selling agents acting for him made a dedication to the public of Strand avenue and all lands lying between the westerly boundary thereof and the ocean. On this issue the evidence is not conflicting. It overwhelmingly supports the finding of the trial court that there was no dedication, and, as dedication to the public is purely a matter of fact, there is nothing on this point to be presented on this appeal.

Appellant's third point is that, when the subdivision map was filed, the westerly line of Strand avenue was the mean high water mark of the ocean. On this issue the evidence of the witnesses as well as the photostatic copy of the subdivision map in evidence negatives appellant's claim. As this issue likewise was a pure question of fact, the trial court's findings are conclusive.

[2, 3] In its fourth point the county argues that subsequent accretions are subject to an easement in the public, and that the trial court erred in not finding on this special issue. Going back to the first point, it must be borne in mind that the trial court found that Strand avenue was never dedicated as a public street. The undisputed evidence shows that it was never improved and never used as a public street, but that on the contrary the only vehicular traffic was on the wet sands 100 feet or more to the west of the westerly street line as delineated upon the subdivision map. Appellant's claim to the accretions therefore falls because there is no base to stand on. But the evidence unmistakably demonstrates that there was no appreciable change in the line of the mean high tide since the filing of the map in 1905 to the date of the trial in January, 1930. This evidence would have demanded a finding adverse to the appellant, but the failure to make a special finding on that evidence is not available to the appellant at this time because the trial court found that the appellant did not have any right, title, or interest in any portion of the land in controversy, and this, of course, would include the accretions if there were any.

[4-6] Appellant's fifth point is that the public had acquired an easement by adverse possession. Here again the evidence is conflicting. Appellant's point rests upon the testimony that the public had used portions of the land in controversy for travel and recreation. There was no evidence that the public's possession was "exclusive, hostile, and under a claim of right," elements which an adverse holder must establish if he would prevail. Sheehan v. All Persons, 80 Cal. App. 393, 401, 252 P. 337, where cases are cited. Appellant's evidence merely discloses that some people used the land from time to time for travel and picnicking, but there is no evidence that the county, which is the legal entity suing here, ever asserted any claim by adverse possession or otherwise until this suit was filed. If the people of the state generally have any claim to or interest in the lands here in controversy, they are not asserting their claims in this proceeding, and we do not understand that the county could claim any right to represent the people here. F. A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 447, 150 P. 62.

Appellant's sixth point, claiming that the defendants are now estopped from claiming adversely to the public, rests entirely upon their assertion that the defendants had theretofore dedicated to the public the land in controversy. As the trial court found no dedication. the claim of estoppel falls because it is without a premise.

For the reasons given, none of the points raised by appellant requires argument or further consideration, and the judgment is therefore affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

127 Cal.App. 391

CHANCE v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8694.

District Court of Appeal, First District, Division 2, California.

Nov. 7, 1932.

Master and servant ⇐405(4).

Evidence *held* to justify Industrial Accident Commission's conclusion that employee's hernia was congenital, and not attributable to alleged injury or strain.

Certiorari to Industrial Accident Commission.

Proceeding for compensation under the Workmen's Compensation Act by William Chance, employee, opposed by the Pacific Felt Company, employer, and the Pacific Employers' Insurance Company, insurance carrier. Compensation was denied by the Industrial Accident Commission, and the employee appiles for certiorari to annul the award.

Award affirmed.

Otto G. Kuklinski, of San Francisco, for petioner.

A. I. Townsend, of San Francisco, for respondents.

SPENCE, J.

Petitioner seeks to annul the award of the respondent commission denying his application for compensation.

On March 31, 1932, petitioner was examined at Mount Zion Hospital and advised that he had a bilateral rupture. An operation was performed and thereafter petitioner sought compensation. The evidence showed that in March, 1932, petitioner had gone to his doctor and complained of pain in his abdomen. Petitioner believed that he had appendicitis. He was examined and found to be normal physically. Shortly thereafter he went to another doctor, who examined him and gave some prescriptions. In neither instance did petitioner advise the doctor that he had suffered any injury or strain, nor did he complain of any swelling. Neither doctor made any finding of hernia. Petitioner continued his work until March 31, 1932. He made no mention of any injury or strain when examined on that date, but after ascertaining that he had a hernia and being operated upon he thought back to a time early in March when he was lifting some wet cotton on a fork into a tank and attributed his condition to that incident of lifting the cotton.

Petitioner had been employed by the Pacific Felt Company for many years. His duties had been practically the same during all of that time. These duties included heavy work, such as lifting wet cotton in the manner above mentioned. He had not at any time reported any injury or strain to his foreman, nor had he requested medical attention from his employers. When asked why he had not given the doctors any history of injury, he said: "Because I do not absolutely remember the injury. I don't remember injuring myself. When lifting a pain came there, struck like a knife, but not so severe. I did not associate that with the trouble at all. I thought of appendicitis." His history taken at the hospital on March 31, 1932, showed that he had been suffering pains in the abdomen "for the past two months."

Upon the hearing before the commission petitioner attempted to show that his condition resulted from a definite injury or strain in the course of his employment. He testified that he felt a pain in his right groin while lifting cotton one afternoon in the early part of March, 1932. He "did not think much of it" and kept on working. He felt no pain in the left groin at that time, but testified that he did experience pain in the left groin a few days later. He made vague reference to a swelling "about that time" and "all during that period," but it does not appear that he called any swelling to the attention of the doctors who examined him. On leaving work on March, 31, he did not request medical attention from his employer as he "never dreamed it was a rupture."

The medical testimony was far from satisfactory as to the cause of petitioner's condition. This testimony indicated that his general condition was congenital in character with the *possibility* that a strain might have been the immediate cause of the condition requiring operative treatment. The medical report introduced by petitioner stated: "I do not think it possible for anyone to make a dogmatic statement about the methods by which herniæ are produced. There are world renowned champions in favor of both the congenital and the acquired methods of origin. It is possible that even with a congenital sac that the occupation of the patient may be the actual cause of the hernia. With Mr. Chance the type of work which he was consistently doing for several years which entailed constantly increased intra-abdominal tension could well be the immediate cause of his hernia even though a sac was present since birth."

Upon the evidence the respondent commission found that "the evidence does not establish that the hernia or the herniæ complained of by said employee, which forms the subject matter of this proceeding, was or were caused or exacerbated by injury arising out of and in the course of said employment," and made its award denying relief to petitioner

Petitioner seeks annulment of the award, relying entirely upon the decision of this court in Lucas v. Industrial Accident Commission (Cal. App.) 10 P.(2d) 537. We are of the opinion that the decision referred to does not sustain petitioner under the facts in the present case. In the Lucas Case the unimpeached testimony of petitioner showed that there was a definite injury or strain followed immediately by a swelling which had not previously existed. Furthermore, the petitioner there "had never complained of previous trouble in the groin." Here some of the testimony offered by petitioner tended to discredit his claim that there was a connection between his condition and an alleged injury or strain which petitioner claimed he had received in the course of his employment in the early part of March. Considering all of the evidence offered by petitioner, including that showing that he had suffered pains for two months prior to March 31st, that he first suffered pain in the right groin and some time thereafter in the left groin, and that he never mentioned any injury or strain to anyone until after March 31st, we believe that the respondent commission was justified in concluding that petitioner's condition was one of congenital origin and gradual development rather than one attributable to any alleged injury or strain in the early part of March. Under these circumstances the findings of the commission are conclusive.

The award is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

127 Cal.App. 276

KELLUM v. SAN MATEO COUNTY TITLE CO. et al.

Civ. 8622.

District Court of Appeal, First District, Division 2, California.

Nov. 1, 1932.

1. Mortgages ⇐209.

Persons consenting to act as trustees under trust deed securing note became agents of both makers and payee selecting them.

2. Bills and notes ⇐527(1).
Principal and agent ⇐123(10).

Evidence *held* to support trial court's finding that certain person was payee's agent to collect both principal of and interest on note and that escrow holder paid him amount loaned for payment thereof pursuant to his instructions.

3. Principal and agent ⇐92(2).

Successor of company, paying amount, held in escrow for payment of note to payee's agent, pursuant to latter's instructions, *held* not liable to payee therefor.

4. Limitation of actions ⇐28(2).

Action against successor of company paying money held in escrow for payment of note, to payee's agent, *held* barred by limitations two years after payment (Code Civ. Proc. § 339, subd. 1).

5. Appeal and error ⇐909(5).

Appellate court cannot assume that trustee, not alleged, proved, or found to have violated duty to protect interests of beneficiary of trust deed not in record, did not follow every call therein (Civ. Code, § 2239).

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Action by Howard C. Kellum against the San Mateo County Title Company and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

W. W. Watson, of San Francisco, for appellant.

Robert Beale, of San Francisco, for respondent E. A. Davis, as trustee and individually.

Ross & Ross, of Redwood City, for respondent San Mateo County Title Co., Geo. H. Rice Abstract Co., Virginia Whipple Henry, and J. Bayard Henry.

STURTEVANT, J.

This is an action to recover on a promissory note. From a judgment in favor of the defendants, the plaintiff has appealed.

The makers of the note claim that D. H. Ward was the agent of the plaintiff and that they paid the note, both principal and interest, to D. H. Ward. The plaintiff contends that D. H. Ward was not his agent. The trial court made findings on the subject of agency against the plaintiff. Although he divides his brief into several subheadings, the one point made on this appeal is that the findings on agency are not sustained by the evidence. Before proceeding further, it will clarify this decision to state that the plaintiff concedes that D. H. Ward was his agent to collect the interest but that he had no authority to collect the principal. On the other hand, the defendants contend that D. H. Ward was the ostensible agent of the plaintiff to collect both principal and interest. In this behalf the defendants call to our attention the following facts. For many years prior to June 4, 1925, D. H. Ward maintained an office at 333

Kearny street, San Francisco, and was transacting business under the fictitious name of Hub Investment Company. The business so conducted was that of making loans. E. A. Davis had desk room in Ward's office and used to stay in the office during the noon hour. The plaintiff had known Ward for many years and visited the office frequently. His connection was so intimate that at times when Ward was not present the plaintiff would receive moneys for Ward and make the entries in the books. At other times he would enter the office in Ward's absence, open his desk, and examine the entries in Ward's books. Prior to June 4, 1925, the defendants J. B. Henry and his wife desired a second loan on a piece of property located at Burlingame in San Mateo county. Mr. Henry had negotiated loans through Ward at other times and therefore he called upon Ward asking for a loan in the sum of $1,500. Ward put him in touch with the plaintiff. Pursuant to an appointment the plaintiff met Mr. Henry and the two went to the property at Burlingame and examined it. After making the examination the plaintiff stated that he was satisfied, stated the terms of the loan, and directed Henry to have Ward make out the papers and thereafter to pay the interest monthly to Ward for the plaintiff. He never changed that order. Acting upon those directions, Mr. and Mrs. Henry executed and delivered to Ward their promissory note for said sum on the 4th day of June, 1925. The note was payable one year after date and bore interest at the rate of 12 per cent. per annum payable monthly in advance. To secure the promissory note the Henrys executed a deed of trust to D. H. Ward and E. A. Davis as trustees selected by the plaintiff. Thereafter the makers of the note paid the interest regularly down to the 16th day of September, 1926. It was paid by checks payable directly to Ward. On or about that date the Henrys made arrangements with the Prudential Life Insurance Company for a loan sufficient in amount to pay off all of their indebtedness on the Burlingame property including the debt owing to the plaintiff. When the money was ready to be paid the Prudential Life Insurance Company opened an escrow with the George H. Rice Abstract Company. It gave that company instructions what to do and it is not claimed it violated its instructions. Thereafter the abstract company wrote to Ward advising him that the makers desired to pay off the Kellum note. In due time Ward caused a reconveyance to be executed by E. A. Davis and himself and forwarded to the abstract company. Thereafter the abstract company paid the note, both principal and interest, to Ward, recorded the reconveyance, and delivered to the Prudential Life Insurance Company the note and deed of trust made in its favor. For some months thereafter Ward paid to the plaintiff the interest on the Henry note in the same sum and in the same manner it had been paid prior to the transfer of the loan. On or about the 5th day of January, 1929, the plaintiff learned that the Henrys had paid their note. The plaintiff demanded the moneys from Ward. Ward did not make the payment but left for lands unknown. On March 27, 1930, the plaintiff commenced this action. He named as defendants Mr. and Mrs. Henry, Mr. Davis, the abstract company, and the San Mateo County Title Company, which is the successor of the George H. Rice Company. Other persons were named as defendants but were not served and the action was dismissed as to them.

After the Henrys delivered to Ward their note and trust deed, they were never informed that said documents or either of them were delivered to the plaintiff. Nevertheless the documents were so delivered and the plaintiff held the same and produced them at the time of the trial.

Defendants Mr. and Mrs. Henry.

[1, 2] In drawing his complaint the plaintiff asserts that he was pleading a claim based on a promissory note. However, he pleaded consecutively all of the facts hereinabove. Among other allegations he alleged that Ward received the payment of principal and interest from the Henrys through the abstract company but that the payment was without authority. These defendants denied that allegation and alleged affirmatively that "full payment has been made to said plaintiff of said promissory note and deed of trust by the payment to his agents, the trustees under said deed of trust." In another place they aver that said payment was so made pursuant to written instructions. The trial court found (6) "that at all the times mentioned in plaintiff's complaint D. H. Ward was the duly authorized, actual and ostensible agent of the plaintiff and acting by and with his knowledge and consent in the collection of both principal and interest on the promissory note and trust deed. * * *" In another place it found "that said George H. Rice Abstract Company did therefore pay said sum of $1,507.90 to D. H. Ward doing business in the name of Hub Investment Company pursuant to instructions of said D. H. Ward who was then and there the duly authorized agent of said plaintiff upon delivery to it by said D. H. Ward of a good and sufficient reconveyance of said deed of trust duly executed by said D. H. Ward and E. A. Davis, trustees, which said reconveyance was thereafter duly recorded. * * *" On the trial the question of authority was at once put in issue and much evidence was addressed to that issue. The uncontradicted evidence, both oral and documentary, is that both the principal and interest were paid to Ward. The question remains: Was the payment to Ward

in legal effect a payment to the plaintiff? It is admitted that the plaintiff had conferred on Ward the actual authority to collect the interest. It is also admitted that he selected Ward and Davis as trustees. By consenting to act they became the actual agents of both the Henrys and of the plaintiff. 3 Jones on Mortgages, § 2292. We think it is clear that Ward was also given certain ostensible authority, but that the case does not wholly rest on that factor. The plaintiff calls particular attention to his own testimony which was to the effect that he held both the note and trust deed when the principal was paid on the 16th day of September, 1926, and for a long time prior thereto. Thereupon he contends that the makers made the payment of the principal to Ward at their own risk. Continuing, the plaintiff claims that under the facts Ward had no authority to receive the principal and the plaintiff may now recover from the makers. He cites and relies on Schomaker v. Petersen, 103 Cal. App. 558, 285 P. 342. The case is not directly in point. Mrs. Schomaker had authorized one Hauschildt to call on the makers and ask for the payment of one item of interest. She never at any time authorized him to make any other collections. She never at any time held any communications with the makers. These defendants oppose the contention of the plaintiff, and they cite and rely on Quinn v. Dresbach, 75 Cal. 159, 16 P. 762, 7 Am. St. Rep. 138. In reply the plaintiff calls attention to the fact in that case the alleged agent had collected not only items of interest but at least one item of principal and therefore the case is not in point. We think that the plaintiff places a wrong interpretation on the decision. The court stated the facts and then it said on page 162 of 75 Cal., 16 P. 762, 763:

"The Civil Code provides that 'ostensible authority is such as a principal, intentionally or *by want of ordinary care*, causes or *allows* a third person to believe the agent to possess.' Civil Code, § 2319.

"And this is the embodiment of a well-established principle of the common law, which has been called 'the foundation of the law of agency.' 1 Pars. Cont. 44; Kasson v. Noltner, 43 Wis. 650.

"Nor does the fact that the note was not in the possession of Treadwell change the result. *The want of possession of the note is a circumstance to be considered in determining the question of authority, but is not conclusive.* The fact that the bank held the note for collection would not prevent the owner from collecting it himself. Flanagan v. Brown, 70 Cal. 254, 257, 11 P. 706." (Italics ours.)

In the case of Dover v. Pittsburg Oil Co., 143 Cal. 501, 77 P. 405, the court was again considering the authority of an ostensible agent. Commencing on page 503 of 143 Cal., 77 P. 405, 406 the court said: "This result is founded upon general elementary rules, as announced many times and in various ways in our Codes. It is made a conclusive presumption 'whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.' Code Civ. Proc. § 1962, subd. 3. Under the title on 'Agency' in the Civil Code it is said: 'An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.' Civ. Code, § 2300. Again, 'An agency may be created, and an authority may be conferred, by a precedent authorization or a subsequent ratification.' Id. § 2307. *'Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.'* Id. § 2317. 'A principal is bound by acts of his agent, under a merely ostensible authority to those persons only who have in good faith, and without ordinary negligence, incurred a liability or parted with value, upon the faith thereof.' Id. § 2334. And under the maxims of jurisprudence it is said: 'He who consents to an act is not wronged by it.' Id. § 3515. 'He who can and does not forbid that which is done on his behalf is deemed to have bidden it.' Id. § 3519. *'Where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened, must be the sufferer.'* Id. § 3543." (Italics ours.) It follows that in the instant case the evidence supported the findings, and the findings supported the judgment in favor of these defendants.

The application of the doctrine of ostensible agency is not uniform. The Supreme Court of Wisconsin so held in Loizeaux v. Fremder, 123 Wis. 193, 101 N. W. 423. But an examination of that case discloses that in Wisconsin the rule applicable to the authority of an ostensible agent in making collections of either principal or interest on commercial paper is different from the rules applicable to other agents. That rule has been followed in some of the other states. 2 Jones on Mortgages, § 1231. Nevertheless, Quinn v. Dresbach, supra, has been cited and followed in many of the states. Brown v. Guaranty Securities Co. (Tex. Com. App.) 265 S. W. 547, is one of the latest expressions on the subject. In that case the commission of appeals of Texas made an exhaustive study of the subject. Having cited passages from the text-books, the court then quoted from Quinn v. Dresbach, supra, and continuing quoted decisions from other jurisdictions to

the same effect. To the authorities there cited may be added Astoria State Bank v. Markwood, 37 S. D. 56, 156 N. W. 583; McVay v. Bridgman, 21 S. D. 374, 112 N. W. 1138; Catlin v. Reed, 141 Okl. 14, 283 P. 549, 67 A. L. R. 1410; First National Bank v. Hessell, 133 Wash. 643, 234 P. 662, 664. In the case last cited the Supreme Court of Washington quotes at length the facts and the law as stated in Quinn v. Dresbach, supra. McVay v. Bridgman, supra, is particularly helpful in two respects. It holds directly that when the deed of trust was executed Ward and Davis had actual power to receive payments and furthermore as to the collection of both principal and interest an ostensible authority may be created although the agent has not possession of the note or deed of trust.

Defendant San Mateo County Title Company.

[3, 4] For the reasons just expressed, it is also apparent that as to this defendant the judgment should be affirmed. However, as to this defendant there is an additional reason for affirming the judgment. The note by its terms was due and payable June 4, 1926. This action was commenced March 27, 1930. The defendants pleaded part of the statute of limitations, subdivision 1 of section 339, Code of Civil Procedure. The court found the facts in favor of the defendant. At this time the defendants earnestly press the defense so found. In reply the plaintiff states that he did not discover the payment had been made until December 17, 1928. The reply is insufficient. This defendant was neither a party nor privy to the contract evidenced by the promissory note. Its liability rests on its violation, if any, of some other right of the plaintiff. As to this defendant the action was on a liability not founded on an instrument in writing. Its wrong, if any, was committed when it made the payment on the 16th day of September, 1926, and the action should have been commenced as early as the 16th day of September, 1928. Code Civ. Proc. § 339, subd. 1. It thus appears that the plea of the statute of limitations was sufficient. Lattin v. Gillette, 95 Cal. 317, 30 P. 545, 29 Am. St. Rep. 115.

[5] As to the defendant E. A. Davis, it is not claimed that at any time he handled, directly or indirectly, any part of the money. We assume that it is claimed he violated some covenant contained in the deed of trust. Be that as it may the facts have not been made to appear. The deed of trust is not contained in the record and we are not advised that he violated any part of that contract. The plaintiff states that it is the duty of a trustee to diligently and faithfully protect the interests of the beneficiary and he cites and relies on Civil Code, § 2239. It is sufficient to state there was neither allegation, proof, nor finding that this defendant violated such duty. The trust deed is not before us. We may not assume that this defendant did not duly follow every call contained in that instrument.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

127 Cal.App. 385

O'NEILL v. WILLIAMS et al.

Civ. 8443.

District Court of Appeal, First District, Division 2, California.

Nov. 7, 1932.

Hearing Denied by Supreme Court Jan. 5, 1933.

1. Automobiles ⇐6.
Constitutional law ⇐299.

Statute imposing liability upon "owner" of motor vehicle for operator's negligence *held* not unconstitutional because conditional sale vendor was by definition not an "owner" (Civ. Code, § 1714¼; Const. U. S. Amend. 14; Const. Cal. art. 1, § 11).

2. Constitutional law ⇐42.

Objection that statute imposing liability upon automobile owner for operator's negligence does not give equal protection to all injured persons cannot be urged by owner (Civ. Code, § 1714¼; Const. U. S. Amend. 14; Const. Cal. art. 1, § 11).

3. Automobiles ⇐195(1).

Husband had no right to use wife's automobile without her permission, and if while using it with her permission he injures or kills another, wife is liable under statute as "owner" (Civ. Code, §§ 157, 1714¼).

[Ed. Note.—For other definitions of "Owner," see Words and Phrases.]

4. Automobiles ⇐200.

Judgment against operator of motor vehicle should be for full amount of damages sustained, and recovery against owner is not in addition to that against operator (Civ. Code, § 1714¼).

5. Judgment ⇐314.

Where judgment was entered against both owner and operator for $5,000 and $12,500, respectively, and costs, it should be modified so as to prevent collection of more than $12,500 and costs, and to show that owner's liability was statutory (Civ. Code, § 1714¼).

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Action by Mary O'Neill against Carl Williams and Gladys Williams. From judgment for plaintiff, defendants appeal.

Modified and affirmed.

Humphrey, Searls, Doyle & MacMillan and Morgan J. Doyle, all of San Francisco, for appellants.

Ford & Johnson and J. Horton Beeman, all of San Francisco, for respondent.

SPENCE, J.

Plaintiff brought this action to recover damages for personal injuries. Upon a trial by jury she recovered judgment against defendants, from which judgment defendants appeal.

The undisputed facts having reference to the questions presented on this appeal may be briefly stated. Defendant Carl Williams and defendant Gladys Williams were husband and wife. The automobile involved belonged to the defendant Gladys Williams, having been acquired by her prior to her marriage to the defendant Carl Williams. At the time of the accident defendant Carl Williams was operating said automobile on a personal pleasure trip with the knowledge and permission of his wife. It is conceded that he was not accompanied by his wife and that he was not acting as the agent of or for the purposes of his wife in operating his automobile at the time. Judgment was entered against defendant Carl Williams in the sum of $12,500 and against the defendant Gladys Williams in the sum of $5,000, said last-named sum being the limit of liability herein of said defendant Gladys Williams as owner of the car under the provisions of section 1714¼ of the Civil Code.

[1, 2] The only questions raised on this appeal involve said section 1714¼. Appellants first contend that said section is "unconstitutional and void," but we find no merit in this contention. Under this heading appellants argue that said section violates the provisions of the Fourteenth Amendment to the Constitution of the United States and the provisions of article 1, § 11, of the Constitution of this state, in that "it does not apply to all owners of motor vehicles" and "it does not give equal protection to all injured persons." The only authorities cited by appellants are Yesler v. Board of Washington Harbor Line Commissioners, 146 U. S. 646, 13 S. Ct. 190, 36 L. Ed. 1119, and Watson v. Greely, 67 Cal. App. 328, 227 P. 664; but these cases are not helpful. It has been heretofore held that said section is constitutional even though it does not apply to all vehicles. Sutton v. Tanger, 115 Cal. App. 267, 1 P.(2d) 521. Here the objection is that it does not apply to all "owners." This objection is based upon the terms of the section which provide that a vendor under a conditional sales contract shall not be deemed an "owner" for the purposes of the section until he retakes possession of the vehicle. This exemption of conditional sales vendors is no doubt based upon the distinction that such vendors have parted with the right to present possession under contracts which have for their ultimate purpose the vesting in the vendee of the legal title, together with the right to possession for all times. After the contract has been executed it is the vendee and not the vendor who has the right to grant to or withhold from others permission to use the car, and if the vendee complies with the terms of the contract, the vendor never regains the right to possession thereof. It is therefore entirely natural and reasonable that the section should make this distinction treating the conditional sales vendee rather than the conditional sales vendor as the "owner" of the car for the purposes of the section. Such classification or exemption is permissible without violating any of the constitutional provisions mentioned above. 5 Cal. Jur. 823 et seq. If there is any merit in appellants' further objection on the ground that said section does not give equal protection to all injured persons, such objection is not available to appellants. 12 C. J. 768; 5 Cal. Jur. 623.

[3] Appellants further contend that even if said section is valid, it does not apply where the owner is the wife of the operator. Appellants proceed to argue that in this state the "husband has the *legal right* to use the separate personal property of the wife without any permission or consent on her part" and therefore the "husband's use of his wife's car is a use *as a right*, and not a *permissive* use," within the meaning of the section. No authority is cited supporting appellants' premise and in our opinion it is an erroneous statement of the law. The husband's common-law rights in the separate property of the wife have been changed by statute and in this state "neither husband nor wife has any interest in the property of the other" except that "neither can be excluded from the other's dwelling." Civ. Code, § 157; 13 Cal. Jur. 818. It therefore follows that defendant Carl Williams had no legal right to use the automobile which was the separate property of the defendant Gladys Williams without her permission. It is conceded that he was operating said automobile with such permission. In our opinion said section is equally applicable where the wife of the operator owns the automobile as her separate property.

The third contention of appellants is that even assuming that the foregoing contentions are without merit "the instructions given in this case were erroneous and the judgment must be reversed." The only instructions complained of are those relating to said section 1714¼ of the Civil Code and include those given on this subject in the main charge to the jury and also those given when the ju-

ry returned and asked for further instructions. These instructions are quite lengthy. It is unnecessary, however, to set them forth in this opinion unless it appears that the error, if any, in the giving of these instructions was prejudicial to appellants. Here the jury returned a single instrument entitled "Verdict" signed in two places by the foreman as follows:

"Verdict.

"We, the jury in the above-entitled cause, find a verdict in favor of plaintiff and against defendant Carl Williams for the sum of $12,500 twelve thousand five hundred & no/100 dollars.

"Michael J. O'Connor
"Foreman.

"We, the jury further find a verdict in favor of plaintiff and against defendant Gladys Williams for the sum of $5,000.00 Five Thousand & No/100 Dollars.

"Michael J. O'Connor
"Foreman."

Following the recording of the verdict, a single instrument entitled "Judgment on Verdict" was entered which recited the verdict above set forth and adjudged that plaintiff have and recover from defendant Carl Williams the sum of $12,500 and costs in the sum of $153.40, and further adjudged that plaintiff have and recover from defendant Gladys Williams the sum of $5,000 and costs in the sum of $153.40.

[4, 5] Appellants' real attack is upon said judgment rather than upon the instructions which resulted in the verdict upon which the judgment was based. Appellants seem to treat the judgment as one awarding respondent damages in the sum of $17,500. They state that the "verdict and judgment, if any, against the operator, must be for the full amount of damages sustained by plaintiff," and, "If, in addition to that verdict and judgment for the full amount of plaintiff's damages, a further and additional verdict and judgment may be rendered in favor of plaintiff and against the owner, then plaintiff can enforce both judgments for a total recovery in excess of the damages sustained by plaintiff." There is no doubt that the judgment against the operator should be for the full amount of the damage sustained and we agree that the judgment in the present case cannot stand in its present form if its effect is to give to plaintiff the right to collect an amount in excess of that awarded to plaintiff against the operator. But here respondent concedes that she is entitled to no more than an amount equal to that awarded against the operator and that the judgment against appellant Gladys Williams is based solely upon her liability as owner under the provisions of said section 1714¼. If that appeared upon the face of the judgment, there would be no uncertainty as to the rights of the parties under the judgment and the alleged errors in the giving of instructions relating to said section could not be prejudicial to appellant. In our opinion it is only necessary to modify the judgment in the present case so as to make it appear with certainty that the liability of the appellant Gladys Williams to respondent is not entirely independent of and in addition to the liability of appellant Carl Williams to respondent, but is merely the liability imposed upon her as owner under the provisions of said section 1714¼. The nature of the judgment under that section is quite anomalous, but the situation bears some similarity to the situations discussed in People v. Love, 25 Cal. 520, People v. Rooney, 29 Cal. 642, and Heppe v. Johnson, 73 Cal. 265, 14 P. 833.

The judgment is modified by adding thereto the following provision: "Provided however that no more shall be collected by plaintiff from said defendants than an amount equal to that awarded against the defendant Carl Williams, the liability of defendant Gladys Williams, being that imposed upon said Gladys Williams, as owner, under the provisions of section 1714¼ of the Civil Code." As so modified the judgment is affirmed, and each of the parties will bear his own costs on this appeal.

We concur: NOURSE, P. J.; STURTEVANT, J.

127 Cal.App. 417

PEOPLE v. SHERMAN.

Cr. 1679.

District Court of Appeal, First District, Division 2, California.

Nov. 10, 1932.

Rehearing Denied Nov. 25, 1932.

Hearing Denied by Supreme Court Dec. 8, 1932.

1. Criminal law ⇐999(1).

Judgment commitments need not affirmatively show prisoner was present when they were pronounced, and that he had been asked if he had any legal cause why sentence should not be pronounced (Pen. Code, §§ 1207, 1480, 1484).

2. Criminal law ⇐103.

When jurisdiction of court is attacked, record evidence tending to prove jurisdiction is admissible.

3. Habeas corpus ⇐85(1).

Where petitioner for habeas corpus collaterally attacked judgment, pleading an ir-

regularity and want of jurisdiction not shown by judgment roll, excluding certified record of proceedings on arraignment and sentence, disclosing insufficiency of attack *held* error (Pen. Code, §§ 1207, 1480, 1484).

4. Habeas corpus ⇐85(1).

Petitioner for habeas corpus had burden of showing want of jurisdiction in judgments, that imprisonment was unlawful, and that he was entitled to discharge (Pen. Code, §§ 1207, 1480, 1484).

5. Criminal law ⇐999(1).

Judgment commitments valid on face, issued from court having jurisdiction, and containing required recitations, *held* "valid warrant or other written authority" making prisoner's detention lawful (Pen. Code, §§ 1207, 1480, 1484).

[Ed. Note.—For other definitions of "Warrant," see Words and Phrases.]

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Proceeding by Robert C. Sherman for a writ of habeas corpus to be directed to the Warden of the State Prison. From an order granting the writ, the People of the State of California appeal.

Reversed.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

Robert C. Sherman, in pro per.

NOURSE, P. J.

This is an appeal by the state under section 1506, Penal Code, from an order of the superior court granting petitioner a writ of habeas corpus.

Petitioner was convicted in the superior court in Los Angeles county upon two counts, each charging a felony—issuing checks without sufficient funds. Judgment was duly entered from which he appealed. The judgment was affirmed. 100 Cal. App. 587, 280 P. 708. None of the points raised in this proceeding was raised on that appeal. While confined in the state penitentiary the petitioner applied to the superior court of Marin county for a writ of habeas corpus. In his petition he alleged that the two judgment commitments under which he was held in the state prison are void because the judgments and the record concerning them failed to show that he was present when the judgments were pronounced, and also that they fail to show that he was asked whether he had legal cause why sentence should not be pronounced. The petitioner also alleged that the trial court had not at any time asked him if he had such legal cause and did not, prior to the pronouncement of the judgments, inform him of the nature of the charges against him, or of his pleas, or of the verdicts. The petitioner personally verified the petition before a notary.

The evidence of the record of the proceedings in the trial court discloses without possibility of contradiction that the petitioner in the verification of this petition committed deliberate and willful perjury. Though this is evident from the unimpeached record, the trial court in this proceeding refused to require the petitioner to prove those facts and refused to permit the state to controvert them upon the record.

The warden's return consisted of the two judgment commitments, both of which were regular and disclosed that the prisoner was lawfully confined in the state penitentiary. When this return was filed the petition became functus officio. The petitioner might have made it a traverse to the return, but he did not do so. There was nothing before the court but the two judgment commitments issued from a court having jurisdiction of the person and of the subject-matter. If jurisdiction was lacking in any respect it was incumbent upon petitioner to make his showing.

[1] On this appeal the petitioner argues that the judgment commitments should show on the face that he was present when they were pronounced and that they should affirmatively show that he had been asked if he had any legal cause why sentence should not be pronounced. The statute (section 1207, Pen. Code) does not require the judgment to state either of those matters. It does require a brief statement of the offense and that was done. The same section provided for a judgment roll to consist of: (1) The indictment or information, and a copy of the minutes of the plea or demurrer, and all rulings thereon. (2) A copy of the judgment. The minutes of the arraignment for sentence are not included in the judgment roll under this section.

[2, 3] On this appeal the case is simple. Petitioner made a collateral attack upon the judgment, pleading an irregularity and want of jurisdiction not shown by the judgment roll. The certified record of the proceedings on arraignment for sentence disclosed the insufficiency of the attack. He objected to the offer of this record in evidence on the ground that the state was thereby making a collateral attack upon the judgments. His objection was sustained. This was error because when the jurisdiction of any court is attacked, record evidence tending to prove jurisdiction is admissible. In re Chaus, 92 Cal. App. 384, 388, 268 P. 422; In re Williams, 183 Cal. 11, 14, 190 P. 163.

[4, 5] But beyond this, the burden was on petitioner to show want of jurisdiction in the judgments, and "that his imprisonment or detention is unlawful, or that he is entitled to

his discharge." Section 1484, Pen. Code. The petitioner did not meet this burden. He made no showing whatever. Hence, since the judgment commitments are valid on the face, issued from a court having jurisdiction, and recite all that the Code requires them to recite, they are the valid "warrant, or other written authority * * *" (section 1480, Pen. Code) under which the warden retains the prisoner in custody.

The order is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

127 Cal.App. 370

PEOPLE v. WHITAKER.

Cr. 2220.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1932.

1. Forgery ⇐9, 16.

Forgery is complete when one either makes or passes false instrument with intent to defraud.

2. Forgery ⇐44(1).

In prosecution for issuing forged checks, evidence *held* to support implied finding that forged checks were passed with intent to defraud.

Evidence disclosed that defendant admitted to officer that he and others were present when checks in question were made, and that he received some money from the cash realized from such checks. A handwriting expert further testified that in his opinion the face of the two checks and the indorsement on the other were penned by the same man who wrote the exemplar. The exemplar was written by the defendant.

3. Criminal law ⇐404(5).

In prosecution for forgery, exemplar by defendant of his handwriting *held* properly admitted in evidence, in absence of showing that it was involuntarily given.

4. Criminal law ⇐516.

Exemplar made by defendant of his handwriting *held* not analogous to confession, and therefore not governed by same rules.

5. Criminal law ⇐404(5).

Fact that exemplar of handwriting was made by defendant after his arrest on forgery charge *held* not to render exemplar inadmissible in evidence (Code Civ. Proc. § 1944).

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Charles L. Whitaker was convicted of forgery, and he appeals.

Judgment and order affirmed.

Orbison & Irwin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J.

Appellant and one Leo J. Kiemel were charged by information containing three counts with the crime of forgery, appellant being charged additionally with a prior conviction of the crime of forgery. He admitted the previous conviction, but pleaded not guilty and not guilty by reason of insanity on all three counts, which latter plea was subsequently withdrawn. The jury found him guilty on all three counts, pursuant to which judgment was pronounced; thereafter he made a motion for a new trial, which was denied, and he now appeals from the judgment and the order denying the motion for a new trial.

All three counts charged the issuance of forged checks drawn on the Security First National Bank of Los Angeles, Seventh and Witmer branch. The first check was drawn December 2, 1931, to the order of Lewis B. Fisher and indorsed with the name "Lewis B. Fisher." The other two checks were drawn the 5th day of December, 1931, to the order of C. O. Skaggs and indorsed with the name "C. O. Skaggs." The evidence showed that all three checks were presented by Kiemel, who cashed the first one at a meat market and the other two at grocery stores. Appellant was apprehended on or about January 7, 1932, and on the evening of that day at a police station in Los Angeles, and at the request of the police officer, Magness, he (appellant) made an exemplar of his handwriting, which writing was later introduced into evidence at his trial.

Appellant's contentions are as follows: (1) Insufficiency of the evidence to sustain the verdict; (2) error in the admission of certain evidence; and (3) error in the refusal to give certain instructions requested by defendant.

[1] Before setting forth portions of the evidence tending to show the sufficiency thereof to sustain the verdict, it should be noted that appellant's reasons for contending there was error in the refusal to give certain of his proffered instructions is based upon the same grounds he advances for his contention that there was insufficient evidence to sustain the verdict, and for that reason they will be treated together. The point he makes is this:

That, before there can be a conviction of the crime of forgery, there must be the *act of delivery* of the forged instrument by the alleged forger with the intent and purpose on the part of the alleged forger to have the same uttered or passed, or he himself must do some act showing an intent or purpose to pass or utter the forged instrument; that the mere writing of another's name, be it fictitious or otherwise, without such showing, does not prove the crime. The error in this premise is made apparent by a reading of the case of People v. Lucas, 67 Cal. App. 452, 227 P. 709, wherein the rule is laid down that the crime of forgery is complete when one either *makes* or passes *a false instrument with intent to defraud.* Thus, if there is sufficient evidence in the record to prove the making of the instruments with intent to defraud, the conviction must be upheld.

[2] In this regard it is sufficient to observe that the testimony shows that the appellant admitted to an officer that he and three others were present when the checks were made and that he received some money from the cash realized from the checks. A handwriting expert testified that in his opinion the face of the two checks dated December 5th and the indorsement on that of the one dated December 2d were written by the man who penned the exemplar, giving his reasons therefor. There can be no doubt of the sufficiency of the testimony to warrant the implied finding of the jury.

[3-5] Appellant claims that it was error to permit the introduction of the exemplar executed by appellant on the night of his arrest because there was no showing that appellant was warned that the evidence so secured might be used against him or that no threats or promises of immunity were used to secure the exemplar, and because it was obtained after his arrest. Concerning the first reason it is well to note that the officer told appellant that he wanted the exemplar "for the purpose of comparing it with checks that we had in our possession." Also there is no evidence in the record sufficiently indicating that it was involuntarily given, while there is evidence that the same was freely given without promise of reward or immunity. Furthermore, it cannot be said that the exemplar is analogous to a confession and governed by the rules pertaining to its introduction into evidence, for, as it is said in People v. Hall, 105 Cal. App. 359, 287 P. 533, 534: "It is only with respect to confessions, which are acknowledgments in express terms by a party in a criminal case, of the truth of the crime charged, that the rule prevails that preliminary proof that they were voluntary must be made before they can be admitted in evidence." See, also, People v. Ramirez, 113 Cal. App. 204, 298 P. 60, and People v. Fowler, 178 Cal. 662, 174 P. 892. The objection that it was inadmissible because it was taken after defendant's arrest is answered by the provisions of section 1944, Code of Civil Procedure, which provides that "Evidence respecting the handwriting may also be given by a comparison, made by the witness or the jury, with writings *admitted or treated as genuine by the party against whom the evidence is offered* * * * to the satisfaction of the judge." (Italics ours.)

Judgment and order affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, Justice pro tem.

127 Cal.App. 338

H. G. FENTON MATERIAL CO. v. NOBLE et al.

Civ. 963.

District Court of Appeal, Fourth District, California.

Nov. 3, 1932.

1. Highways ⇐113(5).

Highway contractor's statutory "release bond" must be liberally construed (St. 1919, p. 488, § 2, as amended by St. 1925, p. 539, § 2).

2. Highways ⇐113(5).

Materialman may recover agreed price, not merely reasonable value, of materials from surety on highway contractor's release bond (St. 1919, p. 488, § 2, as amended by St. 1925, p. 539, § 2).

3. Appeal and error ⇐1170(7).

Exclusion of opinion testimony, answers to questions already answered, and testimony on further examination of witness as to other contracts between parties to action on contractor's bond, *held* not reversible error (Const. art. 6, § 4½).

4. Appeal and error ⇐173(2).

Contention that judgment on highway contractor's bond for price of materials furnished was erroneous for want of proof that materials were used in contract work *held* unavailable on surety's appeal (St. 1919, p. 488, § 2, as amended by St. 1925, p. 539, § 2).

There was evidence justifying court's finding that materials were used on project, surety's counsel stated that his defense was largely same as that of contractor, who admitted allegation that materials were so used, and only controversy was over terms of contract and right to particular discount.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Appeal from Superior Court, San Diego County; H. G. Ames, Judge.

Action by the H. G. Fenton Material Company, a corporation, against Bert Noble, the Detroit Fidelity & Surety Company, and others. Judgment for plaintiff, and named surety company appeals.

Affirmed.

Lobdell & Watt, of Los Angeles, for appellant.

Charles C. Crouch, of San Diego, for respondent.

BARNARD, P. J.

In this action, brought under the so-called Public Works Act (Stats. 1919, p. 487), as amended (Stats. 1925, p. 538), the plaintiff sought to recover for materials furnished to a contractor for use in the construction of a public highway.

Among other things, the complaint alleged that the defendant Noble entered into a contract with the county of San Diego whereby he agreed to construct a certain paved road, and that, in accordance with the provisions of the act, the defendant Noble, as principal, and the defendant Federal Surety Company, as surety, executed a labor and material bond. It is then alleged that between June 23, 1930, and December 26, 1930, at the special instance and request of Noble, "the plaintiff furnished materials, to-wit, gravel, crushed rock, expansion joints, and reenforcing steel to be used in, and which were used and consumed in the performance of the said work, at the agreed price of, and of the reasonable value of, twelve thousand one hundred five dollars and seventy-one cents ($12,105.71)." After alleging the completion of the work, its acceptance, the filing of notice of completion, and the filing of a verified claim by the plaintiff, the complaint alleges the execution and delivery by the defendant Noble, as principal, and the defendant Detroit Fidelity & Surety Company, as surety, of a bond a copy of which is attached to the complaint. This bond is what is commonly known as a "release bond" and was given under the provisions of section 2 of this act, as amended in 1925 (St. 1925, p. 539, § 2). The defendant Detroit Fidelity & Surety Company in its answer denied, on information and belief, that the plaintiff furnished materials "at the agreed price of, and of the reasonable value of" the precise amount named in the complaint. After a trial, the court found in favor of the plaintiff, including the finding that at the special instance and request of the defendant Noble, "the plaintiff furnished the said defendant with materials, to-wit, gravel, crushed rock, expansion joints, and reenforcing steel to be used in, and which were used and consumed in the performance of the said work, which said materials were furnished at the agreed price of twelve thousand, ninety-nine dollars and one cent ($12,099.01)." From the ensuing judgment, the Detroit Fidelity & Surety Company alone has appealed.

[1, 2] The first point raised is that a materialman cannot recover from a surety, on such a bond as this, any sum in excess of the reasonable value of the materials furnished, and that the findings herein will not support the judgment since the court made no finding on the issue presented as to the reasonable value of these materials. In other words, the contention is that the surety on such a bond as this can be held only for the reasonable value of the materials furnished and not for the agreed price thereof.

The appellant relies particularly on Panama Commercial Co. v. Tingey, 26 Cal. App. 576, 147 P. 585, and Hammond Lumber Co. v. Richardson Bldg. & Engineering Co. et al., 209 Cal. 82, 285 P. 851. In the latter case, it was stated that the obligation of a surety on a bond is not to pay the agreed price of materials furnished, but the reasonable value thereof. That was a mechanic's lien case, and, in addition to the more stringent rules applied in such cases, the language used in section 1183 of the Code of Civil Procedure furnishes a basis for such a statement. A different kind of statute is under consideration here. In A. L. Young Machinery Co. v. Cupps, 213 Cal. 210, 2 P.(2d) 321, 322, the court said: "It has repeatedly been held in reference to the 1919 act, and its predecessors, that such acts are to be more liberally construed than the mechanic's lien statutes, and that the reasons for giving a limited construction to the latter are not applicable to the former. [Citing cases.]" While the first case above cited lends some support to appellant's contention, the actual decision therein went no further than holding that an action could be maintained for the reasonable value of materials furnished, and that such reasonable value had been proved. The interpretation of the decision in that case, which is contended for by the appellant here, was somewhat questioned in Prince v. Hill, 170 Cal. 192, 149 P. 578. In any event, in view of other decisions in this state, we feel that the principle apparently there expressed should not be applied in relation to a bond given in accordance with the provisions of section 2 of this act, as amended in 1925. As is pointed out in the opinion in A. L. Young Machinery Co. v. Cupps, supra, it has been held under the 1919 act and similar public work statutes that rentals, money expended, and money spent for various supplies and equipment, are all recoverable against the surety. The cases there cited in support of that proposition, and a number of other cases along that line, all indicate that a recovery was allowed on the basis of the contract price of the materials furnished. None of this line of cases seems to hold that the reasonable value of such ma-

terials must be proved in such an action, and most, if not all, of them seem to have been decided on the basis of the price of the articles furnished or the amount paid which, in effect, is an allowance of the agreed price.

While the precise question now before us seems not to have been passed upon, this statute, as it existed prior to its amendment in 1925, has been considered in several cases. In Cooley v. Freeman, 204 Cal. 59, 266 P. 545, 546, in passing upon the liability of the surety on a bond given in accordance with the provisions of section 1 of this act, it was held that the obligation in question was not affected by the terms of the original contract under which the work was done, but that the liability of the surety is controlled by the provisions of the 1919 statute. It was pointed out that the surety had agreed to pay for the materials furnished in the event the contractor failed to pay for the same, the court then saying: "The obligation of the surety is to supply to persons in the class of respondent a quick, reliable, and sufficient means of payment. No lien law is available to persons performing labor or furnishing materials which go into the construction of public works." In Williamson v. Egan, 209 Cal. 343, 287 P. 503, 506, there was involved the question of the liability of a surety upon a bond given under the provisions of section 1 of the act, for the rental value of certain mules and certain tools under an agreement as to the price. In speaking of an amendment to the complaint, which apparently based the claim upon reasonable value, the court said: "It is asserted that the purported amendment was in fact not such, but was the statement of a new cause of action. The original complaint was for the contract price of the teams and the amendment sought to add a count for the reasonable value of the rented equipment. However, recovery was allowed to the plaintiff upon the cause of action stated in the original complaint for the contract price, and the error, if any, in permitting the amendment would not affect the merits of the case nor warrant a reversal of the judgment."

In the same case it was further said: "It is contended, finally, that as against the defendant surety company the judgment is erroneous because it makes no allowance in rental for the time the teams might not have worked on the job due to rain or unfavorable conditions; that the surety is liable only for rental during the time the teams were actually used on the work of improvement. This argument is predicated upon the language of the bond obligating the surety to pay for labor, materials, etc., 'used in, upon, for or about the performance of the work.' We are not disposed to give so narrow a construction to the terms of the bond. The plaintiff did not agree to permit his teams to be present on the job, ready to work at any and all times, but without compensation in the event they could not work for a day or more or for a fractional part of a day because of conditions over which plaintiff had no control. It is not shown that the contract for rental was unreasonable, nor that it did not represent the usual terms and charge for such rental. Delays due to the weather were a part of the surrounding circumstances which entered into the cost of the improvement. The bond sued upon here is one required by statute and its provisions are to be liberally construed to effectuate its purpose."

From the language there used, it would appear that a recovery was allowed in that case, based upon the contract or agreed price of the things furnished, and in accordance with the terms of an agreement. The case of A. L. Young Machinery Co. v. Cupps, supra, also involving a bond given under the provisions of section 1 of this act, was one brought to collect the balance of the purchase price of the equipment furnished. It was held that a complaint based upon such purchase price stated a cause of action. As we read these cases involving sureties on bonds given under section 1 of this act prior to its amendment in 1925, they do not support the contention that recovery under such a bond cannot be had on the basis of the agreed price of the articles furnished.

In 1925, section 2 of this act was amended in such a manner as to provide that any one furnishing materials who had not been paid by the contractor might file a verified statement of his claim with the public body that had awarded the contract. It was then provided that, if the contractor against whom any such claim was filed should dispute the correctness or validity of any such claim, he might secure a release of the money tied up through the filing of such a claim, by furnishing a new and additional bond. The statute provides that this bond "shall guarantee the payment of any sum which said claimant may recover on said claim, together with his costs of suit in said action, if he shall recover therein, and upon the filing of said bond by and with the consent of such board, commission or officer, then such board, commission or officer shall not withhold any moneys from said contractor on account of said claim." It will be noted that the bond thus provided for has no reference to any lien, but is purely a release bond to be given to secure the release of certain moneys upon certain definite conditions. These conditions relate only to the controversy between the claimant and the principal on the bond, who is presumably the party who agreed to pay for the materials furnished. The bond relates only to that controversy, and the statute provides that it shall guarantee the payment of any sum which the claimant may recover on his claim as so filed against the contractor. The bond here in question was given pursuant to the provisions of this amendment and for the

purpose of securing the release of money which had been tied up by the filing of the respondent's claim against the defendant contractor. The bond executed by this appellant, after various recitals, contained the following: "Whereas, certain claimants and materialmen have filed stop notices and claims against the moneys to be paid to Bert Noble for the work so performed according to the above contract, and, whereas, said Bert Noble now disputes the correctness and validity of one of said claims, to-wit, the claim of the H. G. Fenton Material Company whose claim has been filed with said Board of Supervisors for the amount of $10,484.94, and, whereas, the amount of said claim that is not contested is in the sum of $3,701.55, and the contested amount is in the sum of $6,783.44. * * *"

And also the following: "The Condition of The Above Obligation is such that if the said claimant above named, whose claim is disputed by said Bert Noble, shall recover on its said claim, said principal and surety holds harmless said W. S. Heller, County Treasurer, and the said County of San Diego, California, and guarantees the payment of any sum which said claimant the H. G. Fenton Material Company may recover on said claim, together with its costs of suit in said action if it shall recover therein, not exceeding the penal amount of this said bond."

By the terms of the bond this appellant specifically guarantees the payment of any sum which the respondent might recover on its claim against the defendant Noble. Being a statutory bond, it is to be liberally construed, and since, by its terms, the surety agrees to pay any amount which may be recovered by the respondent as against the party with whom he was dealing, we think the agreed price of the materials furnished could be recovered by the respondent and that the same is within the obligation assumed by the surety. We therefore hold that the court's finding as to the agreed price of the materials furnished is sufficient to support the judgment.

A further consideration here is the fact that this case was unquestionably tried upon the issue as to what was the agreed price of the materials, and not upon any issue as to the reasonable value thereof. While this appellant denied upon information and belief the allegation in the complaint to the effect that the agreed price and the reasonable value of the materials was the amount named, its counsel stated at the outset of the trial that its defense would largely follow the defense of the defendant Noble. Counsel for the defendant Noble then stated, in effect, that he denied that the agreed price and/or the reasonable value of the materials was the sum named in the complaint and that he claimed, as a matter of fact, that "the agreed price and the reasonable value of said materials was and is" a lesser sum, which was named. While the transcript of the evidence contains 485 pages, only three lines on one page are devoted to the question of reasonable value, consisting of one question and the answer thereto. All of the rest of the transcript relates to a controversy as to whether, under the agreement between the respondent and Noble, a certain discount should be allowed and as to which of the two should pay the freight on the materials furnished, both of which matters were decided by the court in favor of the respondent. It further appears that the only question asked and answered in relation to the reasonable value of the articles furnished failed to take into consideration the conditions in controversy, and, in fact, no evidence was given as to the reasonable value of the materials at the place and under the conditions found by the court to have existed. While this appellant complains that the court has failed to find upon a material issue, namely, the reasonable value of the materials, there is no evidence in the record justifying such a finding as it is claimed should have been made, and the record shows the case was tried entirely upon the question of what was the contract between the parties. If it be conceded that an issue as to the reasonable value of these materials was raised by the pleadings, it was practically, if not entirely, abandoned at the trial, and is pressed for the first time on this appeal.

[3] The second point raised is that the court erred in excluding evidence of prior contracts between the same parties. In most of the matters referred to the court merely sustained objections to questions calling for the opinion of a witness, or to the asking again of questions which had already been answered. In the only other ruling of which complaint is made, the court merely refused to permit further examination of a witness in reference to other contracts between the parties, not involved herein. If received, the evidence would have been merely cumulative, and the entire situation was brought out by other evidence. There seems no possibility that a different ruling would have changed the result and under article 6, § 4½, of the Constitution, if any error is shown, it is not reversible.

[4] The last point raised is that the judgment is erroneous, since there is no proof that the materials furnished by the respondent were used and consumed in the public work involved in the original contract. If it be assumed that this question is material in this action upon a bond given to secure the release of money upon an agreement to pay any judgment that might be obtained against the parties securing the release of the money, we think the point can be of no avail to this appellant. The record shows that the materials

involved in this action were shipped to the site of the job, that the defendant contractor instructed the board of supervisors to pay freight charges thereon, and that the defendant contractor's cost records show that the cost of the material was included in a heading entitled "Stock Pile on this Job." The court found that the materials furnished were used and consumed in the work in question, and such evidence as there is in the record would justify the court in drawing the inference that the materials involved herein were actually used on this project. Garvey School Dist. v. Paul, 50 Cal. App. 75, 194 P. 711; Pacific Wood & Coal Co. v. Oswald, 185 Cal. 321, 197 P. 70. It further appears that appellant's counsel at the opening of the trial stated that his defense was largely the same as that of the defendant Noble. The defendant Noble not only admitted, by failing to deny, the allegation of the complaint that the materials in question were used and consumed on this particular public work, but his attorney stated at the opening of the trial that the only issues to be tried were as to the amount that should be paid for the materials in question. The record shows that in the long trial which followed the only controversy was over the terms of the contract and whether or not a particular discount should be allowed. The point is not only raised for the first time on appeal, but no error is shown.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

127 Cal.App. 405

PORTER v. RASMUSSEN et al.

Civ. 8464.

District Court of Appeal, First District, Division 2, California.

Nov. 10, 1932.

Hearing Denied by Supreme Court Jan. 9, 1933.

1. Automobiles ⇐246(60).

Instructions on res ipsa loquitur doctrine in action for injuries to street laborer, struck by driverless automobile, *held* erroneous, where complaint only alleged specific negligence in parking automobile without properly applying brakes.

2. Negligence ⇐121(2).

Res ipsa loquitur doctrine does not apply, where complaint specifically states negligence complained of.

3. Negligence ⇐121(2).

"Res ipsa loquitur doctrine" is that negligence of defendant, having full control of instrumentality by means of which accident occurred, will be inferred on proof of prima facie case by plaintiff without knowledge of exact cause of accident, in absence of adequate explanation.

[Ed. Note.—For other definitions of "Res Ipsa Loquitur," see Words and Phrases.]

4. Appeal and error ⇐1064(1).

Instruction erroneously applying res ipsa loquitur doctrine in action for injuries to street laborer, struck by driverless automobile, *held* prejudicial to defendant, in view of conflicting evidence as to whether automobile brakes were set.

There was undisputed evidence that defendant applied brakes tightly before leaving car; that defendants' witness, who entered car and found brakes set after it crashed into another car at bottom of grade and careened onto sidewalk, released brakes, backed car from sidewalk, and then left it, and that plaintiff's witnesses, who testified that brakes were not set, examined them after such occurrence.

5. Automobiles ⇐246(33).

Instruction that person required to work in street traveled by automobiles need not constantly keep lookout from behind for approaching machines *held* not erroneous.

6. Automobiles ⇐245(75).

Street laborer, protected by signs, bearing words "street closed" and "men at work," and red flags, when struck by driverless automobile, *held* not contributorily negligent as matter of law in not keeping constant lookout for vehicles approaching from behind him.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by S. M. Porter against Edna M. Rasmussen and others. Judgment for plaintiff, and named defendant appeals.

Reversed.

Myron Harris and John Jewett Earle, both of Oakland, for appellant.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff sued for personal injuries sustained when struck by an automobile of the defendant Edna M. Rasmussen. The cause was tried with a jury, which returned a verdict in favor of plaintiff in the sum of $7,902.71. The defendant Edna M. Rasmussen has appealed upon typewritten transcripts.

Plaintiff was employed by the Pacific Telephone & Telegraph Company in digging a trench on Broadway street in the city of Oakland, his duty consisting of the operation of an appliance termed an "air gun," used for

the purpose of cutting an opening in the paved surface of the street. In the block where plaintiff was employed on March 31, 1931, Broadway slopes at a grade of about 10.4 per cent. While he was so employed the appellant parked her automobile, headed southerly, at a point about 235 feet northerly of the point where plaintiff was at work; this point being approximately at the top of the grade of the street in that block. Defendant left her automobile unattended and went across the street. The automobile rolled down the grade and struck plaintiff while he was engaged in operating the air gun facing in the direction opposite from that whence the automobile proceeded.

On her appeal the appellant criticizes the instructions of the trial court applying the doctrine of res ipsa loquitur and the instructions relating to her defense of contributory negligence. She also urges that the damages are excessive.

[1-3] The point relating to the instructions covering the res ipsa loquitur doctrine is confined to the rule that when the complaint alleges a specific act of negligence and does not plead negligence in general terms, the pleader is limited to the acts pleaded and may not rely on the res ipsa loquitur doctrine. The complaint alleged "that at the time the defendants parked said automobile, as aforesaid, they so carelessly and negligently applied the brakes of said automobile as to permit the said automobile to roll down said slope * * * and to strike plaintiff * * *." In another part of the complaint it was alleged: "That by reason of the said striking and dragging of the plaintiff, as aforesaid, caused through the negligence of the defendants in failing to properly apply the brakes on said automobile, plaintiff sustained as a proximate result thereof the following injuries * * *." This is the full extent of the pleading in so far as negligence on the part of the defendants is charged. There is no general pleading and no language which would justify a claim that any negligence other than in the setting of the brakes was relied on. With the cause tried on the issue so framed, the trial judge, on request of the plaintiff, instructed the jury as follows: "If it is shown that the defendant left her automobile unattended on a street at a point where there was a considerable down-grade, and that shortly after leaving it the automobile started down the street, gained considerable momentum and ran into the plaintiff, without fault upon his part, the jury is entitled to infer and from such inference find the fact to be that the injury sustained by plaintiff was the proximate result of negligence upon the part of the defendant in the manner in which she left her car or automobile upon the street."

The error of these instructions cannot be denied. In Connor v. Atchison, T. & S. F. R. R., 189 Cal. 1, 5, 207 P. 378, 379, 26 A. L. R. 1462, our Supreme Court said: "The general rule is that, where the plaintiff in his complaint gives the explanation of the cause of the accident, that is to say, where the plaintiff, instead of relying upon a general allegation of negligence, sets out specifically the negligent acts or omissions complained of, the doctrine of res ipsa loquitur does not apply." In Marovich v. Central Cal. Traction Co., 191 Cal. 295, 306, 216 P. 595, 600, the court, applying the same rule, said: "it is clear that where the plaintiff in his complaint makes no general allegation of negligence, or no allegation of general negligence, instructions applying the doctrine of res ipsa loquitur should not be given. This must be so, for the reason that in such case the plaintiff can recover only upon proof of one or more of the specific acts or omissions alleged in his complaint." (Numerous authorities are cited to the point which need not be repeated here.) The Marovich Case was followed in McKeon v. Lissner, 193 Cal. 297, 308, 223 P. 965; Jianou v. Pickwick Stages System, 111 Cal. App. 754, 757, 296 P. 108; Ingledue v. Davidson, 102 Cal. App. 697, 702, 283 P. 837; and Damgaard v. Oakland High School District, 212 Cal. 316, 319, 298 P. 983; and, so far as we have been able to discover, has not been departed from. The reason for the rule is well expressed in the Jianou Case, where it is said (page 756 of 111 Cal. App., 296 P. 108, 109): "The very hypothesis of the doctrine [res ipsa loquitur] is that the plaintiff has no knowledge of just what caused the accident, and that, since the instrumentality by means of which the accident occurred is solely within the control of the defendant, negligence will be inferred upon proof of a prima facie case, in the absence of an adequate explanation on the part of the defendant exempting him from liability."

In defense of the instructions the respondent cites Smith v. Hollander, 85 Cal. App. 535, 538, 259 P. 958; Latky v. Wolfe, 85 Cal. App. 332, 349, 259 P. 470; Soto v. Spring Valley Water Co., 39 Cal. App. 187, 190, 178 P. 305; Vertson v. City of Los Angeles, 116 Cal. App. 114, 123, 2 P.(2d) 411; Cookson v. Fitch, 116 Cal. App. 544, 548, 3 P.(2d) 27; Burke v. Dillingham, 84 Cal. App. 736, 739, 258 P. 627; Atkinson v. United Railroads, 71 Cal. App. 82, 95, 234 P. 863; Seney v. Pickwick Stages, 82 Cal. App. 226, 230, 255 P. 279; Michener v. Hutton, 203 Cal. 604, 265 P. 238, 59 A. L. R. 480; and other cases which do not require mention. No one of the cases cited has any bearing upon the point at issue. They may be segregated into two groups, one holding that when a complaint pleads negligence in general terms and also pleads specific acts of negligence, the pleader is not deprived of his right to rely upon the res ipsa loquitur doctrine. The oth-

er group of cases cited by respondent includes those which merely hold that under certain circumstances the doctrine is applicable, and in these cases the question whether the complaint was general or specific was not raised and does not appear from the decisions. No case cited by respondent holds that in the absence of a general pleading of negligence where the complaint pleads and relies upon specific acts the pleader may without amendment avail himself of the doctrine. Authorities from other jurisdictions may be cited to this point, but, so far as the rule in this state is concerned, we are bound by the Marovich and similar cases. See note in 79 A. L. R., annotation, pages 48, 71.

[4] It cannot be doubted that the appellant suffered prejudice by the application of this doctrine through these instructions. The plaintiff manifestly relied upon the specific charge of the negligent application of the brakes. The undisputed evidence is that before leaving her car she did apply the brakes "tightly"; that the automobile had rolled down the street at an approximately uniform rate of speed, had crashed into another car parked at the bottom of the grade, and had careened upon the sidewalk; that a witness entered the appellant's car and found the brakes set; that this witness released the brakes, started the motor, and backed the car off from the sidewalk and then left the car; that *after this was done* a witness called by the plaintiff came from the place where plaintiff had been working down to the parked car and then for the first time examined the condition of the brakes. This witness testified that the brakes were not then set. Another witness joined him at the same time and gave similar testimony. It is upon the testimony of these two witnesses that plaintiff relies to prove the allegations of her complaint and to show a conflict in the testimony of those witnesses who were actually in a position to see and to know the condition of the brakes at the time in issue. There is no conflict and no evidence of negligence to support the verdict unless the inference growing out of the res ipsa loquitur doctrine is made use of.

[5, 6] We are not in accord with appellant's criticism of the following instruction relating to the duty of the plaintiff to keep a lookout: "A person who by reason of his occupation is required to work in that portion of the public street traveled by automobiles in the absence of warning to him, is not required constantly to keep a sharp lookout from behind to see whether a machine is approaching. Such a person is not required to keep a constant lookout for approaching vehicles." At the time of the injury plaintiff was working with other men at a point about 16 feet from the westerly curb of Broadway, protected by signs on sawhorses upon which were the words "street closed," "men at work," and also some red flags. Plaintiff had no reason to anticipate that an automobile would come down the hill without a driver who could see these signs of danger. To hold that a workman under such circumstances would be guilty of contributory negligence as a matter of law if he failed to keep a constant lookout for vehicles approaching him from behind would be contrary to the authorities. State Compensation Ins. Fund v. Scamell, 73 Cal. App. 285, 290, 238 P. 780.

We do not discuss the point that the verdict was excessive, as the cause must be returned for a new trial.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

127 Cal.App. 379

PEOPLE v. ANTOLIN.

Cr. 73.

District Court of Appeal, Fourth District, California.

Nov. 4, 1932.

1. Homicide ⇨319.

In manslaughter prosecution, refusing new trial for newly discovered evidence as to what became of gun, because not affecting result, *held* not abuse of discretion.

It appeared that record contained testimony of three eyewitnesses to the shooting, and evidence was overwhelming that defendant actually shot and killed deceased. Newly discovered evidence relied on related entirely to what became of gun with which deceased was killed, and such evidence would not, if offered and received and believed, have shown that defendant did not fire the shots.

2. Homicide ⇨319.

In manslaughter prosecution, record showed no abuse of discretion in denying new trial for newly discovered evidence as to what became of gun, because of absence of showing of diligence.

3. Criminal law ⇨935(1).

New trial should be granted if judge believes defendant is innocent.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Joe Antolin was convicted of manslaughter, and he appeals.

Affirmed.

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

J. Harvey Hearn, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

BARNARD, P. J.

The defendant was accused of having shot and killed one Eugenio Herrera, and, after a trial by a jury was found guilty of manslaughter. A motion for a new trial based on the ground of newly discovered evidence was denied, and from that order and from the judgment this appeal is taken.

[1] The record contains the testimony of three eyewitnesses to the shooting, and, as the trial court remarked in passing upon the motion for new trial, the evidence is overwhelming that the appellant actually shot and killed the deceased. The shooting occurred around 7 or 7:30 p. m. on May 8, 1932, in a Mexican camp on a ranch in Orange county. In addition to the evidence of the eyewitnesses who saw the shots fired by the appellant, the prosecution introduced the following evidence relating to the gun used and what became of it. The foreman of the ranch testified that on the afternoon preceding the shooting, at about 3:30 p. m., he was in a house in the camp occupied by Joe Chacon, situated a short distance from the scene of the shooting, and there saw a belt and holster with a pistol in the holster and bullets in the belt; that very shortly after the shooting he went into this house to see if the gun and belt were still there, but found they were gone; and that a few days later he went back and asked for the belt and holster and was handed the belt without the holster, the belt being "all broke and cut up." A police officer testified that he was talking with Joe Chacon when he first received information of the shooting; that he started to go up to the scene of the trouble; that Joe Chacon ran ahead of him; and that, when he arrived at the place, Chacon was not there. Another officer testified that shortly after the shooting occurred he arrived on the scene and saw the appellant "seated in the car holding his leg, and his leg was all covered with blood"; that Joe Chacon was not there when he arrived, but that he came up later; and that a little later he went to search Chacon's house and found Joe Chacon there with blood on one of his sleeves. Another witness testified that shortly after the shooting he saw Joe Chacon start to help the appellant and then take a pistol from him and run down the street with it. Another witness testified that about ten minutes after the shooting occurred she saw Joe Chacon running down the road with a pistol in his hand.

Appellant's main contention is that the court abused its discretion in refusing a new trial. The newly discovered evidence relied on related entirely to what became of the gun with which the deceased was killed, and was presented to the court on the hearing of the motion in the form of four affidavits sworn to by the father, mother, and two sisters, respectively, of Joe Chacon. These affidavits are all to the same effect, which is that during the time the shooting occurred Joe Chacon was in the company of the affiants about three hundred feet from the scene of the shooting; that, immediately following the firing of the shots, Joe Chacon, with the four affiants, left for the home of another party about one and one-half miles away "to inform him of said shooting"; that at no time on the evening of May 8, 1932, either prior to, during or after said shooting, did Joe Chacon approach or go near the place where said shooting occurred; and that there had been no pistol in the house where Joe Chacon resided since about the month of March, 1932. It might well here be said in reference to these affidavits, as was said in People v. De Angelo (Cal. App.) 9 P.(2d) 850, 853: "The trial court might easily have concluded that the statements in this affidavit were so contrary to establish facts that the witness was not worthy of credit and that the contents of the affidavit should be disregarded as inherently improbable." In addition, it is obvious that the new evidence relied on would only tend to impeach the evidence introduced by the prosecution as to what became of the gun, which in itself was merely corroborative in its nature and was not essential to a conviction. The evidence was overwhelming that the appellant did the shooting, and it was neither necessary for the prosecution to establish what became of the gun, nor would the evidence offered, if received and believed, have shown that the appellant did not fire the shots. No abuse of discretion in denying the motion is shown. People v. Webber, 149 Cal. 325, 86 P. 671; People v. Holmes, 126 Cal. 462, 58 P. 917.

[2] It further appears that the motion for a new trial was denied both on the ground that the evidence offered could not be expected to affect the result, and because no proper showing of diligence was made. The appellant especially questions the latter ground, claiming that he was completely taken by surprise, that the possibility that Joe Chacon had any connection with the case did not appear until the second and last day of the trial, and that without the evidence in reference to the actions of Chacon a conviction could not have been had. Not only does the evidence indicate that a conviction could have been had without the evidence as to what was done by Chacon, but we think the court was justified in holding that a proper showing of diligence had not been made. The appellant himself testified that he and his mother were visiting at the Chacon home, a few feet from the scene of the shooting, during the afternoon preceding; that he went over to the house where the shooting occurred about

3:30; that he went back to Chacon's house about 5 o'clock to take his mother home; and that he returned to the house where the shooting occurred about 6. On the first day of the trial the first witness called testified that he first saw the appellant on that day as he was leaving Joe Chacon's house. The evidence of the foreman of the ranch as to seeing the pistol, belt, and holster in Joe Chacon's house on that afternoon and that he found them gone immediately after the shooting was also given on the first day of the trial. It further appears that the four persons now offered as witnesses remained in the camp in question until June 27, 1932, and then moved only a few miles away. In view of all of this, with the further facts that this shooting occurred in a small camp with all parties close at hand, with so many persons knowing the connection of Joe Chacon to the case, and with the availability of all of the witnesses, it cannot be held that the court abused its discretion in denying a new trial for this reason, as well as upon the other and main ground. For the general rule governing a trial court in exercising its discretion in connection with such a motion, see 8 Cal. Jur. 442.

[3] The only other point raised is that it appears from certain remarks made at the hearing of the motion for a new trial that the trial judge believed that the appellant would not have been convicted had he set up a claim of self-defense, and therefore, in the opinion of the trial judge, an innocent man has been convicted. Without question it would have been the duty of the trial judge to grant a new trial, if, in his opinion, the appellant was innocent. However, the entire statement made by the trial judge shows that he considered the evidence overwhelming to the effect that the appellant shot and killed the deceased, and that he placed no reliance at all upon the story related by the appellant on the witness stand. The only possible significance that could be placed on the particular remarks here relied on, taken in connection with their context, is that the court believed the defendant might have had a better chance with the jury, on a theory of self-defense, had he chosen to tell the truth instead of telling a story which no one could believe. The remarks were made incidentally, no question of that sort was presented or passed upon, and no belief in the innocence of the appellant was expressed. The statement of the trial judge, in its entirety indicates what is indicated by a reading of the entire transcript, that no miscarriage of justice has occurred.

No error appearing, the judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.

127 Cal.App. 360

COCORES v. ASSIMOPOULOS et al.

Civ. 8122.

District Court of Appeal, First District, Division 1, California.

Nov. 4, 1932.

1. Pleading ⇐49.
Purpose of action is determined from pleadings and procedure incidental thereto.

2. Sales ⇐477(4).
Seller suing defaulting buyer must elect between inconsistent remedies of retaking property and retaining money theretofore paid, and suing for balance of purchase price.

3. Sales ⇐479(11).
Conditional buyer's agreement to pay interest *held* not separate contract from sale contract so as to support seller's attachment in repossessing property, and enable seller thereafter to sue for purchase price.

4. Sales ⇐479(11).
Conditional seller's election to repossess goods, restored goods to him relieving buyer of future payments, so that seller's attachment of goods for purchase price in same action was unauthorized.

Appeal from Superior Court, Santa Clara County; William Tell Aggeler, Judge.

Action by Daniel Cocores against Anthony Assimopoulos and another. From an order denying defendants' motion to set aside attachment theretofore filed in such action, defendants appeal.

Reversed.

Wm. R. Biaggi, of San Jose, for appellants.

James Snell, of Hollester, for respondent.

PARKER, Justice pro tem.

This is an appeal from an order of the trial court denying appellants' motion to quash and set aside a writ of attachment theretofore issued in the action.

It will be unnecessary to specifically detail the facts to the extent of setting forth the character of the property involved or the amounts or terms of payment. The concrete question may be presented by a more or less general statement. Plaintiff was the owner of certain personal property, consisting of fixtures and furnishings for a candy store. Defendants entered into a contract with plaintiff whereby plaintiff agreed to sell to defendants the said property. The contract was of the usual conditional sales form, providing therein the purchase price and terms of sale. The payments were to be made extending over a period of some years, a certain amount pay-

able on the first of each and every month. The unpaid purchase price was to bear interest at the rate of 7 per cent. per annum, and possession of the property was delivered to the defendants, the vendees. The contract provided that the title to the property should remain in the vendor until the full purchase price and the interest thereon had been fully paid, and further provided that should the vendees fail, neglect, or refuse to pay any installment of the purchase price or any interest at the time when due, the vendor at his option might terminate the agreement and might retake the said property. Default was made in the payments and the present action commenced.

In the complaint it is alleged that plaintiff, vendor, has elected to terminate the agreement and to take possession of said property. The complaint sets up the contract, and default, and also alleges that defendants claim some right, title, estate, or interest in said property. The prayer is that plaintiff be decreed the owner of the property and entitled to the immediate possession, and that immediate possession be awarded plaintiff. The complaint further prays for damages for the wrongful withholding. Then plaintiff prays for a judgment for the sum of $967.35 as interest due and unpaid under the agreement. A writ of replevin was issued upon the affidavit of plaintiff, and due and sufficient undertaking was filed. The affidavit supporting the writ sets forth that plaintiff is the owner of the property which is being wrongfully detained by defendants. Thereafter plaintiff, upon affidavit and undertaking, procured in the same action a writ of attachment directed against defendants. The affidavit, in the usual form, set up the claim that defendants were indebted to plaintiff in the sum and amount of $975 upon an express contract for the direct payment of money, to wit, interest on conditional contract of sale payable in this state and not secured by mortgage or lien or pledge, etc. After the issuance of the said writ of attachment, defendants moved the court below to set aside and quash the said writ, which motion, coming on regularly to be heard, was denied. We are of the opinion that the order thus made was erroneous.

[1-4] We deem it unnecessary to catalogue the contentions of the respective parties, inasmuch as the facts resolve themselves. Respondent contends that the action is not one in claim and delivery, but more in the nature of an equitable or other proceeding whereby he seeks restoration of the goods, the title thereto quieted, and also the unpaid interest which defendants agreed to pay. Yet the purpose of the action is determined from the pleadings and the procedure incident thereto. Respondent specifically elects to terminate the agreement and take possession of the property and to that end secures possession through the process of claim and delivery. The law seems well settled that the vendor under a conditional sales contract is given an election of remedies. He may terminate the contract, retake the property, and retain the money theretofore paid, or he may treat the transaction as a sale and sue for the balance of the purchase price. In Frankel v. Rosenfield, 95 Cal. App. 647, 651, 273 P. 122, 124, it is said: "There is no disputing the foregoing [this] rule, but, as said in Holt Mfg. Co. v. Ewing, 109 Cal. 353, 42 P. 435. 'These remedies being inconsistent, the plaintiff could elect which he would pursue, but he could not have both.'" When the contract is terminated and the property repossessed, the vendee is released and, obviously, thereafter the vendor cannot pursue the alternative remedy afforded by law. It is, however, the main contention of respondent that the relationship between the parties was one arising out of an express contract and this contract provided for two things; namely, the payment of the agreed purchase price and the payment of interest as something distinct and independent from the main contract. Therefore, argues respondent, the demand for interest, arising out of a separate, express contract, would support the writ of attachment. The argument savors somewhat of sophistry. A contract or agreement providing for interest payment, in the very nature of things, must be a part of some antecedent and corelated obligation. If respondent were correct, it could well be that he might repossess for unpaid interest and then retain his cause of action, independently, for the unpaid principal due. Such a construction would in no way harmonize with the law or the decisions construing the same. There was but one contract between the parties, an express contract, it is true, and the vendor could have, in the first instance, brought his action to recover the unpaid balance, including interest. In this action he could have procured an attachment to secure any judgment that might follow. But he could not, as he here attempts, split this obligation into various segments and pursue different remedies, one of which was to terminate the agreement in toto. The election to which the quoted case refers is not a partial or qualified election but is one, the effect of which is to restore to the vendor the goods contracted for and to relieve the vendee of future payments, with forfeiture of payments already made.

Respondent contends that the defendants agreed that in the event of a default plaintiff would be entitled to recover: First, the property delivered by plaintiff, and, second, interest on the unpaid purchase price. The wording of the contract is that, if the vendees should fail to pay any installment of the purchase price or interest, the vendor should have his option to terminate the contract and

repossess. This wording does not bear the construction urged by respondent. Respondent seems unmindful of the doctrine of election of remedies and argues his right to attachment solely in the abstract. We might readily concede that, if he had elected to treat the transaction as a sale, vesting title in the vendees, he could sue for the unpaid balance, with interest, and secure the writ. But he has not done this. He has definitely and unequivocally made his election and pursued the chosen remedy to the prejudice of the vendees and he will be bound thereby. To hold that the contract of purchase embodies two distinct and separate promises, such as the obligation to pay the purchase price and an obligation to pay interest as a thing apart and disconnected from the main obligation would be without support either in law or logic.

There was and is but one consideration supporting the entire contract; namely, a sale of the goods. When the sale is terminated and the vendees discharged from liability thereunder, then the entire consideration falls, both as to principal and interest. For further citation and discussion on the rule of election of remedies, reference may be had to Martin Music Co. v. Robb, 115 Cal. App. 414, 1 P.(2d) 1000.

The order appealed from is reversed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

127 Cal.App. 394

PEOPLE v. LEAVITT et al.

Cr. 2257.

District Court of Appeal, Second District, Division 2, California.

Nov. 7, 1932.

1. Witnesses ⇐306.

Privilege of not testifying where answers may incriminate is personal to witness, and defendant cannot complain because witness is compelled to answer.

2. Criminal law ⇐1043(3).

Error may not be based on improper admission of testimony, unless real ground of admissibility is indicated by proper objection.

3. Burglary ⇐41(1).

Evidence *held* to support burglary conviction.

4. Criminal law ⇐531(3), 736(2).

Where officer testified that admissions were made to him freely and voluntarily without promise of reward or immunity, court *held* justified in first instance in receiving admissions, and jury could find they were free and voluntary.

5. Criminal law ⇐671.

That jury in burglary prosecution was not excused while counsel cross-examined officer in attempt to show that admissions were not free and voluntary *held* not error.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Ralph A. Leavitt and Lance Curryer were charged with burglary, and the last-named defendant, having been tried separately and convicted, appeals.

Affirmed.

Lois B. Preston, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J.

The defendant Curryer, together with Ralph A. Leavitt, was charged by an information filed by the district attorney of Los Angeles county with the crime of burglary, Curryer also being charged with a prior conviction. Curryer admitted the prior. Separate trials were granted and he was convicted. This is an appeal from the judgment and the order denying his motion for a new trial.

As near as we are able to determine from the briefs of appellant it is contended that the judgment should be reversed on the following grounds: (1) The court erred in compelling a witness to answer certain questions over the protest of the witness that to do so might incriminate her; (2) the verdict is not supported by the evidence; and (3) the court erred in not rejecting the admissions of appellant made to certain officers and in refusing to exclude the jury while appellant's counsel was endeavoring to demonstrate that the statements were not freely and voluntarily made.

[1] Turning to the first question of whether the court committed error in compelling the witness Novella Tennis to answer certain questions over her protest that the answers might tend to incriminate her, we find no merit. Assuming a fact, which we do not find borne out by the record, to wit, that the trial judge encroached upon the constitutional rights of the witness, how can it make any difference to the appellant? The privilege of not testifying where the answers may have a tendency to incriminate is one that is personal to the witness, and in which the defendant has no voice. If the witness had testified ful-

ly without complaint, the appellant could not be heard to complain.

[2] It may be argued under this claim of error that the district attorney was permitted to cross-examine his own witness. What he did when it became apparent that the witness was inclined not to answer even the preliminary questions was to confront her with the transcript of the preliminary hearing and ask her if reading certain designated portions refreshed her recollection. No objection was interposed on the ground that the prosecutor was attempting to cross-examine or impeach his own witness. Twice an objection based upon the general ground that the answer called for was incompetent, irrelevant, and immaterial was lodged. Each time it was followed by argument which indicated that defense counsel was seeking to encourage the witness to decline to answer questions on the ground that to do so might incriminate her and to shut out the testimony in this manner. It is a familiar rule of law that error may not be predicated upon the improper admission of testimony unless the real ground of its admissibility is called to the attention of the court by the proper objection.

[3] We therefore proceed to examine the testimony to see if it be sufficient to sustain the verdict. On the evening of March 30th the home of H. C. Pratt and his wife was entered during their absence through a window, and two fox furs, a revolver, and about $4 in change stolen. On the following evening Mrs. Pratt observed two men drive slowly by her home in a light-colored Ford car with a California license number 9R–1096, gazing intently at the house, and then park about six flats away. She testified that the appellant looked like one of them, but that he was not driving —the other defendant was at the wheel. Her husband testified to like effect. On April 2d the appellant was arrested as he sat in the rumble seat of a Ford roadster, license number 9R–1096. Inside the automobile was found a banjo, several suitcases and traveling bags, a portable typewriter, a large typewriter, and a small radio. The appellant asserted ownership of one of the typewriters, the radio, and a camera, which was also in the car. The other defendant, Leavitt, and one Sandberg were standing beside the car. Leavitt said it belonged to him, but the certificate of registration showed that it belonged to a person named Katherine McCormick. About twenty minutes later the officer went into the house before which the Ford had been standing and found a miscellaneous assortment of cigars, cigarettes, chewing gum, etc., in two large suit cases under the bed. He also found one of the fox furs stolen from the Pratt home. This fur was claimed by Novella Tennis, who, together with her sister, was in the house at the time. Officer Johnson told from the witness stand about a conversation he had with appellant after the arrest. He testified with respect thereto as follows: "I told Mr. Curryer that Mrs. Pratt had identified her fur and that she had seen him and Mr. Leavitt and Mr. Sandberg * * * in the jail and she had told us that Mr. Curryer and Mr. Leavitt were the ones that she had seen in front of her place on the night of the 31st of March. He says, 'Yes, I know she recognized me.' I says, 'She also has missed another fur, a new fur and much larger.' And he told me that that fur had been sold. I asked him where and he said in the Foreman Building." The same officer also testified that later he drove past the Pratt residence with the appellant and the latter pointed out the house and the window through which they entered. He also testified of going to an office in the building mentioned together with another officer and Miss Tennis, where the larger fur was found and subsequently identified. A witness was called who testified that he bought this last fur from Miss Tennis on the afternoon of March 31st, and that the appellant looked like the man whom he saw leave their place of business with Miss Tennis. While Miss Tennis declined to answer most questions put to her, she did say she had known appellant for about four weeks prior to the robbery, and that Leavitt had a light-colored Ford roadster.

It needs no argument to demonstrate the sufficiency of the evidence to support the verdict. While it is claimed that appellant was not connected with the offense, it is patent that this assertion is without merit. Indeed, we cannot see how the jury could have arrived at any other verdict.

[4] With respect to the third and last contention it is sufficient to say that the officer who testified that the admissions were made to him swore without equivocation that the statements were freely and voluntarily made to him without promise of reward or immunity. His testimony does disclose that in a conversation on the day following that upon which admissions were made the appellant was told that they (the police) had some property that they did not have reports on and that if he would "clean up this job * * * we didn't think we would file those cases." The conversation then had related to property not involved in the charge of which appellant was convicted. It is apparent from our recital that the judge, in the first instance, was justified in receiving the statements into evidence and the jury was authorized in concluding that they were freely and voluntarily made.

Counsel says she was not permitted a voir dire examination. The fact is that she was allowed ample opportunity so to do, the trial judge saying to her, "You may examine on voir dire, make any showing you wish, as to whether or not the statement was free and

voluntary." And this statement was followed by cross-examination of the witness by defense counsel.

[5] Nor is there any merit in the contention that the jury was not excused during the examination. This argument is answered by the case of People v. Black, 73 Cal. App. 13, 238 P. 374.

Judgment and order affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, Justice pro tem.

127 Cal.App. 322

OTT v. OTT.

Civ. 8719.

District Court of Appeal, First District, Division 2, California.

Nov. 3, 1932.

Hearing Denied by Supreme Court Dec. 29, 1932.

1. Divorce ⇐303(3).

Divorced wife's remarriage constituted some showing of changed condition justifying modification of decree as to children's custody.

2. Divorce ⇐312.

Divorced husband was not prejudiced by entry of two orders modifying decree as to children's custody, where later order merely stated facts more completely.

3. Divorce ⇐303(3).

Question to divorced wife, seeking modification of decree awarding children's custody to husband, as to her relations with another man many years before, *held* improper.

4. Divorce ⇐303(3).

Divorced husband's testimony that he and divorced wife, seeking modification of decree awarding him children's custody, discussed matter before divorce, *held* irrelevant.

Appeal from Superior Court, City and County of San Francisco; Edward W. Engs, Judge.

Suit by Joseph George Ott against Maria Ott. From an order modifying a portion of a final divorce decree for plaintiff, he appeals.

Affirmed.

Joseph C. Meyerstein, of San Francisco, for appellant.

Boyd Oliver, of San Francisco, for respondent.

STURTEVANT, J.

The plaintiff has appealed from an order modifying a portion of a final decree of divorce. The plaintiff and defendant were husband and wife, but the plaintiff was given an interlocutory decree of divorce on February 6, 1925. Thereafter on February 17, 1926, the interlocutory decree was made final. Before the plaintiff applied for a divorce, he had become the owner of a certain lot which had standing thereon two flats. Before the divorce action was commenced, the plaintiff entered into a contract with his wife in which he agreed to pay her the sum of $4,000. After the divorce was granted the plaintiff occupied one flat and his former wife and their two children occupied another flat in the same building. Among other things, the interlocutory decree contained a paragraph as follows: "And it is further ordered, adjudged and decreed that the custody of the minor children of the parties hereto, be, and the same is, awarded to the plaintiff herein." That same passage was carried into the final decree. At the time the action was commenced the two minor daughters, Joan and Irene, were residing with the mother. They continued to reside with her down to the 30th day of June, 1929, at which time the plaintiff took them from her custody. Thereupon she applied to the trial court for an order modifying the divorce decree. Before making that application the mother had remarried. Her second husband is George Hinz. After their marriage Mr. and Mrs. Hinz continued for a time to occupy the flat hereinabove mentioned. Later they moved to 2125 Howard street. Mr. Hinz is a mechanic receiving $37 per week.

[1] The plaintiff earnestly contends that as the trial court made an order regarding the custody of the minors when framing the interlocutory decree and carried it into the final decree, said order should not have been modified excepting on a showing of changed conditions affecting the welfare of the children. Conceding that the point is well taken, it is a sufficient reply to state that the remarriage of the mother constituted at least some showing of changed conditions.

[2] The next point made by the plaintiff is that the trial court made two orders—one on the 7th day of October, 1929, and the second on the 14th day of October, 1929. The defendant replies that the order made on the 7th day of October, 1929, is a copy of the clerk's minutes on the subject and the document purporting to be the order of October 14, 1929, is the instrument that was in fact the order and the document signed by the trial judge. While these facts are not made clear by the record, the distinction is not controverted by the plaintiff in his reply brief. Nevertheless if the two documents are compared one with the other, it will be noticed that the one dat-

ed October 14th is but a more complete statement of the facts recited in the one dated October 7th. It is therefore clear that the rights of the plaintiff were not prejudiced.

[3] During the examination of the defendant while a witness on the stand, several questions were propounded to her about her relations with a man in Germany during the year 1924. To those questions the defendant interposed objections which were sustained by the trial court. In making those rulings the trial court did not err. The question before the court was whether the mother was a proper person at the time of the hearing of the motion and was not in any sense an investigation as to misconduct, if any, committed many years prior thereto. In re Green, 192 Cal. 714, 721, 221 P. 903.

[4] Finally, it is asserted that the plaintiff should have been allowed to prove that before the divorce was granted the mother and father discussed the custody of the children. From what has been said above it is clear that that subject was not relevant to the proceeding on trial.

The order is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

127 Cal.App. 325

OTT v. OTT.

Civ. 8720.

District Court of Appeal, First District, Division 2, California.

Nov. 3, 1932.

Hearing Denied by Supreme Court Dec. 29, 1932.

1. Divorce ⇐312½.

Divorced wife's remarriage did not relieve former husband from paying her money necessary to oppose his appeal from order modifying decree as to children's custody (Civ. Code, § 138).

2. Divorce ⇐312½.

Property settlement did not release divorced husband from liability for wife's counsel fees and costs in opposing his appeal from order modifying decree as to children's custody (Civ. Code, § 138).

3. Divorce ⇐312½.

Divorced wife's receipt of money owed her by former husband did not preclude allowance for her attorney fees and costs in opposing his appeal from order modifying decree as to children's custody.

4. Divorce ⇐■12.

Exclusion from evidence of property settlement agreement, included in record and treated as evidence, on hearing of divorced wife's motion to modify decree as to children's custody, *held* not prejudicial error.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Suit by Joseph George Ott against Maria Ott. From an order making defendant an allowance to pay her attorney fees and costs in opposing plaintiff's appeal from an order modifying a divorce decree awarding him the custody of the parties' minor children, he appeals.

Affirmed.

Joseph C. Meyerstein, of San Francisco, for appellant.

Boyd Oliver, of San Francisco, for respondent.

STURTEVANT, J.

[1] This is an appeal from an order making an allowance to the defendant wife in the sum of $300 to pay her attorney fees and costs in opposing an appeal taken in a divorce action, that is, the appeal in Ott v. Ott (Cal. App.) 15 P.(2d) 896, this day decided. It is claimed that the remarriage of the defendant terminated plaintiff's duty to pay as alimony any money necessary to enable defendant to prosecute or defend such action. Tremper v. Tremper, 39 Cal. App. 62, 177 P. 868; Hite v. Hite, 124 Cal. 389, 57 P. 227, 45 L. R. A. 793, 71 Am. St. Rep. 82. It will suffice to state that neither appeal is a proceeding "* * * to prosecute or defend such (divorce) action." The defendant had asked for an order to modify the judgment regarding the custody of the children. The welfare of the children was the sole subject of her motion. In the divorce action a final decree had been entered and that action had become a closed book as to the plaintiff and the defendant, but the rights of the children had not been finally disposed of. Civ. Code, § 138; Jacobs v. Jacobs, 68 Cal. App. 725, 230 P. 209.

[2] It is next contended that the property settlement agreement, sanctioned and approved by the trial court in the divorce action, released the plaintiff from such a claim as is here made. It has been held that it did not release a wife's claim for counsel fees and costs when acting in her own behalf. Steinmetz v. Steinmetz, 67 Cal. App. 195, 227 P. 713. For more cogent reasons it did not have that effect in a proceeding in which the welfare of the children was alone involved.

[3] The plaintiff in the next place asserts that the defendant had sufficient funds with which to defray the expenses. In this connection he calls to our attention the fact that at the time the motion appealed from was

made the plaintiff owed to the defendant $330, which he then and there offered to pay and in fact did pay after the order was made. Such facts should have been considered by the trial court, and no doubt they were. However, the mere receipt of those moneys not connected with other facts did not show an abuse of discretion by the trial court in making the order appealed from. Speck v. Speck, 92 Cal. App. 365, 267 P. 1090.

[4] On the hearing of the motion the plaintiff offered in evidence the property settlement agreement, but upon an objection being made by the defendant the objection was sustained. The document is set forth in the record. Both parties have treated it as though it had been admitted in evidence. We have done the same. If there was error in the ruling excluding it, the error was not prejudicial.

We find no error in the record.

The order is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

127 Cal.App. 434

CUADRADO v. TARVER et ux.

Civ. 4594.

District Court of Appeal, Third District, California.

Nov. 10, 1932.

1. Automobiles ⇐146.

Driver of automobile cannot assume that road is clear, and at all times must anticipate presence of others.

2. Automobiles ⇐168(1).

Automobile driver must keep machine under such control as will enable him to avoid collision with another using proper care and caution.

3. Automobiles ⇐244(13).

In action for death of boy on bicycle in collision with defendant's automobile at street intersection, evidence *held* to support finding of defendant's negligence.

4. Automobiles ⇐242(8).

Burden of proving that negligence of deceased contributed to accident was on defendant.

5. Automobiles ⇐244(46).

In action for death of boy resulting from injuries in collision between defendant's automobile and boy's bicycle, evidence *held* to support finding negativing contributory negligence.

6. New trial ⇐90.

In automobile accident case, denying new trial to defendants on ground their witness was intoxicated and gave false testimony *held* not abuse of discretion.

7. New trial ⇐102(1).

In absence of showing that defendant, with reasonable diligence, could not have discovered and produced alleged newly discovered evidence at trial, new trial was properly denied.

Appeal from Superior Court, Napa County; Hilliard Comstock, Judge.

Action by Pedro Cuadrado against John V. Tarver and wife. Judgment for the plaintiff, and the defendants appeal.

Affirmed.

King & King, of Gridley, for appellants.

R. F. Hunnewell, of Fairfield, for respondent.

PER CURIAM.

This action was brought by plaintiff for damages resulting from the death of his son, 14 years of age, who was struck and killed by an automobile operated by defendant Mabel Tarver.

The defendants are husband and wife. The said automobile was owned by the husband, and at the time of the accident was being operated by his wife with the consent and permission of the husband.

The case was tried by the court and judgment was rendered for plaintiff. Defendants filed a motion for a new trial and said motion having been denied, they have prosecuted this appeal.

Appellants set forth three grounds for reversal: (1) That the court erred in its finding that Mabel Tarver was guilty of negligence; (2) that the court erred in finding that the said son of respondent was not guilty of contributory negligence; (3) that the court erred in denying the motion for a new trial.

This accident occurred on October 10, 1930, at around 3:30 p. m., in the village of Yountville, an unincorporated town. Appellant Mabel Tarver was proceeding south on the highway at a speed variously estimated by witnesses of from 15 to 30 miles per hour. On the east side of the highway near the place where the accident happened there are a schoolhouse and school grounds, and on the west side there is a hotel building. There was a school zone sign north of the place where the accident occurred and one south of it. By what authority or by whom these signs were placed there is not disclosed. The schoolhouse was, according to the testimony of the witnesses, from 300 to 600 feet north of

the place of the accident. School had recessed some 15 minutes prior to Mabel Tarver passing it, but the pupils had not all left the school grounds. She was operating a Chevrolet automobile equipped with four-wheel brakes. When she was 50 feet from the southeast corner of the hotel building she saw the deceased come from the south end of said building on a bicycle.

The highway at this point is about 60 feet wide, the center being graveled and oiled to a width of from 22 to 27 feet. From the hotel building to the west line of the highway is 22 feet. There is a cow path 18 inches wide along the south end of said hotel building and about 10 feet south of it, and it was along this path that deceased was traveling on his bicycle, prior to entering upon the highway.

As to just what took place after deceased crossed the 22-foot space between the hotel building and the highway the evidence is conflicting. Mrs. Tarver testified that he came out from behind the building and came directly toward her; that she was driving at a speed of 15 to 20 miles per hour and he was traveling at the same speed; that to avoid hitting him she turned to the right and he immediately turned to the right. She then turned to the left and he turned to the left and was struck by the right front end of her automobile; that after the accident she drove a short distance to the left-hand side of the road and stopped and then crossed to the right-hand side and stopped and got out of her machine and came back to the scene of the accident. She further testified that, when deceased was within 18 feet of her and coming directly toward her, she put on her brakes but did not throw out her clutch. She is contradicted in material parts of her testimony by two of her own witnesses.

Edward D. Connors, one of appellants' witnesses, testified that, when deceased came from the south end of the hotel building and entered upon the highway, he was traveling at a speed of 8 or 9 miles an hour, at the same time Mabel Tarver was driving her car at a speed of 25 miles per hour; that deceased did not turn north upon said highway, but, on the contrary, crossed off toward the east or left of the highway and was turning south when struck.

Greenwald, another witness for appellants, testified that deceased traveled straight across the highway; that witness did not see the impact of the automobile with the bicycle, but heard the brakes of the automobile squeak and the noise of the bicycle striking the pavement, and the body of deceased was thrown or dragged some distance south of this point.

There was evidence that Mrs. Tarver was traveling at the rate of 25 or 30 miles per hour at the time of the accident; that after she struck deceased and his bicycle, they were carried a distance of 20 or 30 feet; that the accident occurred near the center of the highway and that the body of deceased was near its east or left side of the oiled portion; that after striking deceased, Mrs. Tarver swerved almost to the east edge of the highway and did not stop until she had gone about 100 feet from the place of the accident.

[1, 2] It has been repeatedly held that the driver of an automobile has no right to assume that the road is clear, and at all times must anticipate and expect the presence of others (Moore v. Bishop, 113 Cal. App. 25, 297 P. 580), and, in order to avoid the charge of negligence, must keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution, and, if the situation requires, he must slow up and stop (Morgan v. Los Angeles R. & G. Corp., 105 Cal. App. 224, 287 P. 152; Reaugh v. Cudahy Packing Co., 189 Cal. 335–340, 208 P. 125).

Mrs. Tarver was some 50 feet away from deceased when she saw him entering upon the highway. According to her testimony she did not throw out her clutch nor put on her brakes until she was within 18 feet of him; at this time her speed was from 25 to 30 miles per hour.

There is evidence that she did not apply her brakes until the instant of the impact and corroborative of this is the fact that her machine dragged or pushed the body of the deceased and the bicycle 20 or 30 feet, and that she did not bring her automobile to a stop until she was 100 feet from the place of the accident.

[3] We are of the opinion that there was substantial evidence to support the finding that Mrs. Tarver was guilty of negligence.

[4] The burden of proving that the negligence of deceased contributed to the accident was, of course, on appellants.

If, as testified by Mrs. Tarver, the deceased turned to the north and ran into her machine, then he was guilty of contributory negligence. But this is contradicted by her own witnesses, one of whom testified the deceased went straight across the highway, and the other that, after going upon the highway, he was turning south when struck.

[5] We are also of the opinion that appellants failed to sustain the burden of proof that deceased was negligent.

[6] The remaining contention of appellants is that the trial court erred in denying its motion for a new trial. This contention is based mainly upon the affidavit of appellants' witness Connors. In this affidavit Connors stated that, when he was called to the stand as a witness at the trial of the case, he was in an intoxicated condition and his mind was dazed and confused; that the facts to which he tes-

tified on the witness stand were not true; that in fact deceased turned north after entering upon the highway and rode his bicycle in front of the automobile.

Appellants cite the case of Rodriguez v. Comstock, 24 Cal. 85, in support of this contention. That case is not in point. In the instant case, there was no proof offered that Connors had told appellants he would swear to certain facts or to any facts whatever before testifying. Under these circumstances, it cannot be said that they were surprised by his testimony.

It appears from the record that the trial judge questioned this witness to an extent and had full opportunity of observing his conduct and his manner of testifying on the witness stand.

[7] As to the other affidavit in support of the motion for a new trial, that of Fred May, the facts stated therein are mainly cumulative, and there is no showing that appellant with reasonable diligence could not have discovered and produced the evidence of this witness at the trial.

We are of the opinion that the trial court did not abuse its discretion in denying the said motion.

The judgment is affirmed.

127 Cal.App. 420

ENNULAT v. TAYLOR.

Civ. 7487.

District Court of Appeal, Second District, Division 1, California.

Nov. 10, 1932.

1. Appeal and error ⇐933(4).

Presumption arises that order granting new trial was not based upon insufficiency of evidence to sustain verdict, where not so stated (Code Civ. Proc. § 657).

2. Trial ⇐253(4).

Instruction *held* erroneous as preventing determination by jury of whether negligent operation of automobile in which plaintiff was riding was sole proximate cause of injuries.

Instruction complained of told jury, in substance, that question as to whether driver of automobile in which plaintiff was riding was negligent should not be considered by the jury, unless they found that, at the time and place of the accident, plaintiff was exercising control over the automobile or over the driver or was engaged in a joint common enterprise with the driver.

3. New trial ⇐39.

New trial because of error in instruction on subject of negligence of operator of automobile *held* not abuse of discretion.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by A. Ennulat against Frank C. Taylor. Judgment for the plaintiff. From an order granting the defendant's motion for a new trial, the plaintiff appeals.

Order affirmed.

Tapper & Tapper and Marks & Klenke, all of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

CONREY, P. J.

The plaintiff brought this action to recover damages resulting from alleged negligence of the defendant in driving an automobile, so that said automobile collided with another automobile in which the plaintiff was riding and which was driven by one Phillippo. The denials contained in defendant's answer raised substantial issues of fact, including a denial of any negligence by the defendant. Defendant further pleaded an affirmative defense charging negligence of the driver, Phillippo, which directly, proximately, and concurrently contributed to plaintiff's alleged injuries. It was further alleged in the answer that the plaintiff and Phillippo were jointly engaged in operating and controlling the automobile in which the plaintiff was riding. In accordance with the verdict of a jury, judgment was entered in favor of the plaintiff in the sum of $5,000. Thereafter, on motion of the defendant, the court entered its order granting a new trial, from which order the plaintiff now appeals.

[1] In its order granting the motion for a new trial, the court did not state that the order was made upon the ground of insufficiency of the evidence to sustain the verdict. When the court does not so specify, "on appeal from such order it will be presumed that the order was not based upon that ground." Code Civ. Proc. § 657. Respondent contends, however, that this rule does not apply in a case where the evidence is insufficient in law to sustain the verdict. Assuming, without deciding, that this exception to the rule should be recognized on appeal from such an order, we have reached the conclusion that the evidence is, as a matter of law, sufficient to sustain the verdict. There is evidence tending to establish negligence on the part

of the defendant, and there is evidence from which the jury was authorized to find that the plaintiff was not guilty of any negligence and further to find that the plaintiff and Phillippo were not jointly engaged in operating and controlling Phillippo's automobile.

Referring to that part of the motion for a new trial which rested upon the ground that there were errors of law occurring at the trial and excepted to by the defendant, appellant in his brief has directed attention, by their numbers, to certain instructions given to the jury, which he says were the only instructions which, in presenting the motion, respondent claimed were erroneous. As to these, appellants said that they would be "discussed later," but he did not give them any further attention in that brief. If respondent had left the matter there, we would not have been called upon to examine the instructions. But respondent in his brief has specified the instructions which he claims were erroneous, and has sought to justify that contention. We therefore assume that the instructions not so specified were correct. The instructions said to be erroneous are those numbered, respectively, 7, 9, 13, 14, and 3.

[2, 3] Concerning all of the above-mentioned instructions except No. 13, it will be sufficient to say that in our opinion they contain no errors sufficiently prejudicial to the defendant to furnish adequate reasons for granting a new trial. This leaves for consideration instruction 13, which reads as follows: "The question as to whether or not Phillippo was negligent in the operation of the automobile in which plaintiff was riding is not to be considered by you, unless you find that at the time and place of the accident plaintiff was exercising control over said automobile or over Phillippo the driver or was engaged in a joint and common enterprise with said Phillippo." We do not approve the last clause as a complete statement of the law, but, of course, respondent does not address his argument to that point. His contention is that the instruction interfered with his right to have the jury determine "whether the negligent operation of the automobile in which appellant was riding, driven by Phillippo, was or was not the sole, direct, and proximate cause of the injuries sustained by appellant." On this point we think that the contention of respondent should be sustained. Assuming that the plaintiff was not negligent, and assuming also that the plaintiff was not chargeable with responsibility for any negligence of Phillippo, it remains true not only that the alleged negligence of defendant was an issue in the case, but also that the conduct of Phillippo in the management of his automobile, like the conduct of any other third person who might have been connected with the accident, would have to be considered by the jury if it had any tendency to aid in the determination of the issue concerning defendant's alleged negligence. The instruction as given to the jury was in effect an instruction that, if the plaintiff was not exercising control over said automobile or over the driver, Phillippo, or was not engaged in a joint and common enterprise with said Phillippo, then the question of whether or not Phillippo was negligent in the operation of his automobile was not to be considered at all by the jury. This was not a correct statement of the law. The court, in granting the motion for a new trial, may have recognized this error, and may have been of the opinion that the giving of this erroneous instruction, taken in connection with the evidence in the case, was prejudicial to the rights of the defendant. We are of the opinion that in reaching this conclusion there was not any abuse of discretion on the part of the trial court.

For the foregoing reason, the order granting a new trial is affirmed.

We concur: HOUSER, J.; YORK, J.

127 Cal.App. 347

In re WARD'S ESTATE.

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. ANGELUS CLOAK CO. et al.

Civ. 965.

District Court of Appeal, Fourth District, California.

Nov. 3, 1932.

Hearing Denied by Supreme Court Dec. 29, 1932.

1. Executors and administrators ⇐510(8).

Order approving executor's first account *held* not subject to attack on appeal from order approving second account.

2. Executors and administrators ⇐93(1).

Order granting executor's application to continue testatrix' business *held* unauthorized, where manner in which notice of application should be given to persons interested in estate was not ordered by court (Probate Code, § 572).

3. Executors and administrators ⇐93(1).

Executor or administrator, as such, possesses no power to continue business operations of decedent.

4. Executors and administrators ⇐93(1).

Independently of statute, testatrix could confer on executor power to continue her business operations (Probate Code, § 572).

Testatrix could confer power on executor to continue her business operations independently of Probate Code, § 572,

since the procedure prescribed therein was merely cumulative, and did not preclude testatrix from conferring on executor right to continue business without conforming to provisions of statute.

5. Action ⇐35.

Where statute creates right not existing prior thereto and prescribes proceeding to be followed in exercise thereof, such procedure is exclusive.

6. Action ⇐35.

Where statute purports to confer right which existed prior to enactment thereof, and prescribes procedure to be pursued, such procedure is merely cumulative.

7. Executors and administrators ⇐93(2).

Under will naming executor as testamentary trustee and authorizing trustee to continue testatrix' business, executor *held* authorized to continue business during time required for administration of estate.

Executor was authorized to continue testatrix' business, since the will disclosed that it was testatrix' idea that the operation of her business should be continued without interruption, and not that the operation of the going concern should be suspended during period of time required for the administration of her estate.

8. Executors and administrators ⇐93(1).

Executor authorized to continue testatrix' business *held* not liable for losses incurred, in absence of fraud or mismanagement.

9. Executors and administrators ⇐271.

Interest installments on mortgages covering realty belonging to testatrix' estate *held* payable from general assets of estate, and not merely from proceeds of incumbered property.

10. Executors and administrators ⇐510(8).

Executor's disbursements, made in accordance with order which had become final, could not be attacked on appeal from order approving subsequent account.

11. Executors and administrators ⇐510(11).

Finding that items of disbursement shown by executor's account were supported by proper vouchers *held* conclusive under evidence.

12. Executors and administrators ⇐46.

Ordinarily proceeds of life policy, beneficiary of which is some one other than executor or administrator, form no part of insured's estate.

13. Executors and administrators ⇐46.

Where executor named as beneficiary of testatrix' life policy claimed disposition of proceeds was controlled by private agreement between testatrix and executor, court *held* under duty to determine what interest, if any, estate had in proceeds.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Accounting of the Bank of America National Trust & Savings Association, executor of the last will and testament of Hattie L. Ward, deceased, in which the Angelus Cloak Company and others, creditors, filed exceptions. From an order approving the account, the creditors appeal.

Reversed in part, with directions.

Samuel A. Miller and Samuel Reichler, both of Los Angeles, for appellants.

J. L. Hofflund, of San Diego, for respondent.

AMES, Justice pro tem.

Hattie L. Ward, in her last will and testament, after making various bequests, devised all the rest, residue, and remainder of her estate to the Bank of Italy National Trust & Savings Association, now known as Bank of America National Trust & Savings Association, in trust for the uses and purposes set forth in said will, and nominated it as executor. Included as a part of the residue was a retail business, dealing in ladies' wearing apparel, known as "Pollyana the Glad Shop," located in the city of San Diego. In the trust clause of her will, which is designated as article fifth, the testatrix provided as follows: "Said Trustee shall, as long as it may in its own discretion deem expedient, practical, and desirable, maintain and operate the business known as Pollyana The Glad Shop, located at 1031 Fifth Ave., San Diego, California. If, at the time of my death, Henry P. Stelling, my son-in-law, is managing and in active control of said Pollyana The Glad Shop, and apparently competent and capable of continuing to control and manage the affairs thereof, then said Trustee shall continue said Henry P. Stelling in the management and control of said business as long as said Trustee shall continue the operation thereof. * * *"

And again in said article fifth she further provides, "Said trustee shall be the sole judge of whether or not said Henry P. Stelling is competent to continue and should continue in the control and management of said Pollyana The Glad Shop," and proceeds to give minute directions as to the management of her business and the conditions upon which Stelling shall continue in the management and control of such business, and fixes the minimum compensation to be allowed him. Hattie L. Ward died on the 31st day of July, 1930, and on the 15th day of August, 1930, the will of decedent was admitted to probate and letters testamentary were issued to respondent, which continued to operate the business of the decedent. Within the time allowed by law, the appellant creditors presented to the executor claims against the estate, which were duly allowed, approved and filed. On the 20th

day of April, 1931, the executor filed its first annual account, and included therein a request that it be authorized to continue the operation of the business known as Pollyana the Glad Shop during the further administration of the estate. On the 1st day of May, 1931, after a hearing thereon, the court made an order settling the account, and found that notice of said hearing had been duly given in conformance with the provisions of the statute, and that no requests for special notice of any steps or proceedings had been made pursuant to the provisions of section 1380 of the Code of Civil Procedure, which was then in effect. The order settling the account contained the following provision: "2. Said executor be and it is hereby authorized and directed to continue the operation of that certain women's retail apparel business known as 'Pollyana The Glad Shop', and to buy goods for the conduct of same, and sell same at retail. Said executor is authorized to purchase said goods on account. All acts heretofore done by said executor in the conduct of said business, in purchasing goods for the account of same, and in the payment of bills for goods purchased, are hereby approved."

No other or further order authorizing a continuance of the business was ever made or applied for. On the 4th day of January, 1932, the executor filed its second current report and account, from which it appears that that certain asset described in the inventory as "women's apparel business" and known as Pollyana the Glad Shop, had been fully liquidated and that all of the assets of said business had been disposed of. Appellants filed exceptions to said current report and account, and, after a hearing thereon, the court approved such report and account, and, from the order approving the same, certain creditors appeal.

[1] It is first contended by appellants that the executor had no authority to continue the operation of the business known as Pollyana the Glad Shop, and they seek to charge respondent with expenses so incurred. The first account and report is incorporated in the transcript, and contains, in itemized form, the receipts and disbursements incident to the operation of the retail business up to and including the 14th day of April, 1931, and the order settling and approving such account, having become final, is not now subject to attack.

Is the executor chargeable with the expense of operating the retail business subsequent to that time? In 1929, section 1581 of the Code of Civil Procedure was amended (St. 1929, p. 157) by adding thereto the following provision: "After notice to all persons interested in an estate, given in such manner as may be directed by the court or a judge thereof, the court may authorize the executor or administrator to continue the operation of the decedent's business to such an extent and subject to such restrictions as may seem to the court to be for the best interest of the estate and those interested therein."

[2] This identical provision was re-enacted as section 572 of the Probate Code, and was in effect at all times during this proceeding. We accede to the argument of the appellant that the purported order of May 1, 1931, was void. Probate proceedings are entirely the creature of statute, and, where a remedy is invoked pursuant to its provisions, the steps therein prescribed must be pursued. The manner in which notice of such application should be given to "persons interested" in the estate was not ordered by the court or a judge thereof. The creditors whose claims had been allowed were entitled to notice as contemplated by section 1581 of the Code of Civil Procedure (Probate Code, § 572), and we have no hesitancy in holding that the court had no jurisdiction to make the order of May 1, 1931, authorizing a continuation of the business, and, if the executor possessed such power, we must look elsewhere for its origin.

[3] It has long been held, in California, that an executor or administrator, as such, possesses no power to continue the business operations of a decedent. In the case of In re Rose, 80 Cal. 166, 22 P. 86, 87, the decedent at the time of his death was engaged in the cattle, sheep, and dairy business. His administrator continued said business and suffered a substantial loss. In holding that he had no authority to do so, the Supreme Court says: "The business was a hazardous one for an administrator to undertake, and one which the law did not require at his hands. Brenham v. Story, 39 Cal. 188. If it resulted in profit that profit belonged to the estate, and not to himself. It being a business which he was neither required nor authorized by law to conduct on behalf of the estate, if he did do it with the property and funds of the estate, and there was loss, the loss was his. Whenever an administrator undertakes to go beyond the strict line of his duty, he acts upon his own responsibility. He can derive no profit from the success of his venture, but must bear the loss of a failure. Estate of Knight, 12 Cal. 200 [73 Am. Dec. 531]. If he uses the real estate of the estate, he must account for the rental value thereof, and, if he makes a profit, account to the estate for that also. Walls v. Walker, 37 Cal. 424 [99 Am. Dec. 290]. To the same effect is Tompkins v. Weeks, 26 Cal. 51. If, as in this case, the administrator elects to assume the peril, and is permitted by the court and parties interested, without objection, to so conduct and manage the business, the liabilities growing out of the management are not claims which could be enforced against the estate by the holders thereof. They are his liabilities. He has a right to pay them out of the increase of the business; but if by so doing a loss is sustained to the es

tate, he must make the loss good. Protected from loss and from liability at all times, the estate is interested in the business only to the extent of its profits; and in them, not because it is the business of the estate, but because the administrator is using the property of the estate in a way he is not authorized to do, and, consequently, is required to account for all the profit made by its use."

In Estate of De Rome, 175 Cal. 399, 165 P. 919, 920, the court says: "As was said in the Rose Case, the administrator who assumes the perils of the management of a business belonging to an estate does not, by so doing, subject the estate to the liabilities growing out of his conduct of the enterprise. They are his liabilities and he may pay them out of the increase of the business, but if by so doing a loss to the estate is sustained he must make that loss good." The same rule has been announced in numerous cases, among which may be cited Estate of Knight, 12 Cal. 200, 73 Am. Dec. 531; Tompkins v. Weeks et al., 26 Cal. 50; Brenham v. Story, 39 Cal. 179; In re Moore, 72 Cal. 335, 13 P. 880.

[4-6] We are next confronted with the question as to whether or not, independently of section 572 of the Probate Code and its corresponding provision in the Code of Civil Procedure, the testatrix had the right to confer such power upon an executor by her will. We have been cited to no decision in California, and we have been unable to find any, in which that question has been directly determined by any of our courts of appellate jurisdiction. However, it has been said that the rule above announced, viz. that an executor or administrator possesses no power as such to continue the operation of the business of the decedent, is not absolute. In Estate of Burke, 198 Cal. 163, 244 P. 340, 341, 44 A. L. R. 1341, it is said: "In all such cases it is held that the administrator, or executor, except in rare and special instances, is under no obligation or duty to continue the business of the deceased." In Riedy v. Bidwell, 70 Cal. App. 552, 233 P. 995, 996, it is said: "The law appears to be well settled that it is no part of the duty of an executor to carry on for the benefit of the estate a business formerly conducted by the testator in his lifetime. Exceptions to such rule may exist where the will of the testator expressly creates the power so to do."

Although this statement is dicta, it recognizes the rule which obtains in other jurisdictions. In Furst v. Armstrong, 202 Pa. 348, 51 A. 996, 90 Am. St. Rep. 653, it is said: "It is unquestionably true that an executor cannot subject any assets of the estate to liability for trade debts unless the will of the testator confers the authority. His duties as executor do not go to that extent. But it is settled that a testator may by his will empower his executor to carry on the business in which he is engaged at the time of his death, and when he does so he subjects the assets of his estate to debts contracted for that purpose."

From numerous authorities recognizing the same rule we will cite the following: Roberts v. Hale, 124 Iowa, 296, 99 N. W. 1075, 1 Ann. Cas. 940; In re Ennis' Estate, 96 Wash. 352, 165 P. 119; Eufaula National Bank v. Manassas, 124 Ala. 379, 27 So. 258; 24 C. J. 58.

If, then, prior to the amendment to section 1581 of the Code of Civil Procedure, a testator had the power to confer upon the executor the right to continue his business after his death, is the procedure prescribed by that amendment an exclusive remedy, or may an executor exercise the right which previously existed, without conformity to its provisions? We think that the rule is, where a statute creates a right that did not exist prior to its enactment, and prescribes the proceedings to be followed in the exercise of such right, that such procedure is exclusive, but where, on the other hand, the statute purports to confer a right which was in existence prior to its enactment, and prescribes the procedure to be pursued, that such procedure is merely cumulative, and that the party upon whom such pre-existing right is apparently conferred may, at his option, pursue the steps prescribed by the statute, or adopt the pre-existing remedy. From the earliest times this doctrine has been recognized and adopted by the courts of this state. In People v. Craycroft, 2 Cal. 243, 56 Am. Dec. 331, the court says: "Where a right is given, and a remedy provided by statute, the remedy so provided must be pursued. It is true, if the right existed at common law, the plaintiff might pursue either remedy, the statutory one being regarded merely as cumulative." The rule is again stated in Ward v. Severance, 7 Cal. 126, that, when a right is introduced by statute, the party complaining of its violation is confined to the statutory remedy, so far as the courts of common law are concerned. If, however, the right existed at common law, the remedy provided by statute is merely cumulative. In the case of Gilbert v. Peck, 162 Cal. 54, 121 P. 315, Ann. Cas. 1913C, 1349, the defendant leased certain premises to the plaintiff, who, it was alleged, conducted a nuisance thereon. Defendant landlord entered upon the premises and removed plaintiff's personal property therefrom, and for this entry plaintiff sued for damages. At the trial defendant objected to the introduction of any evidence on the ground that the plaintiff's exclusive remedy was an action for forcible entry and detainer under the provisions of section 1159 et seq. of the Code of Civil Procedure. The court says, at page 59 of 162 Cal., 121 P. 315, 317: "The complaint stated a good cause of action for the conversion of personal property. If there were also allegations of facts which would have warranted a summary proceeding under the code sections referred to, this would not bar the plaintiff of her right to maintain an ordinary action for damages

The Code itself does not undertake to make the forcible entry proceeding the exclusive remedy where facts showing a cause of action independent of the Code provisions are alleged, and we are cited to no authority supporting appellant's claim in this regard." See, also, County of Monterey v. Abbott, 77 Cal. 541, 18 P. 113, 20 P. 73; 1 Cal. Jur. 383; State of California v. Poulterer, 16 Cal. 515; Blaine County Canal Co. v. Hansen, 49 Idaho, 649, 292 P. 240; Hickman v. Kansas City, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684; Billmyer Lumber Co. v. Merchants' Coal Co., 66 W. Va. 696, 66 S. E. 1073, 26 L. R. A. (N. S.) 1101. And the same rule obtains whether the pre-existing right was founded on common law or upon statute. Colorado Milling, etc., Co. v. Mitchell, 26 Colo. 284, 58 P. 28; Burnham v. Onderdonk, 41 N. Y. 425; Hickman v. Kansas City, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684.

[7] Appellants next contend that the only authority conferred by the will on the Bank of Italy National Trust & Savings Association to continue the operation of the business of deceased is vested in it, if at all, not in its capacity as executor of the will, but in its capacity as testamentary trustee. That authority, if it is such, appears only in the residuary bequest in article fifth above quoted.

In Estate of Phelps, 179 Cal. 703, 178 P. 846, 848, the question involved was whether or not a person who was acting both as executor and trustee under the will, was acting in his capacity as trustee or in his capacity as executor. The court quotes with approval from 1 Woerner on Administration, 504, as follows: "The appointment to a trust under the will, not essential to the office of an executor, does not constitute the trustee an executor according to the tenor, for the offices of an executor and of a trustee are distinct, and may be vested in different persons, and when they are vested in the same person, the functions of each are nevertheless to be performed by him in the respective capacity, the probate court having jurisdiction over him in the one, but not in the other, capacity; and an administrator de bonis non cum testamento annexo, appointed after the death of an executor who was also appointed trustee in the will, does not virtute officii succeed to the trust. But where the testator uses the word 'trustee,' and imposes duties involving the functions of an executor, this will be held a good appointment as executor."

In Creamer v. Holbrook, 99 Ala. 52, 11 So. 830, 831, which is cited in Estate of Phelps, supra, the Supreme Court of Alabama said: "The fact, however, that a testator by his will devolves such a special personal trust or power upon the person who is named as executor does not necessarily oust the jurisdiction of the probate court over the administration of the estate. If the trust or power is not such that its execution is involved in the discharge of the duties of an ordinary executor, so that the functions of the one person in his two characters as executor and as trustee are not so blended and mingled that they cannot be distinguished or separated the one from the other, then the probate court has jurisdiction over the executor in reference to his purely executorial functions, though it has no power over him in his other independent capacity, as a trustee under the will; but if such special trust or power is attached to the executorial office or character, and is not personal to him who is named as executor and trustee, then the jurisdiction of the probate court is ousted, as to the administration of a trust of which only a court of equity can take cognizance."

The same distinction is recognized in Goad v. Montgomery, 119 Cal. 552, 51 P. 681, 63 Am. St. Rep. 145, and Bemmerly v. Woodard, 136 Cal. 326, 68 P. 1017.

[8] The record discloses the fact that the testatrix was the owner of a retail mercantile business in a populous city, involving an investment which constituted a considerable portion of her estate. The items in the second current account would be an indication of the volume of business conducted by the executor, and it would appear therefrom, and from all the facts in the case, that her establishment was a going concern, engaged in conducting an active mercantile business. She specifically directs that Henry P. Stelling shall continue in the management and control of the business, and again provides that the trustee or executor, if that was her intention, should be the sole judge as to Stelling's competency to continue, and as to whether or not he should continue in the control and management of said business. From a reading of article fifth in its entirety, the idea that the testatrix therein conveyed was that the operation of her business should be continued without interruption, and we cannot conceive from the reading of that article that she intended that the operation of this going concern should be suspended during the period of time required for the administration of her estate. If, then, the executor was authorized to continue the operation of the business, it would not be liable for losses incurred, in the absence of fraud or mismanagement, and neither of these is alleged nor proved.

[9] Appellants then object to the payment of certain installments of interest on mortgages on certain real property belonging to the estate out of the general assets of the estate, but contend that such payments can be made only from the proceeds of the incumbered property. This contention, however, is answered in the case of Estate of McDougald, 146 Cal. 196, 79 P. 875. In that case the Supreme Court, in construing section 1645 of the Code of Civil Procedure, says at pages 201,

202, of 146 Cal., 79 P. 875, 877: "The word 'proceeds' as here used does not include the rents of the property accruing before the sale, at least where the rents, issues, or profits of the property are not included in the mortgage. The court, therefore, properly held that the rents were general assets of the estate, on which the mortgage was not a lien and in which it was entitled to no preference. The preference given to mortgage debts by section 1643 is by section 1644 clearly limited to the proceeds arising from the property mortgaged, either upon a foreclosure sale, or a sale by the administrator under section 1569."

[10] Appellants next object to certain items of disbursement, as shown in said account, to Nina May Stelling, on the ground that the same were not debts of the decedent nor charges against the estate, and upon the further ground that said estate was insolvent. By the fourth article of the will of decedent she bequeathed to her daughter Nina May Stelling the sum of $150 per month for the support and maintenance of herself and children pending the settlement and distribution of the estate, and directed her executor to pay the same "as soon as may be" after her death. It appears from the transcript that on the 30th day of January, 1931, an order was made by the court directing the executor to distribute to said Nina May Stelling the sum of $150 per month from the date of the death of decedent and until the final settlement and distribution of the estate, together with a certain automobile which was bequeathed to Mrs. Stelling in the will of decedent, and exacted from her a bond in the sum of $1,000, which was filed. The order recites the filing of the petition by Mrs. Stelling, and finds that notice of said hearing had been given in the manner and form required by law. Said order has become final, and appellants cannot now attack the same by filing exceptions to the current account.

[11] Appellants further excepted to the account on the ground that "no vouchers are on file for any of the items enumerated in said items of disbursement." But one voucher has been incorporated into the record as an exhibit, and it appears to be a receipt in due form. Furthermore, the trust officer of the executor testified that receipts were on file, and the court found that the items were supported by proper vouchers. In the absence of further evidence, the finding of the trial court is conclusive.

Another exception filed by the creditors to the account current was upon the alleged ground that the executor failed and neglected to charge itself with the sum of $10,000 received by it upon a policy of insurance on the life of deceased and that the executor failed and neglected to report that item to the court and to include the same among the assets of the estate. No such item appears in the inventory of the assets of the estate, nor is it appraised therein. Its existence is first disclosed in the first current account, in which the executor reports: "With the money at present on hand in said estate, together with the balance in a certain special trust fund, of which your Executor is Trustee, and which your Executor is authorized to use for such purpose, your Executor has sufficient money on hand to pay twenty-five per cent. (25%) on the claims presented, allowed, and unpaid in the foregoing account." And in the order of May 1, 1931, settling said account, the following is incorporated: "Said executor is authorized and directed to pay twenty-five per cent. of the claims presented, allowed, and unpaid, as set forth in its said account, from the funds of said estate or from the special trust fund referred to therein, or from both of said funds, as said executor may see fit." Again, in the current account under date of May 13, 1931, the following entry appears: "Bank of America, Transfer of Funds from Private Trust 854, $6,183.48." When interrogated at the hearing upon the current account, the trust officer of the executor testified that the decedent carried a life insurance policy in the sum of $10,000, in which the Bank of America National Trust & Savings Association, Trustee, was named as beneficiary; that the sum of $10,000 was collected upon said policy; that, after the hearing of the first account current, the court having ordered 25 per cent. of the claims of the general creditors to be paid, the executor transferred the said sum of $6,183.48 to the assets of the estate to be used for the purpose of paying the claims of such creditors, and the same was actually used for that purpose. He further testified that the balance of the $10,000 was not accounted for to the court because it was not a part of the assets of the estate, and that he did not know what disposition had been made of said balance; that it was a private arrangement between deceased and the bank with regard to an insurance trust.

A subpœna duces tecum was issued and served upon the bank requiring it to produce its records with respect to the life insurance policy and the trust under which it claimed to hold the same. The bank declined to comply with the mandate of the court and declined to disclose the facts with respect to any trust agreement or what disposition had been made of the balance of $3,816.52 remaining from the proceeds of the policy, although no contempt proceedings were initiated and none requested.

[12, 13] It is true that ordinarily the proceeds of a policy of insurance, under the terms of which the beneficiary named is some person other than the executor or administrator, form no part of the estate of the insured. The beneficiaries named in the policy take by virtue of the contract rather than by the laws

of succession or under the terms of the will. Heydenfeldt v. Jacobs, 107 Cal. 373, 40 P. 492; Burke v. Modern Woodmen of America, 2 Cal. App. 611, 84 P. 275; Nickals v. Stanley, 146 Cal. 724, 81 P. 117. But under the terms of the "insurance trust" the estate may have had a beneficial interest in the proceeds of the policy.

That such a trust existed, from which the estate derived a profit of $6,183.48, was disclosed by the reports and account of the executor and by the testimony of an evasive witness, who declined to inform the court as to the nature of the trust and what interest, if any, the estate had in it.

It was the duty of the court, rather than that of the executor, to determine what interest, if any, the estate had in the insurance policy and all of the proceeds thereof, and in failing to pursue such inquiry we think the court erred.

The order appealed from is reversed for further proceedings in connection with this life insurance matter only, and the trial court is directed to take evidence with respect to the policy of insurance on the life of decedent and the agreement under which the Bank of America National Trust & Savings Association held and collected the same and to make such further order in the premises as, under the evidence thus elicited, may be appropriate, in accordance with the views herein expressed. Each party shall pay its own costs on appeal.

We concur: BARNARD, P. J.; MARKS, J.

127 Cal.App.(Supp.) 783

JENSEN v. HARRY H. CULVER & CO.

Civ. A1528.

Appellate Department, Superior Court, Los Angeles County, California.

Oct. 31, 1932.

1. Courts ⇐188(3).

Municipal court had jurisdiction of action to recover $2,000 or less paid pursuant to contract rescinded for fraud; such action being one at law and not in equity for rescission (Const. art. 6, §§ 5, 11; St. 1931, p. 1717).

2. Contracts ⇐272.

One having right to rescind contract may effect rescission by his own action, and need not turn to court to have rescission accomplished.

3. Courts ⇐188(3).

As regards jurisdiction of municipal court, action of claim and delivery is action at law rather than in equity (Const. art. 6, §§ 5, 11; St. 1931, p. 1717).

4. Money received ⇐6(4).

Where money alone has been transferred by rescinding party, upon rescission of contract, law implies promise to return money, which promise becomes basis for common-law action of money had and received.

5. Appeal and error ⇐790(3).

Where orders directing that judgment for plaintiff be set aside, and that action be dismissed, were reversed on appeal, appeal from further order declining to correct such orders became moot and was dismissed.

Appeals from Municipal Court of Los Angeles; Le Roy Dawson, Judge.

Action by Jens Henry Jensen against Harry H. Culver & Co. From orders setting aside a judgment and dismissing the action and denying a motion to set aside such orders, plaintiff appeals.

Orders setting aside the judgment and dismissing the action reversed, and appeal from further order denying motion to set aside orders setting aside the judgment and dismissing the action dismissed.

Thomas D. Long, of Los Angeles, for appellant.

Leslie S. Bowden and Oliver J. Marston, both of Los Angeles, for respondent.

BISHOP, J.

[1] The controlling question presented on this appeal is whether or not a municipal court has jurisdiction of an action to recover the sum of $2,000 or less paid pursuant to a contract induced by fraud and rescinded on that ground. The complaint in the present action is cast in the form of one for money had and received, but both from the written demand incorporated into the complaint and from the argument made it is apparent that the cause of action thus concealed in the common count is one for the recovery of money which had been paid under a contract since rescinded for fraud. We are of the opinion that the municipal court had jurisdiction.

But for some later decisions which are frequently cited to us as requiring a different conclusion, we would be content to rest our opinion on an early Supreme Court case and on a late decision of the District Court of Appeal, Second District. The argument now stressed, that an action such as ours is one of rescission and is therefore in equity rather than in law, was not under debate in the early case of Schroeder v. Wittram (1885) 66 Cal. 636, 6 P. 737; yet

the case is worthy of our attention. It, too, dealt with an action for money had and received, one begun in a justice's court following the rescission of a contract for failure of consideration. The jurisdiction of the court was under attack, but on grounds other than that the case was in equity because an action for rescission; that ground did not suggest itself to counsel or the court. In addition to the significance of silence we have these words in one of the opinions filed in the case (page 638 of 66 Cal., 6 P. 737, 738):

"What is known in the civil law as redhibition, and in our law as rescission of the contract, or dissolution of the proposed sale, takes place, and the buyer and seller are restored to their original position; the law vesting the buyer with the right to a return of any money which he may have paid upon the contract, and to a legal remedy to enforce the return of it by an action against the seller as for money had and received.

"As an action for money had and received, the justice's court in which the complaint was filed had jurisdiction."

At the time with which the case dealt, as now, justices' courts had jurisdiction of cases at law, Const. art. 6, §§ 5 and 11, as does the municipal court, Stats. 1931, p. 1717, but not of cases in equity.

Of greater weight is Taback v. Greenberg (1930) 108 Cal. App. 759, 292 P. 279, an appeal from the superior court judgment affirming a judgment of the municipal court. The complaint, the record discloses, was drawn in two counts, the first reciting the making of a contract, payment of money thereunder by the plaintiff, and the subsequent rescission for failure of consideration. The second count recited the formula of an action for money had and received. The relief sought was the return of the amount paid. Succinctly the court commented: "The action was properly brought in the municipal court, because it was merely an action for the recovery of $550 and not for the rescission of a contract, because that was rescinded by the notice of rescission."

[2-4] These two decisions are the logical result of the application of well-established principles. There can be no doubt that one having a right to rescind need not turn to the courts to have the rescission accomplished; he may effect it by his own action. Prewitt v. Sunnymead Orchard Co. (1922) 189 Cal. 723, 209 P. 995; McNeese v. McNeese (1923) 190 Cal. 402, 213 P. 36; Maxwell v. Jimeno (1928) 89 Cal. App. 612, 265 P. 885, and Ito v. Watanabe (1931) 213 Cal. 487, 2 P.(2d) 799. The reluctant response of him as to whom the contract was rescinded may require the help of a court to secure to him, who rescinded, the relief to which he has become entitled. This relief may be such that only a court of equity can furnish it. For examples, see Mesenburg v. Dunn (1899) 125 Cal. 222, 57 P. 887, and Rocha v. Rocha (1925) 197 Cal. 396, 240 P. 1010. The relief sought may, however, be the return of personal property. In such case the action commonly known as claim and delivery is appropriate. McNeese v. McNeese, supra. This, of course, is an action at law. See Faulkner v. First National Bank (1900) 130 Cal. 258, 62 P. 463. If money alone has been transferred by the rescinding party, upon the rescission, the law implies a promise to return it, which becomes the basis for a common-law action of money had and received. Rand v. Columbian Realty Co. (1910) 13 Cal. App. 444, 110 P. 322; Winkler v. Jerrue (1912) 20 Cal. App. 555, 129 P. 804; Fontaine v. Lacassie (1918) 36 Cal. App. 175, 171 P. 812; Bridges v. Fisk (1921) 53 Cal. App. 117, 200 P. 71; Firpo v. Pacific Mutual Life Ins. Co. (1926) 80 Cal. App. 122, 251 P. 657.

As already mentioned, doubt has been cast upon the conclusion which follows from a recital of these principles by a statement appearing in the majority opinion in Stone v. Superior Court (Cal. Sup. 1931) 4 P.(2d) 777, 778, 77 A. L. R. 743, and the application of the Stone Case in Ingalls v. Superior Court (Cal. App. 1932) 9 P.(2d) 266, and Fair View Farms Co. v. Superior Court (Cal. App. 1932) 10 P.(2d) 1011. The statement referred to, characterizing an action in all essentials the same as the one at bar, is this: "The first count in the plaintiff's complaint in said action clearly and unmistakably set forth a cause of action for equitable relief. * * *" We are satisfied that neither this statement, nor any of the three cases referred to, requires nor justifies an abandonment of our conclusion that the municipal court had jurisdiction of the action.

First of all, it should be noted that the matter strenuously debated in the Stone Case was not the jurisdiction of the court, but whether or not the case was one in which an attachment should issue. The decision was that an attachment should not issue in such an action. The case therefore is not an authority on our jurisdictional question, unless in reaching its decision the court announced principles which are controlling in our situation. But this we find not to be the case. The solution of the Stone Case depended on an answer to the question, "Is the action upon a contract, express or implied?" The question was not, "Is the action one at law or one in equity?" What the court stated, therefore, must be understood in the light of the question being debated. A more accurate understanding may be obtained by quoting further statements from the majority opinion. The first begins the

paragraph immediately following the one from which we have quoted, in these words: "The cause of action thus set forth was essentially an action sounding in fraud and deceit." Later it is again stated: "It clearly appears that her only cause of action is one founded upon the defendants' alleged fraud and deceit." Again: "Plaintiff's real cause of action * * * was an action sounding in fraud and deceit." But an action to recover damages in fraud and deceit is an action at law, not in equity. In denying a rehearing in Stephan v. Superior Court (1920) 183 Cal. 673, 676, 192 P. 1083, 1084, our Supreme Court stated that an action for damages for fraud and deceit was not in equity, but "is without doubt a common-law action for damages for a tort," and held that it was therefore within the jurisdiction of the justice's court when the recovery sought was less than $300. In Hallidie v. Enginger (1917) 175 Cal. 505, 166 P. 1, 3, relied upon in the Stone Case, we find: "It is an action ex delicto for fraud. At common law it would have been an action of trespass on the case for damages for deceit." Such actions do not support attachments, the conclusion toward which the opinion was moving in the Stone Case. We cannot interpret one portion of the opinion as declaring the action to be in equity, when it is followed by three statements that it is an action in fraud and deceit, a tort law action when a money judgment is all that is sought. Rather we see in the expression, "a cause of action for equitable relief," a present day application of the thought expressed by Lord Mansfield in Moses v. Macferlan (1760) 2 Burrows, 1005, where, delivering the opinion of a court dealing only with cases at law, he held that an action on the case for money had and received was proper, saying: "This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged * * * the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." We feel we are justified in concluding, therefore, that the Stone Case neither holds nor states that an action for the recovery of money paid under a contract rescinded for fraud is an action in equity, and not at law, although the result sought may be equitable dealing.

The two other cases, Ingalls v. Superior Court and Fair View Farms Co. v. Superior Court, referred to by some as clouding the title of the municipal court to actions such as the one under review, are to be distinguished from the Stone Case in two particulars. In the first place, they did involve the question of jurisdiction. As the jurisdiction of the superior court in civil cases is limited to those not within the jurisdiction of a municipal court (Const., art. 6, § 5) a decision as to the jurisdiction of the superior court necessarily involves the jurisdiction of the other court. In both cases it was held by the same court that decided Taback v. Greenberg, supra, that the superior court had (from which it follows that the municipal court would not have) jurisdiction. The decisions were based on the Stone Case, and hearings before the Supreme Court were denied. But for the further distinction that is apparent between these two cases and the Stone Case, and between these cases and ours, we would be constrained to reach a different conclusion from that announced, for both of these cases deal with a situation growing out of the rescission of a contract for fraud. A distinction exists, however, and as it is one often found to be determinative of the character of an action, whether at law or in equity, we consider it of commanding importance. The distinction appears in the relief sought. Neither in the Stone Case nor ours is any relief prayed for which a court of law could not give; a money judgment and other proper relief is all that is sought. In the Ingalls Case, however, in addition to the return of the money paid, plaintiff prayed: "That said contract, and all transactions in connection therewith be rescinded, and declared null and void, and of no force or effect whatsoever." In the Fair View Farms Co. Case action the prayer in part was: "That the said contract between the plaintiff and the defendants may be rescinded, delivered up and cancelled." Such relief obviously could not be given by a law court; it must come from a court with equity jurisdiction, viz. the superior court. Neither of these cases, therefore, requires nor supports the conclusion that the municipal court lacked jurisdiction of the action before us.

[5] The trial court erred, therefore, in ordering that the judgment in plaintiff's favor be set aside, and in ordering that the action be dismissed for lack of jurisdiction; these orders are reversed, appellant to have his costs of appeal. The appeal from the further order declining to correct those just mentioned by the reversal becomes moot and is dismissed.

We concur: McLUCAS, P. J.; SHAW, J.

127 Cal.App.(Supp.) 789

SMITH v. BENTSON et al.

Civ. A 1445.

Appellate Department, Superior Court, Los Angeles County, California.

Nov. 10, 1932.

1. Pleading ⇐8(5).

Allegation that defendants "became indebted" to plaintiff for dental work is a conclusion of law.

2. Pleading ⇐192(3).

Conclusion of law is insufficient statement of fact when attacked by general demurrer, and no estoppel, waiver, or other cure appears of record (Code Civ. Proc. § 426).

3. Pleading ⇐192(3).

Common counts, though mainly conclusions of law, are not subject to either general or special demurrer.

4. Assumpsit, action of ⇐19.

Complaint is not good as common count unless it alleges promise by defendant to pay, or facts from which such promise is implied by law.

5. Husband and wife ⇐229(3).

Complaint alleging that husband and wife "became indebted" to plaintiff for dental work done for husband *held* not good as common count against wife.

6. Husband and wife ⇐151(7).

Dental services rendered husband are "necessaries" for which wife is liable under conditions prescribed by statute (Civ. Code, § 171).

[Ed. Note.—For other definitions of "Necessaries," see Words and Phrases.]

7. Husband and wife ⇐229(3).

Complaint stated no cause of action against wife for "necessaries," where it contained no allegation husband and wife were living together when dental services were rendered (Civ. Code, § 171).

8. Husband and wife ⇐82.

Wife may, by agreement, render herself personally liable for services rendered her husband.

9. Appeal and error ⇐236(2).

Judgment will not be reversed for failure to grant leave to amend complaint, where record does not show that such leave was requested.

Appeal from Municipal Court of Los Angeles; William J. Palmer, Judge.

Action by Vern J. Smith against Victor L. Bentson and another. From judgment for Mrs. Victor L. Bentson after order sustaining her general demurrer to complaint without leave to amend, plaintiff appeals.

Affirmed.

Hedley Richmond, of Los Angeles, for appellant.

Frank D. McClure, of Los Angeles, for respondent Victor L. Bentson.

SHAW, J.

This is an appeal by plaintiff from a judgment in favor of defendant Mrs. Victor L. Bentson, entered after an order sustaining her general demurrer to the complaint without leave to amend. The complaint alleges that Victor L. Bentson, the other defendant, and respondent are husband and wife, that plaintiff is a licensed doctor of dental surgery, that the defendants "became indebted to the said plaintiff in the sum of $75 for professional work, labor and services rendered by plaintiff as a Doctor of Dental Surgery, to defendant Victor L. Bentson," which has not been paid, although demanded, and that the sum mentioned is the reasonable value of the services. There is no allegation that respondent requested the performance of these services, or that she promised to pay for them.

[1] The efficacy of the complaint to state a cause of action against respondent depends entirely on the sufficiency of the allegation that she "became indebted" to plaintiff. This is manifestly a conclusion of law. It is impossible to reconcile all the decisions in this state on the question whether a complaint which states a fact essential to the cause of action only by way of a conclusion of law is sufficient when attacked by a general demurrer. The following cases directly hold that it is not sufficient: Branham v. Mayor, etc., of City of San Jose, 24 Cal. 585, 602; Hedges v. Dam, 72 Cal. 520, 522, 14 P. 133; Ohm v. City and County of San Francisco, 92 Cal. 437, 449, 28 P. 580; Callahan v. Broderick, 124 Cal. 80, 83, 56 P. 782; Moran v. Bonynge, 157 Cal. 295, 299, 107 P. 312; Baker v. Miller, 190 Cal. 263, 267, 212 P. 11; Fox v. Monahan, 8 Cal. App. 707, 710, 97 P. 765; Buttner v. Kasser, 19 Cal. App. 755, 758, 127 P. 811; Fisher v. Fisher, 23 Cal. App. 310, 313, 137 P. 1094; Burlingame v. Traeger, 101 Cal. App. 365, 368, 281 P. 1051; Miller v. Gusta, 103 Cal. App. 32, 35, 283 P. 946; and a dictum to the same effect appears in Piercy v. Sabin, 10 Cal. 22, 28, 70 Am. Dec. 692. The following cases are to the same effect, for, although the proposition is not expressly so stated, the allegations condemned are conclusions of law: Knox v. Buckman Contracting Co., 139 Cal. 598, 73 P. 428; Joyce v. Tomasini, 168 Cal. 234, 237, 238, 142 P. 67. The insufficiency of such an allegation is declared without reference to a demurrer in Payne v.

Treadwell, 5 Cal. 310, and Bailes v. Keck, 200 Cal. 697, 703, 254 P. 573, 51 A. L. R. 930.

On the other hand, the following cases hold a complaint sufficient against a general demurrer if all the necessary facts appear, even though some of them are stated only as conclusions of law: Santa Barbara v. Eldred, 108 Cal. 294, 298, 41 P. 410; San Christina Inv. Co. v. City and County of San Francisco, 167 Cal. 762, 769, 141 P. 384, 52 L. R. A. (N. S.) 676; Wells, Fargo & Co. v. McCarthy, 5 Cal. App. 301, 312, 90 P. 203; Burke v. Dittus, 8 Cal. App. 175, 178, 96 P. 330; McNabb v. Byrnes, 92 Cal. App. 337, 341, 268 P. 428; Kirby v. S. F., etc., Soc., 95 Cal. App. 757, 761, 273 P. 609; Allerton v. King, 96 Cal. App. 230, 235, 274 P. 90. The same proposition is involved but not expressly stated in Grant v. Sheerin, 84 Cal. 197, 199, 200, 23 P. 1094; Bliss v. Sneath, 103 Cal. 43, 44, 36 P. 1029, and Eva v. Andersen, 166 Cal. 420, 423, 137 P. 16; and it was declared as obiter dictum in Poetker v. Lowry, 25 Cal. App. 616, 617, 144 P. 981; Green v. Darling, 73 Cal. App. 700, 704, 239 P. 70, and Cullinan v. Mercantile Tr. Co., 80 Cal. App. 377, 383, 252 P. 647. In some of these cases the court was influenced by the fact that there had been a trial on the merits, resulting in a judgment for plaintiff; and it has been declared in several cases that a judgment will cure such defects in the complaint, although a general demurrer has been interposed and overruled. Santa Barbara v. Eldred, supra; Grant v. Sheerin, supra; Wells, Fargo & Co. v. McCarthy, supra; Burke v. Dittus, supra; Alexander v. McDow, 108 Cal. 25, 29, 41 P. 24; Arnold v. American Ins. Co., 148 Cal. 660, 663, 84 P. 182, 25 L. R. A. (N. S.) 6; Baker v. Miller, supra.

Coming now to the particular legal conclusion here pleaded, a complaint alleging merely that defendant "became indebted" was held bad on general demurrer, because this statement was a conclusion of law (Fox v. Monahan, supra), and the same rule was declared in Piercy v. Sabin, supra, but as a dictum. In Ellis v. Central, etc., Co., 37 Cal. App. 390, 395, 174 P. 407, a like allegation was said to be a statement of an ultimate fact; but this also was dictum, and we think it is not correct. It has also been held that on appeal from a default judgment a complaint alleging that defendants "became indebted" is sufficient (Kililea v. Wilson, 5 Cal. App. 6, 89 P. 621); but this is in pursuance of the rule, from which there appears to be no dissent, that a conclusion of law in which the essential fact is implied supports a default judgment. Penrose v. Winter, 135 Cal. 289, 291, 67 P. 772, which is limited to default judgments in Knox v. Buckman Contracting Co., supra.

[2] On a review of all these authorities it is apparent that some of those which uphold a complaint like that we have here are distinguishable because grounded on a different state of the proceedings. Others are not distinguishable in principle, but we think the weight of authority, as well as the better reason, is with those decisions which hold a conclusion of law to be an insufficient statement of fact, when it is attacked by a general demurrer and no estoppel, waiver, or other cure for the defect appears in the record. In so holding we are but following the provision of the Code which requires the facts of the plaintiff's case to be stated. Code Civ. Proc. § 426.

[3-5] There remains for consideration the question whether this complaint may be regarded as a common count and so upheld. Common counts, although mainly conclusions of law, are recognized in this state as sufficient and are not subject to either general or special demurrer. Minor v. Baldridge, 123 Cal. 187, 190, 55 P. 783; Pike v. Zadig, 171 Cal. 273, 276, 152 P. 923; Auckland v. Conlin, 203 Cal. 776, 778, 265 P. 946; Lehner v. McLennan, 54 Cal. App. 491, 493, 202 P. 41. The usual form of common count for services alleges that they were performed at the request of defendant and that he promised to pay for them. Neither of these allegations appears here. But it is held that "under our system of pleading, where only the facts which constitute the cause of action are to be alleged, it is not requisite to aver either the consideration or the promise, *when they are implied as a legal conclusion from the facts which are alleged.* While counsel and advice are frequently given without any request, and may be of no benefit to the party to whom they are given, yet a complaint which shows that the plaintiff rendered services to the defendant *which were received by him in person*, and were presumptively at his request, and of which he has enjoyed the benefit, states facts from which the liability of the defendant therefor is presumed, and is good as against a general demurrer." (Italics ours.) McFarland v. Holcomb, 123 Cal. 84, 86, 55 P. 761. To the same effect are Aydelotte v. Billing, 8 Cal. App. 673, 675, 97 P. 698; Preston v. Central, etc., Co., 11 Cal. App. 190, 194, 104 P. 462; Krieger v. Feeny, 14 Cal. App. 538, 542, 112 P. 901. The reasoning of the court in the language just quoted leads clearly to the conclusion that a complaint is not good as a common count unless it either expressly alleges a promise by the defendant to pay or alleges facts from which such a promise is implied by law. No such facts appear here. If it were alleged that plaintiff's services were rendered to and received by the defendant, the complaint would be good, under the authorities just cited, because from this fact a promise to pay would be implied. But here the allegation is that the services were rendered to another, and in the absence of a request by respondent therefor, no promise to pay can be implied and the

complaint cannot be upheld as a common count, unless some liability to pay for these services is otherwise cast upon respondent by law.

[6, 7] The only law suggested as a source of such liability is section 171, Civ. Code. That imposes on a wife a liability for necessaries of life furnished to the husband; but to establish such liability a plaintiff must show that the services furnished were necessaries of life and that they were furnished while husband and wife were living together. An allegation that the wife has property from which payment may be enforced under that section is not required. Evans v. Noonan, 20 Cal. App. 288, 296, 128 P. 794; Ackley v. Maggi, 86 Cal. App. 631, 261 P. 311. The fact that the services were necessaries sufficiently appears here from the allegation that they were professional services of a dentist. Evans v. Noonan, supra, at page 299 of 20 Cal. App., 128 P. 794. But there is no allegation that respondent and her husband, to whom the services were furnished, were living together at the time. Hence the complaint cannot be supported under section 171.

[8] While a wife may personally agree to pay for services to be furnished to her husband, and if she does so she is personally liable and may be sued on her contract (Wisnom v. McCarthy, 48 Cal. App. 697, 705, 192 P. 337; Lane v. McAlpine, 115 Cal. App. 607, 611, 2 P.(2d) 184), there is here no allegation of any such contract and the complaint is insufficient from this standpoint for the reasons already stated.

[9] While the complaint seems capable of amendment so as to state a cause of action, the demurrer was sustained without leave to amend, which ordinarily would be given in such a case. But the record shows that plaintiff was not represented at the hearing of the demurrer, and it may be that leave was denied for this or perhaps some other sufficient reason not appearing in the record. A judgment will not be reversed for failure to grant leave to amend in such a case where the record does not show that such leave was requested. Philbrook v. Randall, 195 Cal. 95, 105, 231 P. 739; Hansen v. Carr, 73 Cal. App. 511, 518, 238 P. 1048. Here there is no such showing.

The judgment is affirmed, with costs of appeal to respondent.

McLUCAS, P. J., and BISHOP, J., concur.

216 Cal. 686

SHELDON v. LA BREA MATERIALS CO.

L. A. 12839.

Supreme Court of California.

Nov. 17, 1932.

1. Mortgages ⇐295(1).

Ordinarily, where holder of mortgage acquires mortgagor's estate, mortgage interest is merged in fee and mortgage extinguished.

2. Mortgages ⇐138.

Except as to trustees of trust deed and those holding under them, trustor or successor is holder of legal title (Civ. Code, §§ 865, 866).

3. Mortgages ⇐138.

Trust deed vests legal title in trustee for purpose of trust as between parties to transaction (Civ. Code, §§ 865, 866).

4. Mortgages ⇐295(4).

Where trustor, simultaneously with execution of trust deed, delivered grant deed to property subject to trust deed, in escrow for benefit of beneficiary of trust deed, title was not merged in beneficiary so as to render property subject to materialman's lien accruing after trust deed was recorded but before delivery of grant deed.

5. Mortgages ⇐295(4).

Generally, mortgagee's acquisition of equity of redemption does not merge mortgagee's legal estate so as to prevent his setting up mortgage to defeat intermediate lien, unless such appears to have been parties' intention, and unless justice requires it.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Action to quiet title by Edith B. Sheldon against La Brea Materials Company. From the judgment for plaintiff, defendant appeals.

Affirmed.

Hugo Platz and K. B. Kennicott, both of Los Angeles, for appellant.

Hulme, Hastings & Bartlett, of Los Angeles, for respondent.

CURTIS, J.

Action to quiet title to certain real property. Plaintiff claims title through foreclosure proceeding under a trust deed given to secure the payment of a promissory note. Ben C. Sheldon, the husband of the plaintiff, was the original owner of said real property. While such owner he sold and conveyed said real property to Lewis Wagner for the sum of $2,000, and received in payment thereof the sum of $400 in money and a promissory note for $1.600 secured by said trust deed, which was duly recorded in the office of the county recorder of the county in which said real property was situated. Thereafter Wagner entered into a contract for the erection of a building upon said real property, and the defendant, La Brea Materials Company, furnished materials which were actually used in the construction of said building. The materials were not paid for, and said defendant duly filed for record in the office of said county recorder its claim of lien for the amount due and unpaid on account of said materials so furnished and used in the construction of said building. No question is made but that the trust deed under which the plaintiff claims title to said real property was recorded prior to the date of the execution of any contract for the construction of said building, and prior to the commencement of said building, and prior to the time said defendant furnished any of said materials. Were the foregoing all the facts in the case, it is clear that plaintiff should prevail in the action. There are other and additional facts which the defendant contends give it a preference over the claim of the plaintiff and render whatever title plaintiff has in said real property subject to said lien of the defendant. These facts are that at the time of the execution of said trust deed, and as a part of the same transaction, Wagner also executed a grant deed of said real property in favor of the said Ben C. Sheldon, and then and there delivered the same unto James Farraher under a joint power of attorney entered into by said Sheldon and Wagner, whereby said grant deed was to be filed for record by said Farraher upon the default by said Wagner in carrying out the provisions of said trust deed. Wagner so defaulted, and said grant deed was filed for record by said Farraher on or about the 20th day of August, 1929. It might be well to state at this time that the original transaction between Sheldon and Wagner which culminated in the execution of said trust deed and said grant deed occurred on or about October 12, 1928, and each of said instruments is dated October 12, 1928, and that defendant's claim of lien was filed for record on March 23, 1929. Another fact to which the defendant attaches some importance is that Ben C. Sheldon some time subsequent to the execution of said promissory note and trust deed transferred said promissory note to his wife, the plaintiff herein, who thereafter foreclosed said trust deed on default in the payment of said promissory note. This transfer was made during the construction of said building and on or about February 14, 1929. Defendant contended at the trial and it makes the same claim here that there was a merger of the title to said real property in Ben C. Sheldon upon the execution and delivery by Wagner to the trustee therein named of said trust deed and by the delivery of said grant deed to Farraher to be held by the latter upon the terms and conditions above stated. The further contention was and is made that the transfer by Sheldon to his wife, the plaintiff herein, of said note was a fraud upon defendant and others who may have furnished materials in the construction of said building. The trial court made findings in which the foregoing facts were embodied in full. It specifically found that there was no merger of title in Ben C. Sheldon by reason of the conveyances above referred to, and that the transfer of said promissory note secured by said trust deed by Sheldon to his wife was not a fraud upon the defendant or any of the lienholders furnishing materials or performing labor in the construction of said building.

The appeal by the defendant is before us under the alternative method provided by section 953a of the Code of Civil Procedure. The principal contention of appellant is that the title to said real property became merged in Ben C. Sheldon upon the execution and delivery of the two deeds, that is to say, the trust deed given to secure said promissory note, and the grant deed delivered in escrow to Farraher, and that as the title was thus merged in Sheldon, the trust deed was, in the language of some of the decisions, "annihilated." Estate of Washburn, 11 Cal. App. 735, 106 P. 415; Erving v. Jas. H. Goodman & Co. Bank, 171 Cal. 559, 153 P. 945. In which event, defendant contends, Sheldon became the absolute owner of said real property at the date of the execution of said two deeds, and remained such owner up to and after the time of the delivery of the building materials upon which defendant's claim of lien is based, and his interest, therefore, in said real property was subject to the lien of defendant for the materials so furnished.

[1] "When a greater and lesser estate coincide and meet in one and the same person, in the same right without any intermediate

estate, the latter is in law merged in the greater." 10 Cal. Jur. 606.

"The whole title, legal as well as equitable, must unite in one and the same person. Where the two thus meet, without any intermediate estate, the less is immediately annihilated, or, in law phrase, 'merged.'" Estate of Washburn, 11 Cal. App. 735, 746, 106 P. 415, 420.

"Under ordinary circumstances, where the holder of a mortgage acquires the estate of the mortgagor, the mortgage interest is merged in the fee, and the mortgage is extinguished. This is the ordinary legal effect of the transaction, and ordinarily the intention is presumed to accord with the act accomplished." Anglo-Californian Bank v. Field, 146 Cal. 644, 653, 80 P. 1080, 1083.

[2] In discussing the legal effect of a trust deed given to secure an indebtedness of the trustor, this court has said: "The nature of such an instrument has been extensively discussed by this court, and the sum and substance of such discussion is that while the legal title passes thereunder, and the trustees cannot be held to hold a mere 'lien' on the property, it is practically and substantially only a mortgage with power of sale. [Citing cases.] The legal title is conveyed solely for the purpose of security, leaving in the trustor or his successors a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them. Sections 865, 866, Civ. Code. Except as to the trustees and those holding under them, the trustor or his successor is treated by our law as the holder of the legal title." MacLeod v. Moran, 153 Cal. 97, 100, 94 P. 604, 605.

[3] While the case from which the above quotation is taken and others from the appellate courts of this state hold that as between the trustor and the beneficiary a trust deed "is practically and substantially only a mortgage" and the legal title is in the trustor, they also hold that, as between all of the parties to the transaction, such an instrument conveys the legal title to the trustee. Weber v. McCleverty, 149 Cal. 316, 320, 86 P. 706, 708. In that case we find the following language used by the court: "The deed of trust, therefore, vests in the trustee, for the purposes of the trust, the absolute legal title to the entire estate held by the trustor, immediately prior to its execution, and that estate must remain in the trustee for that purpose until the trust is either executed, or ceases to exist by reason of payment of the debt." Further on in this same opinion (page 321 of 149 Cal., 86 P. 706, 708) this court, drawing a distinction between a trust deed and a mortgage, says: "A mortgage or other incumbrance on land does not transfer the title, but leaves it vested in the mortgagor or owner."

There may be some doubt, therefore, whether the same rule as to merger of title would apply in case of a deed by the trustor to the beneficiary in a trust deed, as the cases hold does apply in the case of a deed from the mortgagor to the mortgagee. In the former case, we have the outstanding legal title in the trustee, which has never been transferred to the beneficiary. The latter's title would, therefore, be at least incomplete, and possibly only of an equitable nature, while in the case where the mortgagor conveys the land to the mortgagee we have a complete union of the legal and equitable title in one and the same person. Counsel for the respective parties hereto have not attempted to adequately brief this question. Its decision is not necessary for the decision of this case. We therefore expressly refrain from deciding it.

[4] Conceding, for the purpose of this case only, that ordinarily a merger of title would arise where the trustor grants to the beneficiary the interest of the former in real property subject to a trust deed, there are adequate reasons why no such merger of title can be held to have arisen under the facts present in the instant case. The grant deed from Wagner to Sheldon, while executed at the same time as the trust deed, was not delivered to Sheldon until long after the defendant had furnished the materials for which it now claims a lien. As we have seen, this grant deed was delivered to Farraher in escrow to be held by him until Wagner should default in the payment of his promissory note secured by the trust deed, and it was so held by him until on or about August 20, 1929, when it was filed for record and thereafter delivered to Sheldon. This was long after defendant had furnished said materials; in fact, it was long after the defendant had instituted an action to foreclose its lien for the materials so furnished.

[5] The present action is a proceeding in equity. Holland v. Kelly, 177 Cal. 43, 169 P. 1000; Cobe v. Crane, 173 Cal. 116, 159 P. 587. An action to foreclose a lien under the mechanics' lien law is equitable in character. "It is well established that equity will interpose to prevent a merger where from the circumstances it is apparent that it was not the intention of the grantee that a merger should take place; and where it appears to be for the interest of the grantee that there should be no merger of the lesser estate such will be presumed to have been his intention. The rule is thus expressed by Mr. Jones: 'There is generally an advantage to the mortgagee in preserving his mortgage title; and, when there is, no merger takes place. It is a general rule, therefore, that the mortgagee's acquisition of the equity of redemption does not merge his legal estate as mortgagee so as to prevent his setting up his mortgage to defeat an intermediate title, such as a second mortgage, or a subsequent lien, unless such

appears to have been the intention of the parties, and justice requires it; and such intention will not be presumed where the mortgagee's interest requires that the mortgage should remain in force. The intention is a question of fact.'" Hines v. Ward, 121 Cal. 115, 53 P. 427, 428. We might multiply authorities to the same effect if necessary, but this principle of law is so firmly established that we refrain from doing so. There is no evidence of any intention of the parties that the lien of Sheldon under the trust deed should not remain in full force. In fact, the evidence is all to the contrary. The grant deed was expressly made subject to the lien of the trust deed given to secure the payment of $1,600 in favor of Ben C. Sheldon." In the case of Anglo-Californian Bank v. Field, 146 Cal. 644, 653, 80 P. 1080, 1083, the court held: "But this rule [merger of title] is never applied where there is an intervening lien on the property, which it is to the interest of the purchaser to keep on foot, and where there is no evidence, direct or circumstantial, of an express intention to extinguish the first mortgage and hold subject only to the second. In such a case the legal title and first mortgage lien will be considered as separate interests whenever necessary for the protection of the just rights of the purchaser."

Under the authorities above cited, it is clear that there was no merger of title in Sheldon, and, as his trust deed was of record prior to the commencement of the construction of the building upon said real property, defendant's lien for the materials furnished in the construction of said building was subsequent and subject to the lien of said trust deed. Under proceedings to foreclose said trust, the plaintiff herein acquired title to said real property free and clear of any claim of said defendant.

There is no merit in defendant's contention that as the grant deed was delivered to Farraher, who had previously acted as Sheldon's attorney, said delivery was in law a delivery to Sheldon himself. The grant deed was not delivered to Farraher as the attorney of Sheldon, but under a written agreement constituting him the joint agent of the parties to said deed. Delivery to him under such circumstances was not a delivery to Sheldon.

The further contention of defendant that the transfer by Sheldon of the note secured by the trust deed to his wife, the plaintiff herein, was a fraud upon the defendant and all others furnishing materials or performing work upon said building, seems to be based upon the assumption that such a transfer, if permitted to stand, would defeat a merger of the title in Ben C. Sheldon by reason of the execution and delivery of the deed of trust and grant deed as hereinbefore set forth in detail. As we have held that no such merger of title was accomplished by the execution and delivery of said two deeds, this contention of the defendant has no foundation to support it.

Our conclusions, as set forth herein, render it unnecessary for us to pass upon the question raised by the respondent as to the validity of said grant deed. Respondent contends that by it Wagner attempted to forfeit his equity of redemption in said real property contrary to the provisions of section 2889 of the Civil Code. The decision of this question may well be reserved to some future case, where its determination will be necessary to the decision therein.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; TYLER, Justice pro tem.

216 Cal. 786

Edith B. SHELDON, Plaintiff and Respondent, v. LA BREA MATERIALS COMPANY, Defendant and Appellant.

L. A. 12840.

Supreme Court of California.

Nov. 17, 1932.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Hugo Platz and K. B. Kennicott, both of Los Angeles, for appellant.

Hulme, Hastings & Bartlett, of Los Angeles, for respondent.

PER CURIAM.

The questions involved herein are identical with those decided in the case of Sheldon v. La Brea Materials Company (Cal. Sup.) 15 P.(2d) 1098. The only difference between the two cases relates to the real property upon which a lien is claimed. Upon the authority of the first-mentioned case, the judgment herein is affirmed.

216 Cal. 786

Edith B. SHELDON, Plaintiff and Respondent, v. LA BREA MATERIALS COMPANY, Defendant and Appellant.

L. A. 12841.

Supreme Court of California.

Nov. 17, 1932.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Hugo Platz and K. B. Kennicott, both of Los Angeles, for appellant.

Hulme, Hastings & Bartlett, of Los Angeles, for respondent.

PER CURIAM.

The questions involved herein are identical with those decided in the case of Sheldon v. La Brea Materials Company (Cal. Sup.) 15 P.(2d) 1098. The only difference between the two cases relates to the real property upon which a lien is claimed. Upon the authority of the first-mentioned case, the judgment herein is affirmed.

CHILCOTE v. SAN BERNARDINO COUNTY. *

Civ. 598.

District Court of Appeal, Fourth District, California.

Nov. 14, 1932.

Hearing Granted by Supreme Court Jan. 12, 1933.

1. Counties ⇐146.

County is liable for negligent operation of vehicle although accident occurs within municipal corporation (Civ. Code, § 1714½).

2. Counties ⇐201.

Claimant's theory in drafting claim against county *held* immaterial if claim disclosed cause of action pursuant to statute (Civ. Code, § 1714½).

3. Counties ⇐201.

Claim against county for death of motorcyclist caused by spilling of oil on highway from county's truck *held* sufficient compliance with statute (Pol. Code, § 4075).

Claim stated in substance that claim arose on account of injuries received and sustained by claimant's son on date stated, resulting in his death, which injuries were received by him while riding on motorcycle on certain highway by riding into and on a large puddle of oil which was spilled and left on highway by county oil truck in such dangerous and negligent manner as to cause motorcycle to fall, and that by reason of negligence of county and its employees claimant suffered damages.

4. Negligence ⇐111(1).

Negligence may be alleged in general terms without stating particular omission which rendered act negligent.

5. Highways ⇐153.

All persons must abstain from doing any act by which any part of public highway would become dangerous to traveler.

6. Automobiles ⇐301(3).

Complaint *held* to state cause of action against county for negligence in operating its truck resulting in oil being spilled on highway, which caused motorcycle to fall, and motorcyclist to be injured (Civ. Code, § 1714½).

7. Pleading ⇐271.

Court abused discretion in refusing to permit amendment to amended complaint against county where copy of claim annexed to amended complaint did not contain verification (Pol. Code, §§ 4075, 4076).

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Logan A. Chilcote against San Bernardino County. From a judgment for defendant, plaintiff appeals.

Reversed with directions.

H. E. Thompson and Harold King, both of San Bernardino, for appellant.

Stanley Mussell, Dist. Atty., James L. King, Deputy Dist. Atty., and Ralph E. Swing, all of San Bernardino, for respondent.

AMES, Justice pro tem.

This is an appeal from a judgment rendered in favor of defendant after a motion for judgment on the pleadings. The sole question presented by the record is the sufficiency of the amended complaint. The action was brought by virtue of the provisions of section 376 of the Code of Civil Procedure by the plaintiff as the father of a deceased minor who, it is alleged, died as the result of an accident suffered through the negligent operation of a motor truck by an employee of the respondent. Paragraphs II and III of the amended complaint are as follows:

"II. That Waterman Canyon Highway is, and at all the times herein mentioned, was a public highway extending through the City of San Bernardino (in said county) and through the northeastern portion of said city and extending thence through the defendant county for a distance of twenty miles and more to Lake Arrowhead in said county, and as such was in constant use by the traveling public traveling by means of motor vehicles;

"III. That on the 21st day of June, 1930, defendant, by and through its officers, agents and employees, while acting within the scope of their employment, so carelessly and negligently operated and managed said motor oil trucks upon said highway so as to spill, deposit and leave large quantities of oils upon said highway and on the south and east half of the paved portion thereof covering a space of from three to five feet thereof in width and 600 feet and more in length, at a point on said highway in the northeastern portion of said city and beginning at about one-fourth mile northeast of the Rustic Inn on said highway and extending northeasterly on said highway 600 feet and more; and did then and

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 23 P.2d 748.

there, thereby, negligently spill, deposit and leave said oils on said highway in such a dangerous and negligent manner and condition, and in such large quantities, so as to make and render and leave said highway dangerous and unsafe for use as a public highway to persons traveling by means of motor vehicles."

This is followed by an allegation in paragraph IV that on said 21st day of June, 1930, while plaintiff's son was riding a motorcycle on said highway, "his said motorcycle ran into said large quantities of oils, spilled and left upon said highway as aforesaid, and which spilled oils then and there caused said motorcycle to be thrown and fall and said Olen Chilcote to be violently thrown from said motorcycle down and upon said highway," and that his injury and death resulted therefrom. The presentation of a claim by appellant to the board of supervisors and its rejection of the same is alleged in appropriate language. That portion of such claim which is material to this inquiry is as follows:

"* * * Which claim arises on account of personal injuries received and sustained by my son, Olen Chilcote, on the 21st day of June, 1930, resulting in his death on said day, and which injuries were received by him while riding a motorcycle on the Waterman Canyon Highway, leading between said City and the Arrowhead Hotel, said county, by riding into and upon a large puddle of oil which was spilled and left upon said highway, and the paved portion thereof, by the county oil trucks and the employees of said county using said trucks, in such dangerous and negligent manner so as to cause the motorcycle on which said Olen Chilcote was then and there riding, to fall and be thrown, and the said Olen Chilcote to be thrown with such force and violence on the pavement so as to inflict serious and grave physical injuries to the said Olen Chilcote resulting in his death on said day.

"That by reason of the negligence of the said County and its agents and employees in operating its said oil trucks upon and over said highway and in spilling oil on said highway and the resultant injuries to the said Olen Chilcote and his death therefrom on said day, I, the undersigned Logan A. Chilcote, father of the said Olen Chilcote have sustained damages in the sum of $10,270. * * *"

The liability of respondent county, if any, is based upon the provisions of section 1714½ of the Civil Code which, in so far as it is material to this inquiry, is as follows: "Hereafter * * * every county * * * owning any motor vehicle shall be responsible to every person who sustains any damage by reason of death, or injury to person or property as the result of the negligent operation of any said motor vehicle by any officer, agent, or employee or as the result of the negligent operation of any other motor vehicle by any officer, agent or employee when acting within the scope of his office, agency or employment; and such person may sue the * * * county * * * in any court of competent jurisdiction in this state in the manner directed by law."

It is contended by respondent that the proximate cause of the accident as pleaded in the amended complaint was the defective condition of the highway due to the grease and oil which had been spilled and left thereon and not the negligent operation of respondent's truck and the claim or demand which was presented to and rejected by the board of supervisors, contends the respondent, was based upon the theory that the defendant county was liable for permitting such defect to remain upon the highway, and that such claim is based upon the assumption that the accident occurred upon a public highway outside of the limits of the city of San Bernardino, whereas, it appears from the allegations of the amended complaint, that the accident occurred within the boundaries of that municipality. If the position taken by respondent is correct, its liability, if any, as disclosed by the claim against the county, would then be predicated upon the defective condition of the highway by virtue of the provisions of the act of the Legislature approved June 13, 1923 (Stats. 1923, p. 675), imposing liability upon counties for the dangerous or defective condition of public streets and highways, and not upon the liability imposed by section 1714½ of the Civil Code.

[1-3] It may be conceded that the claim presented to the board of supervisors and the amended complaint are inconsistent with respect to the description of the place where the accident occurred, but the liability imposed by the provisions of section 1714½ of the Civil Code is not affected by the fact that the accident may have occurred either within or without the boundaries of a municipal corporation. The geographical location of the offending vehicle is not an element in the liability imposed by that section of the Civil Code, but is predicated solely upon the negligent operation of the truck. Nor are we concerned with whatever theory the appellant may have had in mind in drafting his claim against respondent county, if the claim in fact discloses a cause of action pursuant to the provisions of section 1714½ of the Civil Code. It appears from that portion of the claim above quoted that the accident to the decedent was caused by riding into and upon a puddle of oil which was spilled and left upon the highway by the county oil trucks and the employees of the county using the same, and that the spilling of such oil was done in a dangerous and negligent manner, and that, by reason of the negligence of the county and its employees, the plaintiff suffered damage.

While the claim may have been inartificially drawn, we think it is a substantial compliance with our code. Pol. Code, § 4075.

[4-6] Turning now to the allegations of the amended complaint it would appear therefrom that the agents and employees of respondent county so carelessly and negligently operated and managed the oil trucks upon the highway as to deposit and leave large quantities of oil thereon in such a dangerous and negligent manner and condition and in such large quantities as to make, render, and leave the highways dangerous and unsafe for use as a public highway. The rule that negligence may be alleged in general terms by stating what was done and that it was done negligently without the necessity of stating the particular omission which rendered the act negligent is a rule too well established in this state to require the citation of authorities and we think that appellant has complied with its requirements. It is well established that it is the duty of all persons to abstain from doing any act by which any part of a public highway would become dangerous to the traveler (Williams v. San Francisco, etc., Ry. Co., 6 Cal. App. 715, 93 P. 122), and for a violation of this duty the person offending is liable in damages (Spence v. Schultz, 103 Cal. 208, 37 P. 220; Flynn v. Bledsoe Co., 92 Cal. App. 145, 267 P. 887; Stockton Automobile Co. v. Confer, 154 Cal. 402, 97 P. 881; McKune v. Santa Clara V. M. & L. Co., 110 Cal. 480, 42 P. 980; Barry v. Tetkildsen, 72 Cal. 254, 13 P. 657, 658, 1 Am. St. Rep. 551). In the last case cited it is said: "When a person pursues a business or does an act perfectly lawful in itself, and not in its nature so hazardous or so conducive to injury as to be of the character of a nuisance, then he can be held liable for injuries to others arising therefrom only when he has been guilty of negligence in his manner of carrying on the business or doing the act." If the maintenance of an obstruction or an encroachment upon a public highway or the creation of a pitfall therein constitutes an actionable wrong, we are unable to distinguish between such an act and the spilling or spreading of oil thereon. The existence of such a substance upon a paved highway might create a hazard equal to, if not greater than, the erection upon the highway of some more substantial obstruction, and, if negligently placed thereon, might be actionable. Causal connection between the negligent spilling of the oil upon the highway caused by the negligent operation of the truck and the injury and death of the decedent is appropriately alleged in those portions of the amended complaint above set forth, and, with the exception hereinafter noted, we think that the complaint states a cause of action.

[7] One ground of the motion for judgment on the pleadings was that plaintiff had "never prepared, filed and/or presented to the board of supervisors of the defendant county his claim for damages growing out of the alleged transaction set up in the complaint." The copy of the claim annexed to the amended complaint as exhibit A does not contain, nor has it annexed to it, the verification required by sections 4075 and 4076 of the Political Code, nor does it appear from the amended complaint whether or not the affidavit has been eliminated from the form of claim as prescribed by section 4076 of the Political Code. While this point is not presented to the court in the briefs of counsel, we believe that the omission of the verification from the copy of the claim as pleaded in the amended complaint is too grave an omission to pass unnoticed, and would technically be a sufficient ground for granting the motion for judgment on the pleadings. However, it appears that, pursuant to a stipulation for a diminution of the record, there is included in the transcript a copy of the original complaint, to which is annexed as an exhibit a copy of the claim as presented to the board of supervisors and which is identical with the claim annexed to the amended complaint which is now before us, except that there is added to the copy of the claim annexed to the original complaint as an exhibit an affidavit of verification which conforms in all respects to the provisions of sections 4075 and 4076 of the Political Code. We are not unmindful of the rule that, in construing a pleading and determining its sufficiency, we may not consider any matter not incorporated therein (Hibernia Savings & Loan Society v. Thornton, 117 Cal. 481, 49 P. 573), and, in determining the sufficiency of the amended complaint, we have confined our attention to that document, but we cannot ignore the fact that, in granting the motion for a judgment on the pleadings, the court had before it a copy of a properly verified claim attached to plaintiff's original and verified complaint. It could well be inferred that the omission of the affidavit of verification in the amended complaint was an oversight or clerical misprision of counsel, or that, by appropriate allegations, it might be shown that the necessity for a verification of the claim had been dispensed with as provided by section 4076 of the Political Code. If it appeared to the court that this error could have been corrected by amendment, it was the court's duty to deny the motion and permit such amendment to the amended complaint, and, in failing to do so, we think the court abused its discretion. Hale v. Gardiner, 186 Cal. 661, 200 P. 598; Raker v. Bucher, 100 Cal. 214, 34 P. 654, 849; 21 Cal. Jur. 191, and cases there cited.

The judgment is reversed with directions to permit the plaintiff to amend his second amended complaint with respect to the verification of his claim against respondent.

We concur: BARNARD, P. J.; MARKS, J.

127 Cal.App. 481

WHITHAM v. WHITHAM et ux.

Civ. 654.

District Court of Appeal, Fourth District, California.

Nov. 14, 1932.

1. Deeds ⇐211(3).

Plaintiff seeking cancellation of deed had burden of proving by preponderance of evidence that defendant induced its execution by fraudulent misrepresentations.

2. Deeds ⇐211(3).

Possible suspicion because of relationship of parties is insufficient to justify canceling deed, whose execution by stepmother was allegedly induced by stepson's fraudulent misrepresentations.

3. Fraud ⇐52.

In action of fraud, prior circumstances concerning, and those surrounding, transaction in issue, are admissible.

4. Judgment ⇐522.

In action to cancel deed to property registered under Torrens Law, evidence that defendant had purchased land and paid consideration *held* not collateral attack on judgment.

It appeared that real property in question was registered under Torrens Land Title Law, and was held in joint tenancy by a husband and his wife, and by his son by former marriage, and that after husband's death joint tenancy was terminated and court decreed title to be vested in the widow and son. Evidence showed that prior to recordation of title, son had acquired title through money left him by his own mother and through transactions with his father. In defending against his stepmother's action of fraud, son simply was allowed to relate prior relationship of parties in real property and manner of its acquisition, and he was not attacking Torrens land title registration or decree of court terminating joint tenancy of his father.

5. Appeal and error ⇐931(1).

In examining sufficiency of evidence to support finding, appellate court must accept as true evidence tending to establish correctness of finding, considering also all supporting inferences.

6. Appeal and error ⇐931(1).

Every substantial conflict in testimony should be resolved favorably to finding in examining sufficiency of supporting evidence.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Kate R. Whitham against John Le Roy Whitham and wife. Judgment for defendants, and plaintiff appeals.

Affirmed.

David H. Cannon, of Los Angeles, for appellant.

Allard & Stead, of Pomona, and Allen G. Mitchell, of Los Angeles, for respondents.

MORTON, Justice pro tem.

Charles S. Whitham, Kate R. Witham, his wife, and John Le Roy Whitham, his son by a former marriage, held in joint tenancy certain real property situated in San Bernardino county, California. Title to this property was registered in that county in accordance with the Torrens Land Title Law. After the death of Charles S. Whitham, the joint tenancy was terminated and the court decreed the title to be vested in the surviving tenants, Kate R. Whitham and John Le Roy Whitham in joint tenancy. In the present action Kate R. Whitham alleges that relying upon the false and fraudulent representations of John Le Roy Whitham to her that because of certain liens and clouds on the title to the property it was necessary that they execute and acknowledge a deed to the property to a third person who would then reconvey the property to them with a clear title, she executed and acknowledged a deed to the property in accordance with his request. It is stated this third person then deeded the property to John Le Roy Whitham and Sylvia Whitham, his wife. The prayer of her complaint that the deed be canceled and that John Le Roy Whitham and Sylvia Whitham, his wife, be adjudged to reconvey her former interest in said property to her was denied by the trial court. Plaintiff appeals under the alternative method from this judgment.

It appears from the evidence that prior to the recordation of the title to the real property involved in the office of the registrar of titles in San Bernardino county, the respondent John Le Roy Whitham had acquired title to this real property through money left him by his own mother and through transactions with his father. Further, that when the property was registered the action was entitled "Petition of John Le Roy Whitham," and it was alleged that John Le Roy Whitham had not been married, that petitioners Charles Sumner Whitham and Kate Ritchie Whitham were husband and wife, and that John Le Roy Whitham and Charles S. Whitham were the owners in fee simple as their joint property with the right of survivorship and that the property was not subject to homestead. After the respondent's marriage and before his father's death, it appeared that the father told respondent that he should have the title to the property placed

in the name of respondent and his wife and cleared of the names of Charles S. Whitham and Kate Ritchie Whitham, but this was never done. Respondent testified he talked this matter over with appellant before she signed the deed now in question. It is not contended that appellant paid any part of the consideration for the property; her claim to an interest being based solely on her marriage to Charles S. Whitham.

[1, 2] The burden of proving by a preponderance of the evidence that respondent induced appellant to execute and acknowledge this deed through false and fraudulent representations made by him to her regarding the condition of the title of the property rested upon appellant. Because a suspicion might be aroused by reason of the relationship of the parties is not sufficient. The court in Ryder v. Bamberger, 172 Cal. 791, at page 800, 158 P. 753, 756, discussed this question as follows: "For fraud must always be proved, so that when the plaintiff's case goes no further than to establish a state of facts from which the inference of fraud may or may not be reasonably drawn, he has failed to establish his charge by a preponderance of the evidence, and it becomes the duty of court or jury, as has been said, to find in favor of innocence and uprightness. This does not, of course, mean that the fraud must be proved by direct evidence. This is not always, nor even often, possible; but it does mean that the indirect evidence and the inference to be drawn from the proved facts must be so convincing as to satisfy trial court or trial jury that fraud was designed and accomplished. If therefore we should accept appellant's statement as above quoted, that the sole proposition is whether fraud can be inferred from the admitted facts, the complete answer is that, conceding that fraud might be inferred, the trial court upon substantial evidence has declined to infer it and its action in so doing is not here open to question."

[3, 4] Appellant contends that it was error to admit evidence concerning the original purchase of the land by respondent and that the total consideration for it had been paid by him. It is stated that this evidence constituted a collateral attack on a judgment. In an action of fraud it is the law that the prior circumstances relating to the matter are admissible as well as those surrounding the transaction in issue. Appellant testified in support of her contention of fraud that she received no consideration for the execution and delivery of the deed. Respondent was allowed to testify that the consideration was the same as he received at the time appellant and his father were made parties to the registered title. The respondent is not attacking the Torrens land title registration, nor is he attacking the decree of the court terminating the joint tenancy of C. S. Whitham, deceased. In defending against appellant's action of fraud he simply was allowed to relate the prior relationship of the parties in the real property, and how it was acquired. Simon Newman Company v. Lassing, 141 Cal. 174, at page 178, 74 P. 761.

[5, 6] After an examination of all the evidence we feel the decision of the trial court should be affirmed. In addition, "it must be borne in mind that, in examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is, under the rule which has always prevailed in this court, to be resolved in favor of the finding." Bancroft-Whitney Company v. McHugh, 166 Cal. 140, at page 142, 134 P. 1157, 1158.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

127 Cal.App. 505

NARUM v. CHEATHAM.

Civ. 7494.

District Court of Appeal, Second District, Division 1, California.

Nov. 15, 1932.

1. Process ⇐96(4).

Order for publication of summons based solely on finding that defendant "cannot after due diligence be found" is void, where affidavit contains no evidence showing diligence (Code Civ. Proc. § 412).

2. Process ⇐90.

Reasonable degree of perseverance in attempt to serve defendant within state is essential to warrant order for publication of summons (Code Civ. Proc. § 412).

3. Process ⇐98.

Order for publication of summons may be vacated where affidavit for publication discloses lack of sufficient statement of facts (Code Civ. Proc. § 412).

4. Process ⇐96(4).

Plaintiff's affidavit for publication of summons, which failed to state facts within plaintiff's knowledge showing that defendant could not be found, *held* insufficient (Code Civ. Proc. § 412).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Plaintiff's affidavit stated place of defendant's residence and stated that his attorney had placed copies of original complaint and summons in hands of process servers who had made numerous attempts to serve defendant at his residence, but had been unable to find him, and that they had been told by his wife that defendant could be found in another county. The affidavit also referred to an attached certificate of sheriff of the other county, certifying to his inability to find defendant there. It further appeared that the numerous attempts of process servers were made at least six weeks before the date of the affidavit, and no affidavits were obtained from any of the process servers.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Thomas M. Narum against J. S. Cheatham. An order was entered granting motion to quash and vacate summons and dismissing the action, and plaintiff appeals.

Affirmed.

Samuel A. Rosenthal, of Los Angeles, for appellant.

Charles S. McKelvey, of Los Angeles, for respondent.

CONREY, P. J.

In this action to recover damages for personal injuries resulting to plaintiff by reason of negligence of the defendant, the complaint was filed and summons issued April 17, 1926. On August 3, 1926, an order for publication of summons was signed and filed. This order was granted upon the sole ground that from the affidavit of the plaintiff filed therewith it satisfactorily appeared to the judge that the defendant "cannot after due diligence be found within this state"; that the complaint showed a good cause of action; that summons had been duly issued; and that personal service thereof could not be made upon the defendant for the reason above stated and by said affidavit made to appear.

[1-3] Aside from publication and mailing in accordance with said order, there was no service of summons until April 28, 1929, when personal service was made on the defendant. Thereupon the defendant upon due notice presented his motion to quash and vacate the summons and the pretended service thereof upon certain stated grounds, and also that the action be dismissed upon the ground the summons was not served within three years from the date thereof. That motion having been granted, and the court having entered its order dismissing the action, the plaintiff appeals from said order.

An order for publication of summons, based solely upon a finding that the defendant "cannot after due diligence be found within this state" is void when the affidavit which constituted the evidence in support of that finding does not contain any evidence tending to prove any diligent effort to find the defendant. In the attempt to make such service the quality of diligence must be present, at least to the extent of a reasonable degree of perseverance. "A judgment or order is said to be void on its face when the invalidity is apparent upon an inspection of the judgment roll. People v. Davis, supra [143 Cal. 673, 77 P. 651]. It follows, therefore, that, if the affidavit upon which the order directing publication of summons was had in this action fails, as urged by the appellant, to comply with the provisions of section 412 of the Code of Civil Procedure, the default judgment thereafter entered on such defective service would be void on its face, and the trial court at any time could have properly set it aside." Morgan v. Clapp, 207 Cal. 221, 224, 277 P. 490, 491. "There is no doubt of the right of a judge to vacate an order for publication of summons where, upon examination of the affidavit, he finds a total lack of a statement of facts sufficient to authorize the order to be made in the first instance; and we may say further that such right might exist where it appeared that the affidavit was fraudulent." Porter v. Superior Court, 30 Cal. App. 608, 611, 159 P. 222, 223.

[4] In the case at bar, the affidavit for publication of summons was made by the plaintiff. It did not state any fact known to the plaintiff and tending to prove that the defendant could not be found at his place of residence in the city of Los Angeles, although that place of residence was known and was actually stated in the affidavit. Affiant did state that his attorney had "placed copies of the original complaint and summons in the hands of process servers, who have made numerous attempts to serve defendant at his residence * * * but have been unable to find the within named defendant"; also that said process servers have been repeatedly told by the wife of defendant that the defendant "is to be found at the Paymaster Mine in Imperial County." It is plain on the face of the affidavit that the plaintiff was not stating any of these facts as within his own knowledge, other than the fact of defendant's residence at the named place in Los Angeles. This affidavit also referred to an attached certificate of the sheriff of Imperial county, wherein that officer under date July 23, 1926, certified that he received the summons on June 18, 1926, and after due search and diligent inquiry was unable to find the defendant in the county of Imperial. From such certificate, together with said affidavit, it appears that the "numerous attempts" of the alleged process servers were made prior to the 18th day of June, and at least six weeks before the date of the plaintiff's affidavit. If

any effort actually was made to serve the summons on the defendant it would seem that an affidavit might have been obtained from at least one of said process servers. There is no claim or pretense in the plaintiff's affidavit, or in the order for publication of summons, that the defendant was concealing himself, and it seems to us that it would be entirely unreasonable to hold that an order of publication made upon the grounds stated in the order made in this case has any legal support in the purely hearsay statements of the plaintiff's affidavit. We are satisfied that the affidavit in no substantial way tends to prove the facts necessary to support the order for publication of summons. It should be noted, moreover, that the record does not show any entry of default, and there has been no judgment in the action except the judgment of dismissal.

Since there was no service of summons within three years after commencement of the action, the court was authorized to enter its order of dismissal. Code Civ. Proc., § 581a.

The order is affirmed, and the judgment of dismissal is affirmed.

We concur: HOUSER, J.; YORK, J.

127 Cal.App. 472

CALIFORNIA COTTON CREDIT CORPORATION v. SUPERIOR COURT IN AND FOR MADERA COUNTY et al.

Civ. 4702.

District Court of Appeal, Third District, California.

Nov. 14, 1932.

1. Judgment ⇐883(1).

One of two judgments of same general character between same parties may be offset against the other, and law will compel such set-off as matter of right, especially where one party is insolvent.

2. Mandamus ⇐55.

Appellate court cannot interfere by mandamus with lower court's determination as to whether execution on judgment should be stayed so that judgment in pending suit may be set off against former judgment, without showing of abuse of discretion.

3. Judgment ⇐883(3).

Judgment on note cannot be set off against prior judgment for return of exempt property, taken from defendant by plaintiff in claim and delivery action.

4. Execution ⇐158(1).

Courts of general jurisdiction have inherent discretionary power to grant stays of execution in proper cases.

5. Mandamus ⇐154(4).

Generally, party applying for writ of mandate to court or judge, must show that duty to do thing asked is plain and unmixed with discretionary power or exercise of judgment.

6. Mandamus ⇐28.

Trial court's exercise of discretion will not be controlled by mandate, in absence of palpable abuse.

7. Mandamus ⇐55.

Refusal to stay execution on judgment for defendant in claim and delivery action, pending plaintiff's suit on note, in order to permit set-off of judgment therein, *held* not abuse of discretion, warranting peremptory writ of mandate.

Application by the California Cotton Credit Corporation for a writ of mandate to the Superior Court in and for Madera County and another, to compel stay of execution on a judgment pending determination of other litigation.

Peremptory writ denied.

See, also, 10 P.(2d) 176.

Irvine P. Aten, of Fresno, for petitioner.

George Mordecai, of Madera, for respondents.

PER CURIAM.

Petitioner commenced an action in the justice's court to recover from respondent Gilstrap certain personal property consisting of horses, mules, and farming implements of which he claimed to be the owner, and which were then in the possession of Gilstrap. The ordinary procedure was followed, and on the demand of petitioner the said property was delivered to it. Respondent Gilstrap in that action claimed the ownership of said property, and judgment was rendered in his favor for the return of said property, or, if return thereof could not be had, for its value in the sum of $299 and for $109 damages for the taking of same and $6 costs. This judgment was rendered November 10, 1931. Petitioner appealed to the superior court, and that court again rendered judgment in favor of respondent Gilstrap for the return of said property, or, in default thereof, for its value in the sum of $299 and for $110 damages for taking and withholding the same, and for his costs in the sum of $8.20. The date of this judgment is February 8, 1932. It has become final. None of said property has been returned to said Gilstrap.

On the 10th day of November, 1931, peti-

tioner commenced an action against said Gilstrap for the balance alleged to be owing it by Gilstrap on a promissory note; the amount of said alleged balance being $1,162.50.

On March 5, 1932, petitioner moved the court to stay the execution on the judgment theretofore rendered in favor of Gilstrap until the final determination of the action then pending, but not at issue, brought by petitioner against Gilstrap to recover the alleged balance on said note, in order that petitioner could then set off the judgment so to be obtained against the said judgment rendered in favor of Gilstrap, alleging in said motion that respondent was insolvent. This motion was denied.

Thereupon this proceeding was commenced, wherein petitioner applied to this court for a writ of mandate, setting forth in his verified petition therefor the aforesaid facts. Upon the filing of said petition, this court caused to be issued an alternative writ of mandate requiring respondents to show cause why the relief prayed for in said petition should not be granted.

Thereupon respondent Gilstrap filed his answer to said petition and attached thereto his affidavits theretofore filed in opposition to the said motion to stay the execution. In these affidavits he alleged that he had paid the said promissory note in full and that an accounting between him and petitioner would show that petitioner was owing him upwards of $1,000.

During the year 1931 Gilstrap was engaged in farming, planting, and maturing a crop of cotton. To enable him to do this, petitioner advanced him the necessary money, taking as security therefor a mortgage on said crop and on certain personal property, the horses, mules, and farming implements for which Gilstrap recovered judgment not being included in said mortgage. When the cotton crop matured, it was turned over to petitioner, who sold it and applied the proceeds on said mortgage. It appears from the affidavits of Gilstrap that there were numerous transactions between petitioner and him, and that an accounting would be necessary. Gilstrap also alleges in said affidavits two of the horses and the farming implements which were taken from him by petitioner in the claim and delivery action were exempt from execution.

[1] It is a well-settled proposition that, where there exist judgments between the same parties of the same general character, the one may be offset against the other (15 Cal. Jur., p. 275, § 269, and authorities cited), and the law will intervene to compel such set-off, especially where one of the parties is insolvent; and in such cases, in equity, a set-off is a matter of right and not of discretion. Hobbs v. Duff, 23 Cal. 596, 629.

[2] In the case now before the court we have a final judgment in favor of respondent Gilstrap and a disputed claim on the part of petitioner upon which an action is pending. Petitioner does not contend that he is entitled to have his claim set off against said judgment, but claims that the court should stay the execution until such time as there is a final determination of his action, in order that, if he recovers a judgment against respondent, he can use it as a set-off against respondent Gilstrap's judgment. In support of this claim, the petitioner cites the cases of Machado v. Borges, 170 Cal. 501, 150 P. 351, Arp v. Blake, 63 Cal. App. 362, 218 P. 773, Nash v. Kreling, 136 Cal. 627, 69 P. 418, and Hobbs v. Duff, 23 Cal. 596. These cases have to do with the right of set-off, and do show clearly when such right should be recognized by the court. However, in the action before us, the question really presented is whether the court below abused its discretion in refusing to stay execution upon the judgment held by respondent Gilstrap against the petitioner. Whether the claim asserted by the petitioner or any judgment that may be obtained by him against the defendant thereon should or should not be set off against the judgment held by the respondent is only presented collaterally, and, if the circumstances presented to the court below were such as to call for the exercise of the court's discretion in determining whether an execution should or should not be stayed on the respondent's judgment, then and in that case this court cannot interfere therewith in this proceeding without showing an abuse of discretion.

[3] Respondent Gilstrap claims that part of the property taken by petitioner in the claim and delivery action was exempt from execution. Such being the case, no right of offset exists as to the extent of the judgment for the property so exempt. Beckman v. Manlove, 18 Cal. 388.

[4, 5] Courts of general jurisdiction have inherent discretionary power to grant a stay of execution in a proper case. 23 C. J. 528; 11 Cal. Jur. 57. It is a general rule that, in order that a writ of mandate issue to compel action on the part of a court or judge, the appellant must show that the case is one where the duty to do the think asked for is plain and unmixed with discretionary power or exercise of judgment. Tomkin v. Harris, 90 Cal. 201, 27 P. 202.

In Candeias v. Superior Court, 49 Cal. App. 580, 193 P. 957, 959, the court in denying the writ said: "In order to invoke against the respondent herein the writ of mandamus, petitioner must show from the record that there were no facts or circumstances to sustain the action of the trial judge in refusing the application for a stay, and that consequently the order refusing to grant the stay was made without jurisdiction; or, as stated in the case of Raisch v. Board of Edu-

cation, 81 Cal. 542, at page 546, 22 P. 890, at page 891, 'there was no semblance of cause' for the action of the court; or, as stated by Mr. Justice Henshaw in the case of Newlands v. Superior Court, 171 Cal. 741, at page 744, 154 P. 829, at page 831, petitioner should show 'that discretion under the facts can be legally exercised in but one way.'"

[6] When a trial court is vested with discretion in the exercise of its judicial power, the exercise of such discretion will not be controlled by mandate except in case of palpable abuse. Beardsley Land & Inv. Co. v. Superior Court, 104 Cal. App. 255, 285 P. 908; Los Angeles A. T. Co. v. Superior Court, 94 Cal. App. 433, 271 P. 363; Realty, etc., Co. v. Superior court, 165 Cal. 543, 132 P. 1048.

[7] We are of the opinion that the trial court did not abuse its discretion in refusing to stay the said execution, and therefore the peremptory writ is denied.

127 Cal.App. 516

SWIM v. ACKEL et al.

Civ. 7947.

District Court of Appeal, First District, Division 1, California.

Nov. 16, 1932.

1. Husband and wife ⇐268(1).

Wife is not liable for price of goods sold to husband where goods were not necessaries (Civ. Code, §§ 161a, 171).

2. Appeal and error ⇐1071(6).

Failure to find that plaintiff had notice of bankruptcy proceedings against defendant after institution of action, and that defendant was discharged, was not ground for reversal where any findings would necessarily have been for defendant.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action for goods sold and delivered by Meurice Swim against Edward Ackel and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Meurice Swim, in pro. per.

Aaron N. Cohen, of San Francisco, for respondents.

PER CURIAM.

Appeal by plaintiff from a judgment entered in favor of defendants in an action to recover for merchandise alleged to have been sold and delivered by plaintiff's assignor to the defendants, who are husband and wife. The husband admitted the allegations of the complaint, but alleged that on April 9, 1928—which was a few days before the filing of his answer—he was adjudged a bankrupt. His wife denied all the allegations of the complaint. The trial court found the answers to be true and entered judgment accordingly.

Plaintiff contends that certain findings are unsupported and that the court failed to find on all the allegations of the complaint.

First it is claimed that the evidence shows that the merchandise was sold to both defendants, and also that the same having been purchased subsequent to the adoption of section 161a of the Civil Code, which declares that a wife shall have a present, existing, and equal interest in the community property, subject to the management and control thereof by the husband, it follows that she is liable for the purchase price of such property.

[1] As to this it will be sufficient to say that the claim against defendants was not for necessaries, and the court found upon sufficient evidence that the debt was that of the husband and not of his wife. Under such circumstances she is not liable. Civ. Code, § 171; Cal. Jur., Supplement 1930, Community Property, § 104.

The record discloses sufficient findings on all the issues presented by the plaintiff, and the same are not, as claimed by plaintiff, inconsistent or contradictory.

[2] There was no finding that the husband received a discharge in bankruptcy, and plaintiff claims that there was no proof that he or his assignor had notice or actual knowledge of this proceeding. As stated, plaintiff was the assignee of the claim sued upon, and the bankruptcy proceeding was instituted after the action commenced. The fact of the proceeding was alleged in the answer which was served on plaintiff, and a certified copy of the discharge in bankruptcy was admitted in evidence at the trial. From the above it is apparent that plaintiff must have known of the proceeding, and the document filed proved the discharge. Findings on these questions, if made, would necessarily have been against the plaintiff; and where such is the case the failure to find is not ground for reversal. Hulen v. Stuart, 191 Cal. 562, 217 P. 750.

The evidence was sufficient to support the conclusions of the trial court, and no error has been shown which would justify a reversal.

The judgment is affirmed.

CALIFORNIA REPORTER

IN VOLUME

16 PACIFIC REPORTER

SECOND SERIES

PER CURIAM.

Respondent again insists that, under sections 6.40 and 6.100 of the School Code, school trustees and boards of education may not expend moneys, though levied for the purpose of building schoolhouses or for the purchase or sale of school lands, without a vote of the district authorizing such action. We intended to hold that within the limits prescribed by section 4.375, as added by St. 1931, p. 2493, this might be done without such a vote. We construe the plain intent of the above-mentioned sections to be that such expenditures are optional within the said limits and compulsory where required by a vote of the district. We take the legislative intent to have been that in repealing section 4.469 (Laws 1931, p. 2494) this section was deemed superfluous, in view of the recasting and restating of the various chapters of the School Code as noted in our former opinion.

Rehearing denied.

127 Cal.App. 9

PEOPLE of the State of California, Plaintiff and Respondent, v. Lorenzo CIMAR, Defendant and Appellant.

Cr. 1227 (3).

Supreme Court of California.

Nov. 14, 1932.

Appeal from Superior Court, Yuba County; J. O. Moncur, Judge.

On application for hearing.

Hearing denied.

For opinion of District Court of Appeal, see 15 P.(2d) 166.

Ralph D. Paonessa and Paonessa & Oster, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

Petitioner's application to have the above-entitled cause heard and determined by this court after judgment in the District Court of Appeal of the Third Appellate District is denied. Anything in the opinion in the case of People v. Burns, 75 Cal. App. 84, 241 P. 935, contrary to the decision herein is hereby expressly disapproved.

216 Cal. 588

LOS ANGELES CITY SCHOOL DIST. OF LOS ANGELES COUNTY v. PAYNE, County Auditor.

L. A. 13717.

Supreme Court of California.

Nov. 23, 1932.

On rehearing.

Rehearing denied.

For former opinion, see 15 P.(2d) 501.

216 Cal. 694

In re CALDWELL'S ESTATE.

BROWN et al. v. CALDWELL.

L. A. 13351.

Supreme Court of California.

Nov. 23, 1932.

1. Judgment ⇐199(1).

Making and denial of motion for directed verdict *held* condition precedent to judgment notwithstanding verdict (Code Civ. Proc. § 629).

2. Appeal and error ⇐664(1).

Recital in judgment that motion for directed verdict was made and denied *held* controlled by reporter's duly certified transcript showing neither making nor denial of motion (Code Civ. Proc. § 629).

While a recital in the judgment is conclusive as to the actions of the trial court where there is no bill of exceptions or reporter's transcript or other portion of the record showing the facts, this is not the rule where the record on appeal included the reporter's transcript duly certified as comprising a full, true, and correct transcript of all rulings, instructions, acts, and statements of the court.

3. Judgment ⇐199(1).

Counsel's statement of intention to request directed verdict and court's reply that he preferred case to go to jury *held* not "motion" for and "order" denying directed verdict prerequisite to judgment notwithstanding verdict (Code Civ. Proc. §§ 629, 1003).

"Motion" is an application for an "order," while an "order" is a direction of a court or judge, made or entered in writing, and not included in a judgment.

[Ed. Note.—For other definitions of "Motion" and "Order," see Words and Phrases.]

4. Judgment ⇐199(1).

Requested instruction for verdict and refusal thereof *held* not equivalent to "motion" for directed verdict and "order" denying motion prerequisite to judgment notwithstanding the verdict (Code Civ. Proc. §§ 629, 1003).

5. Appeal and error ⇐1202.

That trial court misconceived its authority to grant judgment, notwithstanding verdict without motion for directed verdict having been made would not prevent motion, within required time, for new trial on statutory grounds, including insufficiency of evidence (Code Civ. Proc. §§ 629, 659).

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

In the matter of the estate of John Caldwell, deceased. Will contest by Gladys Anna Caldwell, a minor, by Theresa Caldwell Allen, her guardian ad litem, opposed by H. T. Brown and another. From a judgment notwithstanding the verdict, contestant appeals.

Reversed, with directions.

For prior opinion, see 12 P.(2d) 979.

Frank G. Howe and Ernest P. Wellman, both of Los Angeles, for appellant.

F. D. Catlin and Laird L. Neal, both of Los Angeles, for respondents.

WASTE, C. J.

This cause was taken over after decision in the District Court of Appeal, Second Appellate District, Division 2, in order that we might more thoroughly consider the questions of law involved. An examination of the authorities satisfies us as to the correctness of the opinion heretofore prepared by Mr. Justice Fricke, pro tempore, and we hereby adopt the same as and for the decision of this court. It reads:

"This is an appeal from a judgment notwithstanding the verdict of the jury.

[1] "Appellant's first point is that the order granting a motion for judgment notwithstanding the verdict is erroneous for the reason that such a motion can only be granted where the moving party before verdict has requested the court to direct a verdict in his favor.

"Section 629, Code of Civil Procedure, providing for the granting of a judgment notwithstanding the verdict, so far as it applies to the question before us, reads: 'When a motion for a directed verdict which should have been granted, has been denied and a verdict rendered against the moving party, the court at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, shall enter judgment in favor of the aggrieved party notwithstanding the verdict.' By the language of this provision the making and denial of a motion for a directed verdict is made a condition precedent to the entry of a judgment notwithstanding the verdict. In the absence of such a motion and its denial the court was not authorized to grant a motion for judgment notwithstanding the verdict. In re Estate of Easton, 118 Cal. App. 659, 5 P.(2d) 635.

"Respondents do not urge that this is not the law but contend that a motion for a directed verdict was made and in support of this contention refer to three matters in the record—a recital in the judgment; a statement by counsel and the court's response; and the refusal of a requested instruction to the jury to find for defendants.

[2] "Respondents contend that the recital in the judgment that a motion for a directed verdict was made and denied is conclusive. While a recital in a judgment is conclusive as to the actions of the trial court where there is no bill of exceptions or reporter's transcript or other portion of the record showing the facts, this is not the rule where the record on appeal, as here, includes the reporter's transcript, duly certified as comprising a full, true and correct transcript of 'all rulings, instructions, acts and statements of the court,' and such transcript shows neither the making nor the denial of a motion for a directed verdict, evidence quite conclusive that no such motion was ever made or ruled upon by the trial judge. Where the record shows, as it does here, that an essential prerequisite to the entry of a judgment notwithstanding the verdict did not exist, the record must prevail over the recital in the judgment where such judgment is attacked upon the ground that the prerequisite had no existence and that the recital in the judgment is not sustained by the record. Stow v. Superior Court, 178 Cal. 140, 144, 172 P. 598; Houghton v. Tibbets, 126 Cal. 57, 58 P. 318.

[3] "The nearest support for respondents claim appearing in the reporter's transcript is a conversation between court and counsel had in the chambers of the judge at his request in which, in addition to a discussion of other matters, the following appears: 'Mr. Catlin: Why, Your Honor, we intend to ask for an instructed verdict. It seems that the court under the circumstances in a case of

this kind—it would take up the time of the Court, if they were not to follow the instructions and evidence, and immediately the court would—. The Court (interposing): Well, I will be frank with you. As far as I am concerned, I prefer to let it go to the jury, but I don't hesitate to tell you, as far as that is concerned, what my position is on the matter under the evidence, but I would prefer to let the matter go to the jury. I have my prerogatives after the jury gets through.' This statement of respondents' counsel that he intended to ask for an instructed verdict was not a motion for an instructed verdict. A motion is an application for an order (section 1003, Code Civ. Proc.), and counsel's statement of what he intended to do was not an application for an order. Neither can the language of the court, though indicating perhaps that his opinion on the facts favored the cause of respondents, be considered an order. An order is a direction of a court or judge, made or entered in writing, and not included in a judgment. Section 1003, Code Civ. Proc.

[4] "Respondents' contention that the refusal of a requested instruction for a verdict in their favor is the equivalent of a denial of a motion for a directed verdict is not supported by authority, and the case of In re Estate of Easton, supra, is authority directly against that contention. Respondents suggest that no such ruling was intended by the opinion in the Easton Case. A reading of that opinion contradicts this contention, for the court there says: 'Evidently, therefore, the main purpose of the statute in requiring such a motion (for a directed verdict) to be made as a condition precedent to the exercise of the court's power to render judgment non obstante veredicto is to give the party against whom the motion is directed an opportunity to introduce whatever further and additional evidence he may have at hand to overcome the grounds of the motion.' Furthermore, the act of handing to the court of a proposed instruction is not a motion nor is the refusal of a requested instruction an order denying a motion. Section 1003, Code Civ. Proc."

In support of the proposition that the making of a motion for a directed verdict is a condition precedent to the entry of judgment non obstante veredicto, see, also, Estate of Yale (Cal. Sup.) 4 P.(2d) 153; Estate of Fleming, 199 Cal. 750, 251 P. 637; Wayland v. Latham, 89 Cal. App. 55, 264 P. 766; Cushman v. Cliff House, 79 Cal. App. 572, 575, 250 P. 575, and authorities there cited.

[5] It follows that, since respondents failed to comply with the provisions of the Code section by omitting to present a motion for a directed verdict, the court below was without authority to render judgment in their favor contrary to the verdict. All that it could do under the circumstances was to grant a new trial, after the entry of judgment in conformity with the verdict. However, the fact that the court misconceived its authority in the particular mentioned does not preclude the respondents, if they be so advised, from moving for a new trial upon the statutory grounds, including insufficiency of the evidence to support the verdict, within the required time after notice of the entry of the judgment hereinafter directed to be entered. Section 659, Code Civ. Proc.; Bond v. United R. R. Co., 169 Cal. 273, 146 P. 688; Tupman v. Haberkern, 208 Cal. 256, 280 P. 970.

The judgment is therefore reversed, with directions to the trial court to enter judgment in accordance with the verdict, and thereafter to hear and determine such other and further proceedings as may be necessary to a final disposition of the cause.

We concur: SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; TYLER, Justice pro tem.

127 Cal.App. 607

ZARAFONITIS et al. v. YELLOW CAB CO. OF ALAMEDA COUNTY et al.

Civ. 8509.

District Court of Appeal, First District, Division 1, California.

Nov. 22, 1932.

1. Appeal and error ⇐882(16).

Defendant, whose attorney stated in open court that insurance company was interested in case after plaintiff referred to it on cross-examination following court's admonition of jury to disregard her reference thereto on direct examination, cannot complain thereof on appeal.

2. Appeal and error ⇐882(1).

Party inviting evidence of, or stating in open court, facts prejudicial to him, cannot complain thereof on appeal.

3. Trial ⇐133(6).

Instruction to disregard remarks concerning insurance company *held* properly refused as contrary to admissions of defendant's counsel in open court that insurance company was interested in case.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Virginia Zarafonitis and husband against the Yellow Cab Company of

Alameda County, a corporation, and another. Judgment for plaintiffs, and defendant corporation appeals.

Affirmed.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant.

Ingemar E. Hoberg, of San Francisco, for respondents.

PER CURIAM.

An action for damages for personal injuries alleged to have been caused by defendants' negligence. Plaintiff's injuries were due to the fact that an automobile operated by her was struck by a cab owned and operated by defendant corporation. A jury returned a verdict against the defendants above named, and defendant corporation has appealed from the judgment entered thereon.

[1, 2] As grounds for the appeal, it is claimed that plaintiff and her counsel were guilty of prejudicial misconduct by stating in effect that appellant carried indemnity insurance, and that the trial court erroneously refused appellant's requested instruction on the matter of insurance.

During the course of the direct examination of plaintiff, she was asked what physicians she had consulted regarding her injuries. In reply she named several, including Dr. Abbott. Later counsel for defendant corporation attempted to enumerate those whom she had mentioned, omitting, however, this doctor's name. The court thereupon corrected counsel by saying "and Dr. Abbott." Following this questions were asked by plaintiff's counsel and the following answers given:

"Q. Now that examination by Dr. Abbott was for whom? A. That was for the other party, the other side.

"Q. And by whom do you mean? A. The insurance company for the Yellow Cab."

Counsel for appellant immediately assigned the last question as misconduct, and asked that a mistrial be declared.

The court, however, admonished the jury to disregard the answer, stating that no insurance company was a party or interested in the action in any way, and that the jury had no right to consider that element. Thereupon appellant's counsel stated that he believed the jury would follow the court's instruction in the matter.

On cross-examination this witness was asked where she obtained the license number of one of the colliding automobiles, to which she replied that she obtained it from the insurance company. Following this reply and some discussion between counsel, appellant's attorney made the following statement: "Well, let it go at that. I will state frankly—I might as well state it any way—there is an insurance company interested in this case along with the Yellow Cab, and I represent that." Subsequently several references were made to "the insurance company" by appellant's counsel.

It has been frequently held that answers of this character elicited by plaintiff's counsel, where presumably he knew what answers would follow his question, are prejudicial and ground for reversal, notwithstanding instructions that they be disregarded by the jury (Citti v. Bava, 204 Cal. 136, 266 P. 954; Rising v. Veatch, 117 Cal. App. 404, 3 P.(2d) 1023); but, in view of the above, the prejudice, if any, was more likely to have been caused by the statements and questions asked by appellant's counsel than by the conduct of plaintiff or her counsel, and we cannot say, in view of the court's admonition, that the jury would not have disregarded her first answer. Where evidence of facts likely to be prejudicial to a party are invited, or the facts are stated in open court by him, he is under well-settled principles in no position to complain. 2 Cal. Jur., Appeal and Error, § 496, p. 846.

[3] Appellant requested the following instruction, which was refused: "You are hereby instructed that upon your voir dire examination and during the trial of this case there have been certain remarks made concerning an insurance company. Upon arriving at your verdict you are instructed to disregard such remarks, and are further instructed that no insurance company is a party to or in any way interested in this action." As shown, counsel admitted in open court that an insurance company was interested in the case with appellant. While this was not a material fact, and the jury might properly have been so instructed, the instruction offered was directly contrary to the admission. This was sufficient to justify its refusal by the court.

The evidence supports the judgment, and, after an examination of the entire record we are satisfied that no misconduct or error has been shown which would justify a reversal.

The judgment is affirmed.

127 Cal.App. 462

GREENING et al. v. FORD et ux.

Civ. 7240.

District Court of Appeal, Second District, Division 2, California.

Nov. 14, 1932.

Hearing Denied by Supreme Court Jan. 12, 1933.

New trial ⇐58.

In automobile collision case, where counsel, although later retracting statement, argued that defendant, if responsible, was guilty of crime, and jury returned verdict of, "Not guilty," order granting plaintiffs new trial *held* affirmed.

It appeared that when defendant's counsel stated in argument that defendant, if responsible for accident in question, was guilty of a criminal offense, plaintiffs' attorney objected to statement as erroneous, whereupon court said that it was not a true statement of the law and admonished jury to disregard it, and defendant's counsel then told jury that they should take the law as given by court, but for some cause jury brought in the unusual and irregular verdict of, "Not guilty," which perhaps meant not guilty of negligence; but whether it did or not was not a question for appellate court to decide.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Ethel Greening, widow and heir of Walter L. Greening, deceased, and certain others, minors, by their guardian ad litem, against Harry Ford and wife. After a judgment for defendants, plaintiffs' motion for a new trial was granted, and defendants appeal.

Order granting new trial affirmed.

Hearing denied by Supreme Court; PRESTON, J., dissenting.

Harry D. Parker, of Los Angeles, for appellants.

Russell H. Pray, of Long Beach, for respondents.

STEPHENS, Justice pro tem.

This is an automobile collision case and was tried before a jury. It is here on appeal from an order of the trial court granting a new trial to plaintiffs. The facts relevant to the appeal are as follows: In presenting the case to the jury the following occurred:

"Mr. Parker [attorney for defendants]: I tell you, ladies and gentlemen, if Mr. Ford is responsible for this accident he is guilty of a criminal act—of a crime.

"Mr. Pray [attorney for plaintiffs]: Just a moment, your honor, I assign that statement of counsel as misconduct and as not the law.

"Mr. Parker: I believe it is the law.

"The Court: I do not think that it is a true statement of the law. I will have to differ in opinion with you. In other words, a person might be responsible civilly in damages for negligence and yet his conduct might not be sufficiently wanton to amount to a crime, and I think you are in error in that statement, and the jury is instructed to disregard it."

Whereupon counsel for defendants stated to the jury: "Ladies and gentlemen, do not take the law from me. All I ask is that you follow the law and the instructions given to you by this court." The arguments were finished without further event, the jury was instructed, and the case submitted. The jury returned the following verdict: "We the jury in the above entitled action find for the defendant Not Guilty." Judgment was duly entered, and subsequently plaintiffs moved for a new trial on all of the grounds enumerated in section 657, Code of Civil Procedure, though not in the strict language thereof. After presentation of the motion the court made the following order: "Said motion is argued upon all the grounds set forth in said notice of intention and by the court granted upon the ground of prejudicial error."

The sole error claimed to have been committed during the trial consists of the passage in court as above related. We have carefully read and considered all of the authority submitted by appellants' able briefs. It is true appellants' attorney and the court did all in their power before the case was submitted to the jury to cure the effect of the misstatement to the jury. It is, however, elemental that while both criminal and civil proceedings may arise from the same acts, the conviction of a crime and the determination of tortious liability are based upon vastly different principles. In this proceeding we are faced with the bald fact that for some cause the jury brought in the very unusual and irregular verdict, "We the jury find for the defendant Not Guilty." It may be that the jurors remembered the criminal reference in spite of its withdrawal and the court's admonition, and that this affected their consideration of the evidence and the wording of the verdict. On the other hand, it may be that the jury was merely finding Mr. Ford not guilty of negligence, since we find the terms "guilty" and "not guilty" of negligence repeated six times in the instructions. But it is not for us to say. Of course, the doubt could have been removed by sending the jury back under a proper explanation, but this was not asked

for nor was it done, and no point in regard thereto is presented to us.

As the motion was made to the judge who presided at the trial, he was in a better position than we are to judge the effect of the remark in question upon the jury. We cannot say that his observations, when taken in connection with the unusual wording of the verdict, may not have correctly convinced him that a fair trial was, in fact, not had by the plaintiffs. Merralls v. Southern Pacific Co., 182 Cal. 19, 186 P. 778.

The order granting a new trial is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

127 Cal.App. 465

PEOPLE v. LUZOVICH.

Cr. 1228.

District Court of Appeal, Third District, California.

Nov. 14, 1932.

1. Infants ⇐68.

Requirement that minor under 18 shall be tried by juvenile court is not jurisdictional, and was waived by failure of youth of 17 and attorney to suggest matter to superior court (St. 1915, p. 1229, § 6, as amended by St. 1921, p. 799).

2. Criminal law ⇐516, 517(3).

Accused's written statement concerning manner in which he killed father *held* not "confession" and was admissible without preliminary proof that it was voluntary.

Written statement was not a "confession," since a "confession" is restricted to an acknowledgment of guilt, whereas accused contended that he killed his father in self-defense.

[Ed. Note.—For other definitions of "Confess; Confession," see Words and Phrases.]

3. Homicide ⇐301.

Where accused and father were far from home at time of killing, court did not err in failing to voluntarily give instruction that self-defense extended to accused's mother whom father had threatened (Pen. Code, § 197).

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Anthony Luzovich was convicted of manslaughter, and he appeals.

Affirmed.

C. I. Bennington, of Oroville, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON, delivered the opinion of the court.

The defendant was charged with the murder of his father. He was convicted of manslaughter and sentenced to imprisonment in the state prison for a term not to exceed ten years. From this judgment and from an order denying a motion for new trial an appeal was perfected.

It is contended the court erred in admitting in evidence an alleged involuntary confession of the defendant, and other evidence to which objections were made; that the court failed to instruct the jury on its own volition regarding the defense of justifiable homicide according to the provisions of section 197 of the Penal Code; and that the defendant should have been tried in the juvenile court.

The defendant, who was but seventeen years of age, lived with his father and mother at Oroville. The family had lately moved to California. They were Slavonians and they were very poor. Domestic trouble existed between the husband and wife. The defendant had been severely punished by his father. There was evidence that the deceased had choked his wife and that he had threatened to poison and kill both his wife and the defendant. The night before the homicide a quarrel occurred between the husband and wife. The defendant and his father had been placer mining on the Feather river with poor success. They left for this location early on the morning of the homicide. The defendant took with him on this occasion a loaded revolver which he concealed beneath a large rock near the point where his father was panning for gold. This fact was unknown to the father. The defendant was working at the river some distance from his father. No quarrel appears to have occurred between them on this morning prior to the shooting. The father called to his son inquiring about his success. The defendant testified that he returned to his father, who then proceeded to abuse him for his lack of success and charged him with idleness. The defendant claims that when he reached a point near the rock where he had concealed the revolver, his father cursed him and drawing a pocketknife started to rush toward him. When the father reached a point about twenty feet from the rock beneath which the revolver was concealed, the defendant crouched behind the rock and securing the revolver repeatedly fired upon his father. At the second shot, the father turned and was shot twice in the back. One

bullet passed through his neck. He was hit five times. He dropped and immediately died from the effect of the wounds. The defendant ran to his father and, seizing the knife which had fallen to the ground, he cut the cord which was attached to his watch, and taking the watch and purse containing a few coins, he hid them in the brush near by. He did not take from the person of his father a tobacco can which contained particles of gold worth eight or ten dollars. Leaving the body of his father where it had fallen, he returned to their home at Oroville and told his mother of the killing. At her suggestion, he immediately went to the sheriff's office and reported that his father had been murdered and robbed. An investigation was promptly made. Certain circumstances surrounding the tragedy did not match with the defendant's story. The officers became suspicious of him. He was not formally arrested, but was taken in custody and placed in the ward for the insane at the county jail, where he remained over night. He asked to see his mother, but was refused permission to do so. He was repeatedly questioned by the officers and finally admitted the homicide. The alleged confession was taken in shorthand by a stenographer. It was subsequently transcribed and signed by the defendant. The defendant was charged with murder. The family was without means and the court appointed an attorney to defend him. He was convicted of manslaughter. From this judgment of conviction he appealed.

[1] It is contended the defendant, who was but seventeen years of age, should have been tried by the juvenile court; that the superior court was without jurisdiction to try him upon the charge of murder. The record does not disclose the fact that the court was aware of the defendant's age until some time during the progress of the trial. The defendant's age was not suggested to the court as provided by section 6 of the Juvenile Court Act (as amended by St. 1921, p. 799), by his attorney or otherwise. It is not mandatory that a defendant under the age of eighteen years who is charged with a crime shall be tried by the juvenile court, unless his age "shall be suggested or shall appear to the judge." It is not a jurisdictional requirement that a minor under eighteen years of age shall be tried in the juvenile court. That privilege is waived by failure to call the age of the minor to the attention of the court. 14 Cal. Jur. 151, § 40; People v. Oxnam, 170 Cal. 211, 149 P. 165; People v. Tossey, 85 Cal. App. 435, 259 P. 488. There is therefore no merit in the contention that this case was not lawfully tried in the superior court.

[2] The defendant's written statement concerning the manner in which he committed the homicide was properly admitted in evidence. It is competent evidence without a preliminary showing that it was voluntarily made. This statement is not a confession of guilt. It is an admission of the circumstances attending the affair. The defendant acknowledged that he shot and killed his father, but throughout the statement he insists that he acted in necessary self-defense to prevent the deceased from attacking him with a knife. The first assertion of the defendant which is contained in this challenged statement is that, "This murder happened in self defense." He then proceeded to relate the facts regarding his father's previous acts of cruelty toward him and his mother, together with his threats to kill them. This conduct of his father was assigned as his reason for taking with him and concealing the revolver on the morning of the homicide. He said in that regard, "I thought I would take the gun for protection that morning." He asserted that his father cursed him and rushed at him with the open knife at the very time of the shooting. He said: "I came back there where he was working and he asked me how I was getting along. I told him there was no luck. * * * He got mad, he drew his knife and was going to try to stab me. I had a gun hid in the bushes, I ran for the gun as he was going to charge at me. I shot two times, then he started to run away from me and I shot once more, then later he was charging at me again, and I shot two more times, then he fell. I threw the gun in the river, I took his pocket book, watch and the knife he had, and hid it." While this statement contains some details which appear to be inconsistent with the defendant's claim of shooting his father in necessary self-defense, it is not a confession of guilt. It is an acknowledgment of the killing accompanied with a persistent claim that the homicide was committed in necessary self-defense. This is the exact theory upon which his defense was conducted. At the trial he became a witness in his own behalf.

A confession is restricted to an acknowledgment of guilt. It does not apply to a mere statement of facts from which guilt may be inferred. An admission of facts which contains a claim of innocence of the crime involved, or which asserts a justification therefor, is not a confession in contemplation of law, which requires preliminary proof that it was voluntarily made, to render the statement competent evidence at the trial of the accused for the offense charged. 8 Cal. Jur. 98, § 194; 16 C. J. 715, § 1464; 16 C. J. 626, § 1243; People v. Miller, 122 Cal. 84, 54 P. 523; People v. Fowler, 178 Cal. 657, 664, 174 P. 892.

While there was an attempt to show this statement was procured by means of coercion, while the defendant was held in custody by the officers, and that they offered

to "help him out all they could," in the event of his admission, these facts were contradicted. There is a conflict of evidence regarding the question as to whether the statement was made by the defendant voluntarily and without promise of leniency.

The admissibility of an alleged confession of guilt depends upon the circumstances attending the procuring of the statement. In determining whether the statement was made freely and voluntarily without intimidation or offer of reward, the court has a reasonable discretion in passing upon the weight of the evidence and the credibility of witnesses. Except for an abuse of this discretion, an order admitting or rejecting a confession of guilt will not be disturbed on appeal. 14 Cal. Jur. 151, § 40; People v. Fowler, 178 Cal. 657, 664, 174 P. 892; People v. Jim Ti, 32 Cal. 60; People v. Fredericks, 106 Cal. 554, 39 P. 944. The mere fact that a defendant was under arrest at the time of his confession will not necessarily render it incompetent as evidence, provided it appears to have been voluntarily made.

This challenged statement does not amount to a confession of guilt. It was therefore not necessary to prove that it was voluntarily made before it was entitled to be admitted as evidence.

[3] The court did not err in failing to instruct the jury pursuant to section 197 of the Penal Code that: "Homicide is also justifiable when committed by any person * * * in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished."

No such instruction was offered by the defense. Even though the deceased had previously threatened to kill or poison his wife, the evidence does not indicate there was "imminent danger of such design being accomplished." The defendant at no time stated that he feared his father would kill or poison his mother. There is no evidence of demonstrations on the part of the deceased which reasonably indicate that he really intended to do so. At the time of the homicide the defendant and his father were far from their home, where the mother remained. There could have been no imminent danger of death or injury to her at the hands of the deceased. The justification for the killing of his father in lawful defense of his mother has no reasonable support in the evidence. At the trial and in his previous declaration of circumstances attending the homicide, the defendant justified the killing of his father by a persistent claim of necessary self-defense against an assault with a knife. The jury was fairly and adequately instructed regarding the principles of this defense. The following instruction was given: "The defendant has set up and introduced evidence to show that he was justified in the killing of the deceased by what is known to the law as self defense. The law of self defense is a law of necessity, and that necessity must be real or apparently real; a party acting under it may act upon appearances, and if he be justifiable in acting upon them, even though they turn out to be false, whether they were real or apparently real, is for the jury to decide upon all the circumstances out of which the necessity springs. If from all the evidence in the case the jury should find that the circumstances were such as to excite the fears of a reasonable man or woman and that the defendant, acting upon the influence of such fears, killed the deceased to prevent the commission of a felony upon his person, he would be justified in the eyes of the law."

There was a sufficient preliminary identification of the empty cartridges and the map to admit them in evidence. The objections to this evidence are without merit.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

127 Cal.App. 513

TRICKEY v. SMITH et ux.

Civ. 583.

District Court of Appeal, Fourth District, California.

Nov. 15, 1932.

1. Evidence ⇐441(6).

Preceding oral negotiations varying terms of written agreements for broker's commission *held* inadmissible (Civ. Code, § 1625; Code Civ. Proc., § 1856).

2. Brokers ⇐60.

Notwithstanding noncompletion of property exchange, broker *held* entitled to commission promised by listing agreement, by exchange agreement between prospective purchaser and vendors, and by subsequent written agreement between broker and vendors.

It appeared that vendors gave to broker a written listing agreement authorizing broker to sell property in question and agreeing to pay commission if he was able to sell or procure purchaser for property; that broker procured purchaser who enter-

ed into exchange agreement with vendors on terms satisfactory to vendors, in which broker's right to commission was confirmed; and that two months later broker and vendors signed separate unconditional agreement for commission.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by M. N. Trickey against Floyd B. Smith and wife. Judgment for plaintiff, and defendants appeal.

Affirmed.

West & McKinney, of Santa Ana, for appellants.

Drumm, Tucker & Drumm, of Santa Ana, for respondent.

BARNARD, P. J.

This is an action to recover a commission for the sale of certain real estate. The following facts are not disputed: On November 18, 1929, the defendants signed and gave to the plaintiff, a licensed real estate broker, a listing authorizing the plaintiff to sell the property in question for $43,125, and agreeing to pay him a commission of 5 per cent. of the selling price in the event he was able to sell or procure a purchaser for the same. On September 15, 1930, and while said listing was still in force, the plaintiff procured a purchaser for defendants' property on the basis of part payment in cash and the balance through an exchange of other property. This purchaser and the defendants entered into a written agreement providing for the exchange of their properties on definite terms named therein. Among other things, the defendants agreed to convey the property they were selling free and clear from incumbrances, although at the time it was incumbered by a mortgage. This agreement further provided that the defendants would pay to the plaintiff as a commission for procuring this exchange of real properties, the sum of $1,250. On September 15, 1930, this exchange agreement, with appropriate instructions, was placed in escrow with a certain title company. On November 14, 1930, while this escrow was still pending, the plaintiff and the defendant Floyd B. Smith signed and placed in the same escrow a supplemental escrow instruction by which it was agreed that all previous instructions relative to the commission to be paid to the plaintiff were canceled, and, in lien thereof, providing that the sum of $975 was to be paid as a commission to the plaintiff from the defendant Floyd B. Smith. The defendants were unable to raise the money on other property they owned with which to clear the title to the property they were selling, and, after waiting until December 15, 1930, the other party to the exchange agreement withdrew from the escrow and refused to give further time for the completion of the exchange. Under the agreement of exchange, the deal was to have been completed "within a reasonable time" after September 15, 1930. The court found that the other party to the agreement waited for a reasonable time after that date and this finding is not attacked. Judgment was entered in favor of the plaintiff for $975 with interest, and the defendants have appealed.

[1] The first point raised is that the court erred in refusing to admit evidence offered by the appellants in support of certain affirmative defenses set up in their answer. These defenses were to the effect that, before the exchange agreement was executed, the respondent had agreed that he would completely finance the properties involved in the exchange in whatever amount was necessary in order that the exchange provided for might be consummated, and that he failed so to do; and further, that, at the time said agreement was made, the respondent agreed that he would charge no commission unless the exchange was actually consummated. Through these defenses the appellants sought, by evidence of preceding oral negotiations, to vary the terms of the original listing agreement as continued and applied in the exchange agreement, and of the final written agreement between the parties on November 14, 1930. No attempt was made to allege or prove fraud, mistake, or undue influence. Under the facts shown, we think the ruling complained of was correct. Civ. Code, § 1625; Code Civ. Proc., § 1856; Lundeen v. Ottis, 164 Cal. 183, 128 P. 335.

[2] The next point that need be considered is appellants' contention that, under an exchange agreement to which he is not a party, a real estate broker is not entitled to his commission until an exchange has been actually consummated. Appellants rely on such cases as Jennings v. Jordan, 31 Cal. App. 335, 160 P. 576, and Brion v. Cahill, 34 Cal. App. 258, 165 P. 704, where the agent has no written authorization or listing and where he merely claims the benefit of a provision in an exchange agreement between other parties providing for the payment of a commission. The distinction between such cases and the instant case is clearly set forth in the case of Stewart v. Bowie, 43 Cal. App. 751, 185 P. 868. In the case now before us, the respondent had a written listing agreement, the appellants accepted the purchaser he procured and entered into a binding contract with this purchaser upon terms satisfactory to them, confirming in that contract the right of the respondent to a commission, and two months thereafter signed an unconditional agreement to pay a commission. Under these circumstances, the payment of the commission was not dependent upon the actual completion of the exchange. Stewart v. Bowie, supra.

The only other point raised is that a contract made expressly for the benefit of a third person cannot be enforced by him after it has been rescinded by the parties thereto. This has been answered by what we have already said, it fully appearing that the respondent is in a very different position from one who relies only on a contract between two other parties containing an incidental provision for his benefit. The plaintiff had a written listing agreement, furnished a purchaser with whom the appellants entered into a binding contract of exchange upon terms satisfactory to them and in which they agreed to pay a commission, and later this was followed by a third agreement to pay the commission, which was made directly with the respondent.

For the reasons given, the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

127 Cal.App. 412

COGGINS v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 8779.

District Court of Appeal, First District, Division 2, California.

Nov. 10, 1932.

1. Courts ⇐122.

Action to recover deposit *held* within jurisdiction of superior court, notwithstanding failure of complaint to demand amount within court's jurisdiction, where defendant filed cross-complaint in interpleader (Code Civ. Proc. § 76; St. 1929, p. 838; Const. art. 6, § 5).

2. Pleading ⇐411.

Insufficiency of cross-complaint does not strike at court's jurisdiction as equity court, where no demurrer was interposed (Const. art. 6, § 5).

Original proceeding by Leon S. Coggins for writ of review to annul the judgment of the Superior Court of the City and County of San Francisco, Honorable Michael J. Roche, Judge.

Application denied.

Waldo F. Postel, of San Francisco, for petitioner.

Sullivan, Roche, Johnson & Barry, of San Francisco, for respondents.

STURTEVANT, J.

This is an application for a writ of review. Heretofore Charles A. Brickett, as executor of the last will and testament of Mary E. Brickett, deceased, commenced an action against the Bank of America National Trust & Savings Association. In his complaint the plaintiff alleged that in 1916 the decedent deposited in a bank that has subsequently been consolidated with the Bank of America the sum of $2,000. He alleged that the said amount was deposited in an account in the name of Leon I. Coggins. Continuing he made other appropriate allegations, and in his prayer he asked for judgment in the sum of $2,000, with interest from date of deposit. The Bank of America appeared and answered, and at the same time filed a cross-complaint. The cross-complaint purports to be a complaint in interpleader. Therein the bank set forth the claims that were made against it by Charles A. Brickett, and continuing it pleaded that a claim was also being made against the bank for the same moneys by Leon S. Coggins, this petitioner. In the cross-complaint the bank set forth that it made no claim to the moneys, but that the deposit was in a commercial account, and that the moneys did not bear interest. Other appropriate allegations were inserted, and the bank asked that the claimants be required to interplead and litigate among themselves their respective rights to the deposit, and that the bank might be authorized to deliver the deposit to some person designated by the court, and thereafter that it might be discharged from further liability. The cross-complaint was answered by Charles A. Brickett, and it was also answered by this petitioner. Thereafter the action was called for trial. Without objection on the part of any one, all of the issues made by all of the pleadings hereinabove mentioned were put in issue.

[1] After the action had been fully tried, the trial court made findings of fact in favor of Charles A. Brickett on his complaint and also in favor of Charles A. Brickett on the issues presented by the cross-complaint. It also made findings of fact against this petitioner. Thereafter judgment was entered in favor of Charles A. Brickett on the findings so made, and an appeal was taken on May 9, 1932. While making up his brief on that appeal, this petitioner noted that the original complaint should have been filed in the municipal court and not in the superior court. Code Civ. Proc. § 76; St. 1929, p. 838. Thereupon the petitioner paused in the preparation of his brief and made this application in which he asks that the judgment of the superior court be annulled for want of jurisdiction. He claims that the superior court had no jurisdiction of the subject-matter because the claim of the plaintiff against the bank exclusive of interest did not exceed $2,000. Continuing he claims that jurisdiction of the subject-matter cannot be conferred by consent, agreement, or waiver of the parties.

Schwartz, Inc., v. Burnett Pharmacy, 112 Cal. App. (supp.) 781, 784, 295 P. 508. The respondent at once admits the assertion of the petitioner if that assertion is confined to the original complaint filed by Charles A. Brickett. However, the respondent continues by calling attention to the pleadings that were subsequently filed in the superior court and takes the position that the said superior court did have jurisdiction of the subject-matter of the complaint in interpleader and the answers thereto, and that the point now presented by the petitioner comes too late. In this connection he claims that an action in interpleader is a proceeding in equity (Union Mutual Life Ins. Co. v. Broderick, 196 Cal. 497, 238 P. 1034; Young v. Colyear, 54 Cal. App. 232, 201 P. 623; Israel v. Bryan, 52 Cal. App. 66, 197 P. 121) and thereupon he asserts that the superior court alone has jurisdiction to determine proceedings in equity. Const. of California, art. 6, § 5.

He next asserts that although lacking jurisdiction to entertain the cause of action set forth in plaintiff's complaint, the court had jurisdiction to try and determine the cause of action in equity set forth in the bank's cross-complaint in interpleader and the issues raised by such cross-complaint. He cites and relies among others on City of Santa Barbara v. Eldred, 95 Cal. 378, 30 P. 562; Hart v. Carnall-Hopkins Co., 101 Cal. 160, 35 P. 633; Faxon v. All Persons, 166 Cal. 707, 137 P. 919, L. R. A. 1916B, 1209. The authorities so cited, while not directly in point, are quite convincing. Moreover, there is another line of authority that is applicable. In the United States District Courts and various state courts the jurisdiction of certain actions depends upon the amount involved. Especially in those states having the reform procedure the statutes provide that the defendant may come forward and file a counterclaim or cross-complaint. In several instances the case as presented by the original complaint was defective by reason of the amount involved being less than the sum specified establishing the jurisdiction of the court. However, when the defendant appeared he filed a cross-complaint that was clearly within the jurisdiction of the court. When, in those cases, an attack was made that the court did not have jurisdiction, the question which is presented in the instant case arose. In Merchants' Heat & Light Co. v. James B. Clow & Sons, 204 U. S. 286, 27 S. Ct. 285, 51 L. Ed. 488, a somewhat similar question was presented to the Supreme Court of the United States. On page 290 of 204 U. S., 27 S. Ct. 285, 286, 51 L. Ed. 488, Mr. Justice Holmes, speaking for the court, said:

"If, as would seem and was assumed by the form of pleading, the counterclaim was within the Illinois statutes (Charnley v. Sibley, 20 C. C. A. 157, 34 U. S. App. 705, 73 F. 980, 982), the case is still stronger. For by that statute the defendant may get a verdict and a judgment in his favor if it appears that the plaintiff is indebted to him for a balance when the two claims are set against each other; and after the cross claim is set up the plaintiff is not permitted to dismiss his suit without the consent of the defendant or leave of court granted for cause shown. Ill. Rev. St. chap. 110, §§ 30, 31; East St. Louis v. Thomas, 102 Ill. 453, 458; Butler v. Cornell, 148 Ill. 276, 279, 35 N. E. 767.

"There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits. De Lima v. Bidwell, 182 U. S. 1, 174, 21 S. Ct. 743, 45 L. Ed. 1041, 1047; Fisher v. Shropshire, 147 U. S. 133, 145, 13 S. Ct. 201, 37 L. Ed. 109, 115; Farmer v. National Life Association, 138 N. Y. 265, 270, 33 N. E. 1075. As we have said, there is no question at the present day that, by an answer in recoupment, the defendant makes himself an actor, and, to the extent of his claim, a cross-plaintiff in the suit. See Kelly v. Garrett, 1 Gilman (6 Ill.) 649, 652; Ellis v. Cothran, 117 Ill. 458, 461, 3 N. E. 411; Cox v. Jordan, 86 Ill. 560, 565."

In McConnell v. Frost, 45 S.W.(2d) 777, at page 779, the court of civil appeals of Texas said: "Whatever may have been the status of the case at the time the suit was filed, when the defendants and interveners filed their cross-actions and pleas of intervention alleging claims within the jurisdiction of the district court, and seeking a foreclosure of their liens as against the plaintiffs and all other parties on the same property covered by plaintiffs' liens, the court acquired jurisdiction to try the whole case and to adjust the liens of the various parties on the property in question. *It is sufficient that, at the time the court tried the case, there was then pending before the court a cause of action within its jurisdiction in which the parties were jointly interested.*" (Italics ours.) That case rests in part on an earlier case, Phelps & Bigelow Windmill Co. v. Parker (Tex. Civ. App.) 30 S. W. 365. At page 366 of 30 S. W., the court said: "Upon principle, we think the same rule should apply to this case. Appellees would have had the right to institute their suit for damages in the district court in the first instance, and, had they done so, there could be no question as to the right of appellant to plead in reconvention the notes sued upon. Practically the same result is here accomplished. *The order in which the parties appear in court is of but little consequence. It is to the substance, more than the form, that we must look.*" (Italics ours.) So in the instant case. The Bank of America might have commenced its action first. In that event there is no question but that the superior court would have had jurisdiction.

However, when the defendants were served they would have had the right to appear and file pleadings continuing the same identical issues which they have tendered. If the pleadings had been filed in the order as just stated, no question whatever could have been presented regarding jurisdiction.

[2] In his closing brief the petitioner asserts that the complaint is the test of jurisdiction. Of course that is true in the presence of an attack made by a demurrer. Again he asserts that jurisdiction is unaffected by counterclaim or cross-complaint. In the instant case we are not concerned with counterclaims. The contention of the petitioner as to a cross-complaint is not supported by any authority. Again it is stated that an objection to jurisdiction of the subject-matter can be raised at any time. We do not understand the respondent to claim to the contrary. The petitioner again asserts that the case at bar is not an interpleader action. A cursory reading of the cross-complaint shows that it certainly purports to be a proceeding in interpleader. No demurrer was interposed. If for any reason the cross-complaint was insufficient, that fact did not strike at the jurisdiction of the trial court.

For the reasons hereinabove stated, the application is denied.

We concur: NOURSE, P. J.; SPENCE, J.

127 Cal.App. 509

KAWAMURA v. HONEK.

Civ. 7262.

District Court of Appeal, Second District, Division 2, California.

Nov. 15, 1932.

1. Death ⇐86(1).

Father's life expectancy is important element in assessing his damages for minor son's death, as he is entitled, not only to son's services and earnings during nonage, but to society, comfort, and protection reasonably to be expected from son while both lived.

2. Death ⇐99(3).

Award of $3,000 damages to partially incapacitated father for death of 17 year old son, attending school and helping father without pay, *held* not so excessive as to indicate passion, prejudice, or speculation.

There was evidence that deceased was normal, healthy, and obedient boy of 17 at time of fatal accident, attended junior high school and helped father in latter's work without pay, and that father was gardener, earning about $210 per month before accident, sustained several broken bones and pelvic injury in same accident, was confined in hospital for two months, could work half day at time of trial, but suffered from pain, and was then earning $80 per month.

3. Death ⇐71.

Evidence of injuries to father, suing for minor son's death in same accident, *held* material, relevant, and competent on question of plaintiff's probable life expectancy.

4. Trial ⇐311.

Jurors may use their common knowledge, not to supply testimony, but to make testimony received intelligible.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by Rikimatsu Kawamura against Leo Honek. Judgment for plaintiff, and defendant appeals.

Affirmed.

Finlayson, Bennett & Morrow and Henry L. Knoop, all of Los Angeles, for appellant.

J. Marion Wright, of Los Angeles, for respondent.

STEPHENS, Justice pro tem.

[1] This appeal comes after a trial wherein the plaintiff was awarded $3,000 as damages for a minor son's death. Appellant makes the point that the jury was without a necessary factor in assessing damages because, as he claims, the evidence was not sufficient for the approximation of the plaintiff's life expectancy. Of course, the father's life expectancy is an important element, as he was not only entitled to the son's services and earnings during the nonage, but was entitled to such society, comfort, and protection as under the circumstances obtaining could reasonably be expected from the son so long as they both should live. Sneed v. Marysville Gas, etc., Co., 149 Cal. 704, 87 P. 376.

[2, 3] Respondent's son was a normal, healthy boy of seventeen when the accident cost him his life. He was obedient, attended junior high school, and helped his father in his work on Saturdays and at other times, but was paid nothing therefor. Respondent was a Japanese gardener, and had been caring for residential lawns for six or seven years, earning approximately $210 per month. He was injured in the accident that proved fatal to the son and was confined in a hospital for two months. He had sustained several broken bones and flesh cuts and there was some injury in the pelvic region. When released from the hospital he walked

with one crutch, but soon abandoned it and worked a few hours a day. At the time of the trial he could work half a day, but suffered from pain where bones had been broken and in the region of the pelvis. The broken bones seem to have united properly. At that time he was earning $80 per month. Respondent appeared in court and testified.

As we have no question here relating to damages to respondent by reason of his physical injuries, testimony relating thereto is only important to us as bearing upon his probable life expectancy. Why respondent did not make his case clearer by testimony as to his age, his health, his family history, or by the introduction of life tables, etc., we cannot inquire. The reason is not disclosed by either the direct or cross-examination. The testimony presented was given to the jury under proper instructions and a verdict was had. The sum of damages is not of such an amount as would indicate in and of itself that it was arrived at through passion, prejudice, or speculation. Harrison v. Sutter, etc., Ry. Co., 116 Cal. 164, 47 P. 1019; Mize v. Hearst, 130 Cal. 630, 63 P. 30. It cannot be claimed that the testimony is immaterial, irrelevant, or incompetent. The very nature of the case requires the jury to assess damages, if any, without the aid of a fixed formula. No testimony can change that. Storrs v. Los Angeles Tr. Co., 134 Cal. 91, 94, 66 P. 72.

[4] It is obvious that the jury could take the testimony given them, including its own view of respondent and his demeanor, and, with the aid of common knowledge, approximate the latter's age and life expectancy. That such common knowledge can be used by jurors, not to supply testimony, but to make the testimony received intelligible, is supported by much authority. Indeed, no evidence in any case would be intelligible if neither the judge nor jury could see and understand it in the light of common experience. We cite the following authorities to the point that the jury can make use of common knowledge in the consideration of testimony introduced in a case. Washburn et al. v. Milwaukee, etc., R. Co., 59 Wis. 364, 374, 18 N. W. 328; Wigmore on Evidence (2d Ed.) vol. 5, § 2570; note II, 31 L. R. A. 491. "In construing and applying testimony, reasonable inferences and deductions may be made [by the jury], and conclusions may be reached that lie quite beyond the mere letter of the evidence." White v. Hammond, 79 Ga. 182, 4 S. E. 102, 103. "A distinction was taken in those cases [referring to cited cases] as to the juror's applying his own general knowledge and experience to the examination of the case, in estimating the weight of the evidence, and in assessing damages. While to this extent the juror may properly call to his aid his personal knowledge, learning and experience, as was properly held in those cases, yet no sanction was given to his acting upon his knowledge of a particular fact, known only to himself, and not a matter of common observation or general knowledge." Schmidt v. New York Union Mutual, etc., Co., 1 Gray (Mass.) 529, 536; Beveridge v. Lewis, 137 Cal. 619, 628, 67 P. 1040, 70 P. 1083, 59 L. R. A. 581, 92 Am. St. Rep. 188; Evarts v. Santa Barbara, etc., Co., 3 Cal. App. 712, 715, 86 P. 830; Steele v. Marsicano, 102 Cal. 666, 36 P. 920; Meek et al. v. Pacific Electric R. Co., 175 Cal. 53, 55, 164 P. 1117.

The exact point discussed herein is but a part of the larger subject of knowledge of jurors and its application in adjudging facts. Worthington in his interesting little volume entitled "The Power of Juries," on page 58, states that he gets the following from Glanville: "When the knights made the recognition * * * the right would be known to all, or all might be ignorant of it. If none of them were acquainted with the truth of the matter, and this was testified in court upon their oaths, recourse was had to others, till they found those who know the truth of the matter, and some not, the latter were to be rejected and others summoned to court, till twelve at least could be found who could agree. But if some of the jurors should decide for one of the parties, and some for the other party, then other jurors should be added, until twelve at least were found, who agreed in favor of one party. Each of the Knights were to swear that he would not utter what was false, nor knowingly be silent as to the truth. With respect to the knowledge requisite on the part of those who were sworn, they were to be acquainted with the matter, either from what they had personally seen and heard or from the declarations of their fathers, and by such other means as had equal credit, as if falling within their own proper knowledge." From this extreme practice, wherein the best jurors were those who knew the most about the matter at hand, we have come to the other embarrassing extreme, when in some American trials the best jurors are assumed to be those most ignorant of anything. The best authority frowns upon the application by jurors of special knowledge of facts outside of testimony given in open court, but encourages the application of common knowledge to a better understanding of such testimony. Of course, the common knowledge of one jury might be very different from that of another; but no definite rule as to what is common knowledge can be made. The more intelligent the juror the better he will apply common knowledge in the understanding of testimony and in making proper deductions and inferences therefrom.

Appellant states in his opening brief: "The issue on this appeal is: *Can a jury assess other than nominal damages for death by wrongful act without the aid of some substan-*

tial evidence disclosing with reasonable certainty the probable expectancy of life of the statutory beneficiary? (Italics appellant's.) The argument in his reply brief relative to testimony sufficient to justify the jury in finding damages for services of the son during nonage seems to broaden the issue beyond this statement. However, we take this argument to be solely in response to respondent's argument that the issue as to life expectancy is not of prime importance, because the damages fixed may well be for the son's services during his minority alone. We think the view we take of the issue as originally defined makes it unprofitable to discuss the latter point.

The judgment is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

127 Cal.App. 451

RUDOLPH v. JOHNSON et al.

Civ. 957.

District Court of Appeal, Fourth District, California.

Nov. 10, 1932.

1. Contracts ⇐10(2).

As respects mutuality, hog raisers employing truckman to haul garbage for ten-year period *held* obligated to pay contract price for same period.

2. Contracts ⇐10(2).

Contract whereby hog raisers, employing truckman to haul garbage, acquired title to truckman's equipment to secure performance, *held* bilateral, mutual, and enforceable.

Under contract in question, truckman agreed for specified price to haul to hog ranch for ten years all garbage collected by certain city, it being agreed that truckman should furnish all necessary equipment, but that record ownership thereof should be vested in operators of hog ranch as security for performance of contract, and, in case of breach of truckman's obligations, he would forfeit his title to such equipment.

3. Contracts ⇐170(1).

In construing contract, parties' construction thereof may have great value (Civ. Code, §§ 1636, 1638, 1643).

4. Contracts ⇐312(1).

Where hog raisers, having employed truckman to haul garbage and taken title to truck as security, granted truckman's request to transfer title to secure loan, transfer *held* not breach of contract.

It appeared that transfer of legal title to third person was made with knowledge and consent of the hog raisers referred to, who indorsed registration slip to third person, and signed written agreement with him whereby they were to repurchase truck and trailer in question for amount of loan payable in installments, which were paid by truckman, and that these agreements signed by the hog raisers waived, if they did not modify, provisions of contract requiring title to truck and trailer to remain in them.

5. Appeal and error ⇐1011(1).

Judge's finding on conflicting testimony in juryless trial could not be disturbed on appeal.

6. Insurance ⇐104.

Contract whereby hog raisers employed truckman, obligated to carry insurance on truck, title to which was placed in hog raisers as security, *held* not to require that they be named as insured.

7. Insurance ⇐389(2).

If application stated circumstances of ownership of truck covered by policy, issued with full knowledge thereof, insurer would be liable, although applicant was not sole and unconditional owner.

8. Appeal and error ⇐901.

Appellant must show by record existence of error.

9. New trial ⇐171.

In action against partners who, after adverse judgment, moved for retrial, permitting plaintiff to join partnership as defendant, and retrial of issues thus presented, resulting in judgment against both partnership and partners, *held* not error (Code Civ. Proc. § 662; Civ. Code, § 2409).

10. Partnership ⇐165.

Each partner is liable with partnership for partnership debts (Civ. Code, § 2409).

11. Damages ⇐124(3).

Truckman suing for breach of contract employing him to haul garbage could recover only net profits which he could reasonably expect from performing contract.

12. Damages ⇐124(3).

In determining damages for breach of contract employing truckman, it would be unfair to charge against prospective profits both interest on value of truck, and future depreciation.

Inasmuch as contract in question was terminated by his employers, truckman could have sold his truck and trailer, and thereby could have received interest on amount so received and thus have reduced his losses, as regards interest on capital investment, and if such sale had been made at time of breach, no future depreciation would have occurred as far as truckman was concerned.

13. Damages ⇐124(3).

In ascertaining net profits as damages for breach of contract employing truckman, legal interest should be deducted from value of truckman's equipment, after allowing for depreciation thereof.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by R. W. Rudolph against Glenn W. Johnson, also known as Glen W. Johnson, and others. Judgment for plaintiff, and defendants appeal.

Modified and affirmed.

Ed. P. Sample and William H. Wylie, both of San Diego, for appellants.

Hillyer & Boldman, of San Diego, for respondent.

MARKS, J.

Glenn W. Johnson and Blaine G. Johnson were at all times material to this appeal copartners doing business under the name of Johnson Brothers. They operated a hog ranch near the city of San Diego. On April 29, 1927, they entered into a contract with the city of San Diego whereby they agreed to buy and haul away all garbage collected in the city. The contract was signed with the individual names of the two Johnsons, but they were referred to in the body of the agreement as "copartners doing business under the firm name and style of Johnson Brothers."

On July 16, 1927, Glenn W. Johnson and Blaine G. Johnson entered into a contract with R. W. Rudolph, whereby Rudolph agreed "to haul all garbage collected by the City of San Diego to the hog ranch * * * for a period of ten (10) years," and the Johnsons agreed to pay him the sum of $1 per ton therefor. It was further agreed that Rudolph should furnish all necessary equipment for hauling and unloading this garbage, but that the record ownership of the equipment should be vested in the Johnsons as security for the faithful performance of the contract by Rudolph, and in case of his breach of his obligations he would forfeit all his right, title, and interest in such equipment. The Johnsons agreed that at the termination of the contract they would transfer their title to the equipment to Rudolph. This contract further obligated Rudolph "to carry full coverage insurance on all said equipment used in the hauling of said garbage, to-wit, insurance covering fire, theft, collision and property damage and public liability."

Rudolph purchased a large truck and trailer for the sum of $12,205.82, and entered upon the performance of his duties. On June 15, 1930, the Johnsons sold their contract with the city of San Diego and immediately notified Rudolph of such sale and that they would no longer require his services. Rudolph has not hauled any garbage for the Johnsons since that date. He instituted this action for damages for breach of contract and recovered judgment in the sum of $21,530, from which judgment this appeal is taken.

Appellants urge numerous grounds for a reversal of the judgment. They may be stated as follows: (1) That the contract was unilateral and did not obligate them to employ respondent for ten years, or after they had no more garbage to haul; (2) that respondent breached his contract and terminated it; (3) that respondent could not secure a judgment against both the Johnsons individually, and against the partnership; (4) that an improper measure of damage was used by the court.

Rules which are of assistance to us in the interpretation of this contract are summarized in Tennant v. Wilde, 98 Cal. App. 437, 277 P. 137, 139, as follows: "It is our duty to so interpret this contract 'as to give effect to the mutual intention of the parties as it existed at the time of contracting, *so far as the same is ascertainable.*' Civ. Code, § 1636. (Italics ours.) 'The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.' Civ. Code, § 1641. We must also give it 'such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.' Civ. Code, § 1643. After all, the essential theory in construing any contract is to find out what the parties meant, and this must be done by an examination of the language used therein, provided the same is 'clear and explicit.' Civ. Code, § 1638."

[1] In considering the mutuality of the contract between the appellants and respondent, it should be observed that the instrument contains an express covenant that respondent was employed to haul garbage for a period of ten years and that he expressly agreed "to *haul all garbage* collected by the City of San Diego," and that appellants agreed to pay him one dollar for each ton of garbage hauled. In other words, they promised to pay him for the hauling of "all garbage collected by the City of San Diego" for a period of ten years. Respondent was under obligation to haul all of such garbage for the full term of his contract. This placed an equal obligation upon appellants to pay for a like period. In their answer appellants allege that their contract with the city of San Diego "was intended to be for the term of ten (10) years."

[2] The contract placed upon respondent the necessity of providing equipment for carrying out his part of the contract. This he did at a cost of $12,205.82. Title to the equipment was placed in appellants as security to them that respondent would faithfully perform his obligations under the contract. It was also provided that in case respondent breached his contract, title to the equipment should vest in appellants, which would secure to them the means of carrying out their ten-year contract with the city. These stipulations furnished sufficient grounds for the deductions which the trial court made, namely, that the contract between the parties here was bilateral, mutual, and enforceable. Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 26 A. L. R. 123.

[3] Very often the construction placed upon a contract by the parties themselves is of the greatest value in construing its terms. In February, 1929, respondent requested appellants to permit the legal title to the truck and trailer to be placed in the name of Fremont L. Jones as security for a loan of $2,500. Appellants finally agreed, and the loan was made. They are now contending that this change in the legal title breached the contract and relieved them of any obligations under it, and, further, that it permitted them to dispense with the employment of respondent. If they were under no obligation to permit respondent to haul the garbage for any definite period, it is difficult to see why any breach on the part of respondent was necessary in order to relieve them from an obligation which they now maintain did not exist. Taking the contract as a whole, and construing all of its terms together, we are of the opinion that the construction put upon it by the trial court, that it was mutual and bilateral, and intended to engage respondent to haul all the garbage collected by the city of San Diego for the full term of its contract with appellants, was fully justified and cannot be disturbed by us. We are aided in reaching this conclusion by the following cases: City of New York v. Paoli, 63 Misc. 411, 116 N. Y. S. 544; Id., 136 App. Div. 939, 121 N. Y. S. 1127; Rotzien, etc., Co. v. Franson, 123 Minn. 122, 143 N. W. 253; Ramey Lumber Co. v. John Schroeder Lumber Co. (C. C. A.) 237 F. 39; Fellows v. Fairbanks Co., 205 App. Div. 271, 199 N. Y. S. 772; Humphreys v Central, etc., Co., 190 Ky. 733, 229 S. W. 117, 21 A. L. R. 664; Gallagher v. Equitable Gas Light Co., 141 Cal. 699, 75 P. 329; Wittmann v. Whittingham, 85 Cal. App. 140, 259 P. 63; Clarey v. Security Portland Cement Co., 89 Cal. App. 783, 279 P. 483, 485; and Wood v. Girot, 102 Cal. App. 160, 282 P. 981.

Appellants maintain that respondent breached his contract in two particulars: First, by not leaving the legal title to the truck and trailer in them; and, second, by not carrying full coverage insurance on the equipment in their favor.

We have already mentioned the circumstances of the transfer of the legal title to Jones. This was done with the knowledge and consent of appellants. They indorsed the registration slip to Jones, and signed a written agreement with him whereby they were to repurchase the truck and trailer for $2,500, payable in installments. Respondent paid the installments. On July 15, 1927, there was $600 unpaid.

[4, 5] Appellants cannot successfully maintain that this transaction was a breach of their contract with respondent. The agreements which they signed waived, if they did not modify, the provisions of the original agreement requiring title to the truck and trailer to remain in them. Both the Johnsons testified that at the time of this transaction they told respondent in effect that if legal title to the truck and trailer was placed in Jones it would breach the contract and terminate it. Respondent denied this portion of their testimony. The trial court found in accordance with the testimony of respondent, which finding resolved the conflict in his favor, and is binding here.

[6-8] It is admitted that respondent carried insurance on the truck and trailer satisfactory to appellants until May 9, 1930. Some weeks before that date one of the Johnsons told respondent that an agent named Swayne could save him money on a new policy. Respondent placed the insurance with this new agency. Appellants contend that as respondent (not themselves) was named in the policy as the insured, and as it provided that the insurer would not be liable for loss or damage if the interest of the insured in the truck and trailer be "other than sole and unconditional ownership," the policy was voided by the actual condition of the title. Shortly after the policy was issued appellants saw it and had attached to it an indorsement that "loss, if any, under this contract is payable to Johnson Bros. as their interest may appear." They did not make any objection to the form of the policy thereafter. The trial court found that the policy was in accordance with the original contract between the parties, which provided "that the party of the second part (respondent) binds himself to carry full coverage insurance on all of said equipment used in the hauling of said garbage." This provision did not require appellants to be named as the insured, as they seem to assume. The policy contained the provision that it was issued "in consideration * * * (2) of the statements made in the application for this indemnity contract. * * *" This application is not brought up in the record. It might be that this document contained, over the signature of respondent, a full statement of all the circumstances of the ownership of the truck

and trailer. If it did, and the policy was thereafter issued with full knowledge of these facts, the company could not successfully maintain that it would be relieved of liability because respondent was not sole owner of the truck and trailer. It is incumbent on the appellants to show by the record that error exists. We cannot assume error for the purpose of reversing a judgment.

[9, 10] This action was originally instituted against Glenn W. Johnson and Blaine C. Johnson, and judgment was rendered against them. They filed a motion for new trial, and respondent was permitted to amend by proper allegations concerning the partnership. A new trial was granted upon this issue, the case was again tried, and the judgment under review here was entered. Appellants now assert that respondent cannot "maintain an action and secure a judgment against both principal and agent in his own name after having elected to sue and having judgment against agent." Appellants seem to overlook the fact that the first judgment never became final. They moved for a new trial, the motion was granted in part (section 662, Code Civ. Proc.), the partnership was joined as defendant, and the case retried upon the new issues presented. We find no error in this proceeding. Each partner is liable with the partnership for the debts of the latter. Section 2409, Civ. Code; 20 Cal. Jur., p. 849, § 140.

Appellants maintain that the court used an improper measure of damages in rendering its judgment. Here follow the figures upon which it based its judgment:

Average monthly haul, based on two years and 11 months of hauling before breach of contract:....$981.00		
Months remaining on contract..85		
Gross income for remainder of contract 85 x $981.....		$83,385.00
From the gross income should be deducted the following items:		
Amount of capital charge to be written off during remainder of contract:		
120 months$12,205.82		
85 months 8,645.35	8,645.35	
(Note: The evidence shows equipment good for life of contract.)		
Operation Expenses:		
Salaries:		
85 months at $195.00...$16,575.00		
Gas and oil:		
85 months at $130.95... 11,130.75		
Tires:		
85 months at $100.16... 8,513.60		
Miscellaneous:		
Insurance, licenses, fines, etc. 85 months at $49.86 4,238.10	$40,457.45	
(Note: Monthly costs are arrived at from the average of the actual cost of the items during the 2 years and 11 months when the contract was carried out.)		
Maintenance:		
12 months at $79.21.... $ 950.52		
12 months at 83.71.... 998.04		
12 months at 87.32.... 1,047.85		
12 months at 91.68.... 1,100.16		
12 months at 96.26.... 1,155.12		
12 months at 101.07.... 1,212.74		
12 months at 106.12.... 1,273.44		
1 month at 111.42.... 111.42		
	$7,849.23	7,849.23
(Note: The first 12 months' average maintenance is 5% greater than the maintenance for the last 12 months in which the contract was carried out, and each succeeding year carried a 5% increase in maintenance cost. An increase in maintenance of 5% per year is the highest increase in maintenance cost testified to by any witness.)		
Total	$56,952.08	$83,385.00
Deductions		56,952.08
Net profits for 85 months..		$26,432.92
Net profits for 85 months.....		$26,432.92
Net profits per month.....$310.97		
Interest allowance to plaintiff on profits which, under the terms of said contract, accrued prior to the date hereof.....		119.46
Interest allowance, at the rate of 7% per annum, to defendants on monthly installments of net profits, which would have become due, under terms of said contract, subsequent to date hereof.....	5,022.38	
Total	$ 5,022.38	$26,552.38
Deductions		5,022.38
Amount due plaintiff.....		$21,530.00

In Clarey v. Security Portland Cement Co., supra, it is said: "It is the rule that, if one voluntarily puts it out of his power to perform a contract of this character, he is immediately liable, though the time specified for performance has not expired. Wolf v. Marsh, 54 Cal. 228; Bagley v. Cohen, 121 Cal. 604, 53 P. 1117; Carter v. Rhodes, 135 Cal. 46, 66 P. 985." The rule is amplified in Wood v. Girot, 102 Cal. App. 160, 282 P. 981, 982, where it is said: "This action is not in the nature of a suit for wages. Upon the contract, it is a claim for damages for the breach of a contract employing the plaintiff for the specific term of 52 weeks at a compensation of $50 per week. It was not necessary to wait until the end of the term of employment before commencing the action. A suit for damages for the violation of the terms of a contract may be brought at any time after the breach thereof so long as it is instituted within the statutory limitation of time. Seymour v. Oelrichs, 156 Cal. 782, 134 Am. St. Rep. 154, 106 P. 88. The rule of law is well established that the measure of damages in a suit of this nature consists of the entire unpaid contract price of the services, less whatever sum the employee actually earned during the specified term of the contract, together with any further sum

which he might have been able to earn by the exercise of reasonable diligence to procure other employment. The judgment is not confined to the installments which have actually accrued prior to the commencement of the action, but should include the entire damages which will have accrued at the time of the expiration of the agreement, for the contract is entire and not severable. Seymour v. Oelrichs, supra. This measure is precisely the basis upon which the judgment in the present case was rendered."

The case comes before us on a bill of exceptions setting forth a brief summary of the testimony. There is nothing in the record which in any way suggests that respondent had found, or could find, other employment, especially with his truck and trailer, to minimize his damage. It is the duty of appellants to show error, by the record, if any exists. If respondent could have minimized his damage by finding employment for the equipment, it should have been shown in the record. We cannot presume error in order to reverse a judgment.

Appellants urge that no deductions were made by the trial court for taxes on the truck and trailer. They may be included in the item of $4,238.10 allowed for "insurance, licenses, fines, etc." No evidence is brought up on this question.

Appellants next urge that the trial court fixed the net profits to respondent without deducting from the gross income any interest on the capital investment. Respondent's only reply to this is that the trial court charged against the probable gross income $8,645.35 as depreciation of the truck and trailer. We can see in depreciation no element of interest on invested capital.

In speaking of damages in cases of this kind, the following was said in Shoemaker v. Acker, 116 Cal. 239, 48 P. 62, 64: " 'Prospective profits,' as damages, present one of the most difficult subjects with which courts have to deal. It is not the law, however, that they can never be recovered. Our own Code states the rule to be that the measure of damages for the breach of a contract is 'the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, *in the ordinary course of things, would be likely* to result therefrom.' Civ. Code, § 3300. * * * In Suth. Dam. § 64, the author, after speaking of profits which *are* too remote says (quoting from a decided case): 'But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement.' " In McConnell v. Corona City Water Co., 149 Cal. 60, 85 P. 929, 930, 8 L. R. A. (N. S.) 1171, it was said: "He may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing."

[11-13] We take it that respondent could only recover the net profits which he could reasonably expect had he performed under the contract. As the contract was terminated, respondent could have sold his truck and trailer and could have received interest on the amount so received, and thus have reduced his losses. If a sale had been made at the time of the breach, no future depreciation would have occurred as far as respondent was concerned. It would be obviously unfair to charge against the prospective profits both interest on the value of the equipment and future depreciation. No one is here complaining of the charge for depreciation. After fixing the depreciation, the trial court left a clear value of $3,560.47 for the truck and trailer. The judgment should be reduced by $1,765.40, legal interest on this amount for 85 months.

It is ordered that the judgment be reduced to the sum of $19,764.60, and, as so reduced, is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

127 Cal.App. 484

PEOPLE v. HAND.

Cr. 1652.

District Court of Appeal, First District, Division 1, California.

Nov. 15, 1932.

1. False pretenses ⇨49(1).

Evidence *held* sufficient to sustain conviction for grand theft by virtue of having obtained promissory note unlawfully (Pen. Code, § 484).

2. False pretenses ⇨42.

Evidence that proceeds of note were used in paying bill incurred in work for which note was given was admissible in prosecution for grand theft in obtaining note (Pen. Code, § 484).

3. False pretenses ⇨22.

That defendant charged with grand theft in obtaining note later used proceeds in payment of portion of bills incurred in perform-

ing work for which note was given did not exculpate him from criminal responsibility (Pen. Code, § 484).

4. False pretenses ⇐4.

Offense of grand theft in defrauding another of property is complete when property is obtained by use of false means (Pen. Code, § 484).

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Draper Hand was convicted of grand theft, and he appeals.

Affirmed.

F. A. Devlin, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

KNIGHT, J.

Appellant was indicted for the crime of grand theft, and upon trial before a jury was found guilty. He has appealed from the judgment of conviction and the order denying his motion for a new trial, contending as ground for reversal that the evidence is insufficient to sustain the conviction.

The indictment was based on that portion of section 484 of the Penal Code which declares that every person who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud another of his property is guilty of theft; and the specific charge made against appellant was that he obtained unlawfully from one Samuel Bright a promissory note for the sum and of the value of $275.

[1] The evidence shows that in January, 1931, appellant, using the fictitious firm name of Ash & Hand, contracted with Bright to do certain repair work on the latter's house, and to furnish the necessary labor and materials for such purpose, for the sum of $464, payable as follows: $164 in advance, and the balance after the completion of the work, in monthly installments of $25 each. The advance payment was made as agreed, and during the progress of the work one installment of $25 was paid, leaving $275 as the balance due upon completion of the job. Shortly before the work was finished, appellant obtained from Bright and his wife a promissory note for $275 payable in monthly installments of $25. At the time appellant presented the note for execution, and before Bright and his wife consented to sign the same, they asked appellant, according to the testimony introduced by the prosecution, whether all bills incurred in performing the work had been paid, and he assured them that such was the fact; and further stated that his partner was a multimillionaire, and that the note would be discounted. The representations so made were shown to be false. The bills incurred in performing the work had not been paid, and in due time after completion of the work liens aggregating $368 were filed against the property, which the Brights were obliged to pay. Furthermore, appellant had no partner, and shortly after obtaining the note he discounted the same with a finance company, receiving therefor $244.75. Later, demand was made on appellant by certain workmen and materialmen for the payment of their claims, and he informed them that he had not yet received the money due him from the Brights.

Testifying in his own behalf, appellant denied having made any of said representations; but on this appeal he frankly admits that his testimony merely raises a conflict on those points, and that therefore the evidence is legally sufficient to establish the fact that the note was obtained from the Brights under false pretenses, and that it was of sufficient value to constitute the crime of grand theft. In this regard the case is similar in principle to People v. Pearson, 69 Cal. App. 524, 231 P. 612, wherein a contractor obtained a check from a property owner in payment of construction work, under the false representation and pretense that certain bills for materials had been paid; and his conviction therefor on a charge of obtaining money under false pretenses was sustained on appeal.

Appellant further testified, however, that prior to the commencement of the trial he paid a portion of the bills incurred in performing the work equal in amount to the face value of the note, thus reducing the amount of claims against the job to $368; and basing his contention on those facts he contends that two of the essential elements of the crime of obtaining property under false pretenses were disproved; namely, an intent to defraud, and that a fraud was actually committed.

[2-4] Evidence showing such payment was doubtless admissible upon the issue of whether appellant intended to perpetrate a fraud; but such issue was one of pure fact for the jury to decide, and in the light of all the circumstances connected with the transaction, some of which are hereinabove mentioned, it cannot be said that the decision of the jury thereon is lacking in evidentiary support. And the fact that after having obtained the note under false and fraudulent pretenses appellant at some later time utilized the proceeds derived from the sale of the note or even the full amount called for by the note in payment of a portion of the bills incurred in performing the work did not exculpate him from criminal responsibility for thus obtaining the note, nor constitute a complete defense to the charge, because under the authorities it is held generally in cases of this kind that the offense is complete when the property is obtained by the use of false

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

means and is not purged by subsequent restoration, restitution, or repayment. People v. Wieger, 100 Cal. 352, 34 P. 826; People v. Bowman, 24 Cal. App. 781, 142 P. 495. In so declaring the decisions in the cases cited point out that the fraudulent intent contemplated by the statute is the intent by the use of false representations to induce another to part with his property when otherwise he would not have done so; and that therefore, when the property is obtained under such circumstances, neither the promise to repay, the intention at the time to make the aggrieved party whole, nor repayment, will relieve the false and fraudulent act in obtaining the property of its criminality.

Appellant further contends that he was not permitted to show that he expended an amount equal to the full face value of the note in liquidating a portion of said bills. The record discloses, however, that before finishing his testimony, he explained the entire transaction to the jury; and in any event, whether he expended for such purpose only the proceeds derived from the sale of the note or an amount equal to the full face value thereof would seem to be entirely immaterial, because, under the rule of the cases above cited, the subsequent act of appellant in liquidating a portion of said bills did not absolve him from the criminal offense already committed, namely, obtaining the note under the false pretense and representation that all of the bills had theretofore been paid.

Nor do we find any merit in the argument that appellant's conviction amounts to imprisonment for debt, for, as will be seen, all the elements of the crime of obtaining property by means of fraudulent and false pretenses are present; and while the matter of subsequent payment of a portion of the bills against the job was something to be taken into consideration by the jury in determining the question of intent, and might have been considered by the trial court after conviction in hearing a plea for probation, such subsequent payment did not in itself operate as a legal bar to future prosecution for the criminal offense already committed.

The judgment and order are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

127 Cal.App. 476

DE PUY v. SHAY.

Civ. 11.

District Court of Appeal, Fourth District, California.

Nov. 14, 1932.

1. Trover and conversion ⇐16.

Plaintiff has burden to affirmatively prove either ownership and right of possession or actual possession of property at time of alleged conversion.

2. Appeal and error ⇐1010(1).

Trial court's findings of fact, if record contains any evidence supporting findings, cannot be disturbed.

3. Husband and wife ⇐264.

Whether property is separate property of wife or community property is fact determinable upon proof showing time and mode of acquisition.

4. Husband and wife ⇐264.

In wife's action for conversion of automobile seized under execution on judgment against husband, wife's claim of ownership and possession must be closely scrutinized.

5. Husband and wife ⇐262(1).

Where it was found upon sufficient evidence that husband had actual possession of automobile, presumption of ownership arose.

6. Automobiles ⇐19.

That husband was registered owner of automobile supports finding, in action by wife against sheriff for conversion, that he was owner (St. 1923, p. 523, § 41, as amended by St. 1925, p. 401, § 5).

7. Husband and wife ⇐264.

In wife's action against sheriff for conversion of automobile, seized under execution on judgment against husband, evidence *held* to support finding that husband was owner of automobile and in possession at time of seizure.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Ricka M. De Puy against Matilda V. Shay, executrix of the will of W. A. Shay, deceased, substituted for W. A. Shay, upon his death. Judgment for the defendant, and the plaintiff appeals.

Affirmed.

A. W. Burt, of Upland, for appellant.

David W. Richards and Martin J. Coughlin, both of San Bernardino, for respondent.

BARNARD, P. J.

The plaintiff and her husband, C. F. De Puy, on December 30, 1925, purchased an Overland automobile under a contract which reserved title in the vendor until fully paid for, and which was signed by the plaintiff and her husband as purchasers. The purchase price was fully paid on February 13, 1926, and apparently the necessary papers were signed for a transfer of ownership, for the court found, and the finding is not attacked, "that a new pink certificate of ownership was issued on the first day of March, 1926, by the Motor Vehicle Division of the State of California, showing C. F. De Puy to

be the legal and registered owner of said automobile, and by said Motor Vehicle Department mailed to said C. F. De Puy on or about March 1, 1926." It appears that this pink certificate, with the white certificate of registration, was mailed at Sacramento on March 4, 1926, addressed to the plaintiff's husband at San Bernardino, and, while there is some evidence that it was received on March 9, 1926, there is other evidence indicating that it was received a few days earlier. On March 9, 1926, W. A. Shay, as sheriff of the county of San Bernardino, seized the automobile under a writ of execution issued against the property of the plaintiff's husband, and later sold the same. This is an action for conversion brought by the plaintiff against the defendant sheriff; his executrix having been substituted in his stead after his death. The trial court entered a judgment in favor of the defendant, and the plaintiff has appealed.

[1, 2] This being an action for conversion, the burden rested upon the appellant to affirmatively prove either ownership and the right of possession or actual possession of the automobile in question at the time of its alleged conversion. General Motors A. Corp'n v. Dallas, 198 Cal. 365, 245 P. 184. The appellant concedes that she is unable to show title by virtue of a certificate of ownership, as provided for in the California Vehicle Act (section 41, as amended by St. 1925, p. 401, § 5), and that the automobile was registered in the name of her husband as legal owner. She contends, however, that all of the evidence shows not only that she was the equitable owner of the car with the right of possession, but that she was in the actual possession thereof, and that the court's findings to the contrary are without evidentiary support. The main questions presented are whether the findings that appellant's husband was the owner of the car and that he was in possession thereof, are supported by the evidence. Under well-settled principles, these are questions of fact, and, if the record contains any evidence to support such findings, they cannot be disturbed on appeal. The evidence in regard to ownership and possession is so closely related that we will consider both questions together.

[3] The appellant relies upon her own testimony to the effect that she was the owner of the automobile; that she maintained a bank account separate from her husband; that she paid for the car with money from this bank account which she had maintained as her separate property for some years; that she was in possession of the car; and that her husband drove the same only with her permission. It is significant that, while she testified that she paid for the automobile with money from her separate funds, the record contains no word of evidence as to the source from which these funds came nor as to any fact justifying the conclusion that the money used was the separate property of the appellant. Whether property is separate or community in character is a fact to be determined upon proof showing the time and mode of acquisition rather than by a mere statement of one of the parties that the property is or is not community or separate property. Bias v. Reed, 169 Cal. 33, 145 P. 516.

It appears that the original contract under which this automobile was purchased was signed by both the appellant and her husband, and that the husband signed with the appellant's knowledge and consent. She testified that when the car was purchased the salesman asked in whose name they wanted the car; that she told him to put it in her husband's name; that her husband refused; that it was not agreed that it should stand in his name; and that it was agreed that it should stand in both names. She also testified that she wanted his name on the contract; that she had his name on the registration card in order "to honor him in that way and because of that service"; that she had never made any objection to his name being thus used; that she had seen the certificate of registration in the car, with her husband's name on it; and that this was agreeable to her until she found the car was taken from her. While she testified that when she made the last payment on the car she asked for title thereto from the banker who received the payment, she testified that she did not tell him in whose name to have the car registered, and, when asked if she ever told any one to register the car in the name of her husband, she replied: "Not entirely, no." Both the new pink slip and the white slip were issued in the name of the husband as legal owner, and the evidence indicates that these slips were received at appellant's home several days before the car was seized by the sheriff. The appellant testified that, although she was looking for these slips to come, saw them when they came, and saw that they were addressed to her husband, she was too busy with her housework to open the envelope.

It fully appears from the evidence that the appellant's husband always drove the car; that he had been seen in it alone; that he cleaned and looked after it; that he had just finished cleaning it a short time before it was seized; and that when taken it was standing where he had left it on the driveway of their home. While the appellant testified that this home belonged to her as her separate property, she also testified that her husband lived there with her; that when the sheriff came for the car he told her what he wanted and that the car was registered in her husband's name; that she started to open the gates for the sheriff, but found them locked; that she waited for her husband to come and unlock the gate and let the sheriff in; and that when her husband came she walked away because she thought this was her husband's business.

[4-7] The evidence, considered in the light most favorable to the judgment, falls short of establishing such actual possession in the appellant, as distinct from her husband, as is required to support such an action for conversion. With its reasonable inferences, we think the evidence tends more to show actual possession in the husband than in this appellant. Not only is such a claim of ownership and possession, as between husband and wife, to be closely scrutinized in a case of this kind, but the trial judge could well have distrusted certain of the testimony given by appellant, especially in view of other portions of her own evidence. Jolly v. McCoy, 36 Cal. App. 479, 172 P. 618. The husband himself was conspicuously absent from the trial. It being found upon sufficient evidence that the husband had actual possession of the car, a presumption arose that he was the owner. Jolly v. McCoy, supra. The fact that he was the registered legal owner in itself supports the findings that he was the owner. Hammond v. Hazard, 40 Cal. App. 45, 180 P. 46.

We think that all of the evidence, taken together, not only justified the trial court in refusing to take at its face value the arbitrary statements of the appellant, amounting to no more than conclusions, that she was the owner of the car and in possession thereof, but that it supports the findings complained of.

The respondent also relies upon an estoppel as against the appellant. Although there appears to be considerable merit in this point, it is unnecessary to consider the same in view of our opinion that the findings of the court on the questions of ownership and possession are sustained by the evidence.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

FIELD v. HUGHES et al.

Civ. 4772.

District Court of Appeal, Third District, California.

Nov. 17, 1932.

Rehearing Granted Dec. 17, 1932.

1. Supersedeas ⇐2.

Supersedeas will lie to stay proceedings pending determination of appeal containing issues which will become res judicata.

2. Infants ⇐87.

Judgment procured against minor without appointment of guardian is not void, but merely voidable (Code Civ. Proc. § 372).

3. Supersedeas ⇐2.

Writ of supersedeas would be granted to stay suit to compel minor's insurer to satisfy judgment procured against minor without appointment of guardian pending appeal from order refusing to vacate judgment (Code Civ. Proc. § 372).

Writ of supersedeas would be granted, since the appeal might result in a determination that the judgment was duly disaffirmed by the minor, and then the suit against insurer would be without proper basis.

4. Automobiles ⇐200.

Owner, not in automobile at time of accident, and owner's insurer *held* not liable for resulting damage, unless judgment remained unsatisfied after recourse to operator's property (Civ. Code, § 1714¼).

5. Insurance ⇐616½.

Trial court lacked jurisdiction of suit to compel insurer to satisfy judgment against insured minor who had disaffirmed judgment procured against him without appointment of guardian (Code Civ. Proc. § 372).

Action by Ralph H. Field against Eugene P. Hughes and Wayne Smythe. From an adverse judgment, the last-named defendant appeals. On application for writ of supersedeas to stay proceedings in a suit instituted in the superior court of Sacramento county by Theodore Schoefer against the Farmers' Automobile Inter-Insurance Exchange, involving issues which would become res judicata on determination of the case pending on appeal.

Writ of supersedeas granted.

Humphrey, Searls, Doyle & MacMillan, of San Francisco, and Butler, Van Dyke, Desmond & Harris and Thomas B. Leeper, all of Sacramento, for appellant.

A. B. Reynolds, Ralph H. Lewis, and George E. McCutchen, all of Sacramento, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is a petition for a writ of supersedeas to stay proceedings in a suit which is pending in the superior court of Sacramento county involving issues contained in a cause on appeal which will become res adjudicata of the first-mentioned action.

Wayne Smythe was a minor, twenty years of age. He owned an automobile which was insured by the Farmers' Automobile Inter-Insurance Exchange, a corporation. On November 3, 1930, this machine was loaned to Eugene P. Hughes. While Hughes was operating the car in Sacramento, a collision oc-

curred with a machine which was being driven by Ralph H. Field. Smythe was not then present. Field sustained personal injuries. Suit for damages was instituted against both Hughes and Smythe. No guardian was appointed to represent the minor. The attorneys for the insurance company appeared and filed an answer in his behalf. It was tried in the superior court of Sacramento county. A joint judgment was rendered August 17, 1931, against both defendants. The court found that the machine was being operated by the defendant Hughes "with the permission of the defendant Wayne Smythe, the said owner." The judgment was rendered against Smythe pursuant to section 1714¼ of the Civil Code, solely on the ground that the car was being operated with the permission of the owner. This judgment has not been satisfied.

On March 29, 1932, J. L. Hopkins was appointed guardian ad litem of the minor Wayne Smythe. The following day the judgment was disaffirmed in writing. Upon due notice a motion to vacate the judgment with respect to its application to the minor was made by his guardian on April 4, 1932. This motion was adequately supported by affidavits. There is no controversy regarding the fact that Wayne Smythe was a minor under the age of twenty-one years at the time the judgment was rendered, or that he appeared in that action without being represented by a guardian. The motion to vacate the judgment was denied. From this order the defendant Smythe has appealed. That appeal is pending in and undetermined by the Third District Court of Appeal.

Subsequent to the disaffirmance of the judgment by the minor, another action was commenced June 13, 1932, in the superior court of Sacramento county by Theodore Schoefer against the Farmers' Automobile Inter-Insurance Exchange, as the insurer of Wayne Smythe, to enforce the payment of the first-mentioned judgment against the minor. This complaint alleges the rendering of the judgment for $3,100, together with costs and interest against Wayne Smythe, without mentioning his codefendant, Eugene P. Hughes. It recites the fact that the judgment was assigned to the plaintiff Schoefer, and that he is now the owner and holder thereof; that the judgment is unsatisfied and in full force; that execution was issued thereon against Smythe and subsequently returned unsatisfied; that Smythe is insolvent; that the Farmers' Automobile Inter-Insurance Exchange was the insurer of Smythe, and liable for the payment of the judgment. The plaintiff then prays for judgment for $3,157.20 against the insurance company. Wayne Smythe, by his guardian, intervened in this action. It is alleged the court will proceed to try this last-mentioned cause unless it is restrained therefrom, in spite of the fact that the minor disaffirmed the obligation created against him by the entry of the judgment, and without first seeking to satisfy the judgment by recourse to the property of the codefendant Hughes, who was operating the machine at the time of the accident, as required by section 1714¼, supra.

[1] Supersedeas will lie to stay proceedings pending the determination of an appeal containing issues which will become res adjudicata. 23 Cal. Jur. 980, § 2; Houghton v. Superior Court, 187 Cal. 661, 203 P. 765.

[2] In an action for damages against a minor, he must appear by general guardian or by guardian ad litem as provided in section 372 of the Code of Civil Procedure. A judgment against such minor, without the appointment of a guardian, is not void, but is merely voidable. Childs v. Lanterman, 103 Cal. 387, 37 P. 382, 42 Am. St. Rep. 121. The contract of a minor, except for necessaries furnished to him or to his family, or for an obligation incurred by direct authority of statute, may be disaffirmed by him. Section 35, Civ. Code. A judgment procured against a minor without the appointment of a guardian as provided by statute may be disaffirmed by him. 14 Cal. Jur. 165, § 52; Gouanillou v. Industrial Acc. Comm., 184 Cal. 418, 193 P. 937, 938; Neilson v. Walker, 105 Cal. App. 23, 286 P. 1091. In the Gouanillou Case, supra, it is said: "The right of a minor to disaffirm an adjudication of his rights by a judicial tribunal obtained in a proceeding in which he has not been duly represented as provided by law continues until barred by laches after the minor has attained the age of majority; the right is not dependent upon statute, but is a general rule of law enforced as a necessary incident to the status of minority. Joyce v. Joyce, 5 Cal. 161; Johnston v. Southern Pac. Co., 150 Cal. 535, 89 P. 348 [11 Ann. Cas. 841]; 22 Cyc. 641, 699." 31 C. J. 1121, § 266.

[3] Since there is no controversy in the present proceeding over the fact that the minor did disaffirm the judgment against him, there appears to be no valid reason why the motion to vacate the judgment with respect to him should not have been granted. It therefore seems likely that the appeal from the order denying that motion to vacate the judgment may result in a determination that the judgment was duly disaffirmed and therefore became invalid as to the minor, and hence ineffectual to bind the insurance company. In that event it would appear to be a useless and harmful proceeding to try the case of Schoefer v. Farmers' Automobile Inter-Insurance Exchange until the appeal is first determined. Under such circumstances, neither the time nor expense of court or litigants should be consumed. It therefore appears to be equitable, in the interest of saving a multiplicity of suits, that the writ of supersedeas should be granted.

[4] Under the provisions of section 1714¼ of the Civil Code, when a judgment for damages for injuries to person or property is procured against both the owner of an automobile and the operator thereof who is driving the machine with the consent of the owner, it is necessary for the judgment creditor to first seek recourse against the property of the operator before the owner becomes liable for the satisfaction of the judgment. The liability of the insurer of the owner is also dependent upon compliance with the provisions of this statute.

Section 1714¼, supra, reads in part: "Every owner of a motor vehicle shall be liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner provided that the liability of an owner for imputed negligence imposed by this section and not arising through the relationship of principal and agent or master and servant shall be limited to the amount of five thousand dollars * * * and provided that in any action against an owner on account of imputed negligence as imposed by this section the operator of said vehicle whose negligence is imputed to the owner shall be made a party defendant provided personal service of process can be had upon said operator within this state, and upon recovery of judgment, recourse shall first be had against the property of said operator so served."

In this case it does appear that the operator of the automobile was personally served, and judgment was rendered against him. It also appears that judgment was rendered against the owner of the machine only upon the doctrine of imputed negligence. He was not in the machine at the time of the accident. The operator, Hughes, is therefore primarily liable for the judgment, and the owner of the machine is not responsible, unless the judgment or some portion thereof remains unsatisfied after recourse is had to the property of the operator.

[5] Irrespective of the application of section 1714¼ of the Civil Code, it appears without conflict that the judgment which is involved in this proceeding was duly disaffirmed by this petitioner Wayne Smythe, and thereupon became void as to him. That being true, the trial court lacks jurisdiction to try the cause which is founded entirely upon the validity of that judgment against this petitioner Wayne Smythe.

The writ is granted.

We concur: PULLEN, P. J.; PLUMMER, J.

127 Cal.App. 780

FARMERS' AUTOMOBILE INTER-INSURANCE EXCHANGE (a Corporation), Petitioner, v. SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF SACRAMENTO; Honorable Peter J. Shields, Judge of said Superior Court, and Theodore Schoefer, Respondents.

Civ. 4814.

District Court of Appeal, Third District, California.

Nov. 17, 1932.

Application for writ of prohibition prayed to be directed to the Superior Court of Sacramento County, Peter J. Shields, Judge, to restrain proceedings in a certain action.

Petition dismissed.

Humphrey, Searls, Doyle & MacMillan, of San Francisco, and Butler, Van Dyke, Desmond & Harris and Thomas B. Leeper, all of Sacramento, for petitioner.

A. B. Reynolds, Ralph H. Lewis, and George E. McCutchen, all of Sacramento, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This petition for a writ of prohibition involves the same issues which are presented in a petition for writ of supersedeas entitled Ralph H. Field v. Eugene P. Hughes and Wayne Smythe (Cal. App.) 16 P.(2d) 160, in which an opinion of this court was this day filed. It therefore becomes unnecessary to pass upon this petition for a writ of prohibition.

The petition is therefore dismissed.

We concur: PULLEN, P. J; PLUMMER, J.

127 Cal.App. 495

CLARK et ux. v. RICHFIELD OIL CO. OF CALIFORNIA et al.

Civ. 7419.

District Court of Appeal, Second District, Division 1, California.

Nov. 15, 1932.

Rehearing Denied Dec. 12, 1932.

Hearing Denied by Supreme Court Jan. 12, 1933.

1. Appeal and error ⇐1011(1).

Finding of trial court based on conflicting evidence is not reviewable.

2. Vendor and purchaser ⇐196.

Purchaser under land contract expressly excepting oil lease *held* not entitled to royalties accruing prior to time for delivery of

deed, where purchaser never had possession or right to possession under contract.

3. Partnership ⇐173.

Lessor suing for oil royalties could recover amount due from member of partnership to which lease was assigned (Code Civ. Proc. § 388).

4. Mines and minerals ⇐79(7).

That assignee of oil lease had paid royalties due lessor to purchaser of land *held* no defense as against lessor.

5. Mines and minerals ⇐79(7).

In action against member of partnership to which oil lease was assigned to recover royalties, judgment against purchaser of land to whom assignee had erroneously paid royalties *held* unwarranted.

HOUSER, J., dissenting.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by I. S. Clark and wife against the Richfield Oil Company of California and others. From a judgment adverse to them, defendant Nordenholt and Stevely appeal.

Affirmed in part and reversed in part.

J. Marion Wright, of Los Angeles, for appellants.

Doyle, Clark, Thomas & Johnson, of Long Beach, for respondents.

TAPPAAN, Justice pro tem.

From a judgment in the sum of $2,811.01 entered as against appellants Nordenholt and Stevely this appeal is taken. As to the other defendants named in the complaint a nonsuit was granted.

The facts which form the basis of the action here involved are few in number. Respondents were the owners of certain real property, and, as lessors, leased to one of the defendants named in the complaint the right to remove gas and oil therefrom, it being agreed under the terms of the said lease that respondents were to receive as royalty or rent one-twelfth of all gas, oil, and other hydrocarbon substances produced from said leased property. Thereafter, on September 29, 1927, and subsequent to the making of said oil lease, respondents made and entered into an agreement with appellant Stevely by the terms of which they agreed to sell the property upon which they had granted the oil lease, to appellant Stevely for the sum of $6,000, payable $2,000 at the time of the signing of the agreement, and the balance in two equal payments at one and two years respectively. This agreement provided that upon payment of the full purchase price respondents would deliver to the buyer a good and sufficient grant deed to the premises "free and clear of encumbrance excepting an oil lease between the seller and Pacific National Gasoline Company." There is no provision in this agreement that the buyer, William H. Stevely, should have possession of the premises agreed to be sold. It appears from the evidence that during the year following the execution of this agreement and at a time when the "buyer," Stevely, was not in default under the terms of the agreement, the property in question was drilled under the terms of the oil lease previously referred to, gas developed thereon, and that the sum of $2,381.22 was paid to appellant Stevely as the one-twelfth royalty saved to the lessor under the terms of the oil lease. This payment was made to appellant Stevely by the National Gas Syndicate, a partnership. It also appears that, after the first-year period as fixed in the agreement of sale, Stevely having defaulted in his payments, respondents instituted an action to quiet their title to the premises in question, and in that action all the rights of appellant Stevely were foreclosed.

[1] From the record it appears that the oil lease upon the premises in question was assigned by the Pacific National Gasoline Company, the lessee named in the lease, to the National Gas Syndicate, a copartnership composed of appellant Nordenholt and three other persons who do not appear to have been joined in this action nor to have appeared herein. Respondent I. S. Clark, during the months of October and November, 1926, wrote to both the Pacific National Gasoline Company and the National Gas Syndicate, asserting their (respondents') rights to the royalties under the oil lease, and setting up the claim that these royalties did not pass under the terms of the agreement of sale of the property in question to the buyer therein named. Appellant Nordenholt was president of the Pacific National Gasoline Company, and signed the oil lease with respondent in his capacity as president of the corporation. It also appears that appellant Stevely, the buyer in the agreement of sale, never took actual possession of the property in question. Some testimony was introduced by appellants at the trial as to conversations had before or at the time the agreement of sale was signed by respondents. As to what was said at these conversations, the testimony produced by appellants is as to its material parts directly contradicted by the testimony of respondent I. S. Clark. The questions thus presented were ones of fact, and, as the trial court's implied finding is against appellants' contention, and is based upon conflicting evidence, the matter is not subject to question before this court upon this appeal.

[2] The sole point urged by appellants upon this appeal is that the evidence does not support the finding of the trial court that re-

spondents retained the benefits of the said oil lease after they entered into the agreement for the sale of the real estate, or that appellant William H. Stevely agreed to purchase said property subject to said oil lease and the rights thereunder. The question thus presented, under the circumstances of the case as disclosed by the record here, involves the construction to be placed upon the so-called agreement of sale made between respondent and appellant Stevely. The sole question here presented is: Does the purposed "buyer," under the terms of an agreement to purchase real property calling for installment payment of the purchase price over a period of years, and providing that, when the purchase price is paid in full, the seller therein named will deliver a deed free and clear of all incumbrances except an existing oil lease, and which agreement does not provide that the buyer shall have possession of the property described in the agreement, entitle the buyer to collect and hold the royalties paid under the terms of the excepted oil lease? There is evidence to the effect that the buyer never entered into possession of the property in question, which must have the effect that his rights, if any, are those granted him under the sales agreement referred to. The testimony as to the facts and circumstances surrounding the making of this agreement is in conflict, as has already been stated, and the court's findings as to these facts and circumstances, it appears, must have been adverse to appellants; therefore appellants must rest their contention upon the terms of the sales agreement solely.

Appellants, in support of their contention that the "buyer" named in a contract of sale of real property is entitled to the rents and profits arising from the property agreed to be sold, cite a number of cases which state a generally accepted equitable rule. The case of Miller v. Waddingham, 91 Cal. 377, 27 P. 750, 13 L. R. A. 680, cited by appellants, is illustrative of this, and at page 380 of the opinion in 91 Cal., 27 P. 750, 751, 13 L. R. A. 680, it is said: "Upon the execution of this contract of sale, the vendee of the plaintiff became vested with the equitable title to said land, and the plaintiff retained in himself the legal title as a security for the performance of the contract by the vendee." In this case and all the other cases cited by appellants the possession of the land covered by the contract of sale was in the "buyer" either under the terms of the contract or by the consent of the "seller." In the instant case the contract did not give possession to the "buyer," nor was there any evidence that would support a finding that the "seller" gave consent, either express or implied, to the "buyer" taking possession. The evidence showed, in fact, that the "buyer" never took possession of the premises in question, and that the "seller" placed the *lessee* named in the oil lease in possession of the premises. "There was no stipulation in the contract, Exhibit A, surrendering the possession of the property to the vendee; and, unless there is such a stipulation in a contract like the one mentioned, it may be considered as settled in this state that the vendor retains the possession until the legal title passes to his vendee." Stratton v. California Land, etc., Co., 86 Cal. 353, 364, 24 P. 1065, 1069. "There is no presumption of law that the vendee, in an executory agreement for the purchase of land, has been put into possession. In the absence of anything in the contract from which it can be inferred or implied that he is to have possession, he has no right thereto." Crane v. Ferrier, etc., Co., 164 Cal. 676, 678, 130 P. 429, 430.

We have not found nor has any authority been cited here which would uphold appellants' contention that the "buyer" named in an executory contract to purchase real property, where such "buyer" was not entitled to the possession of the property agreed to be sold, was entitled to the rents and profits of the land agreed to be sold, during the period between the signing of the contract and the time when the "buyer" became entitled to a deed to the property. In other jurisdictions, under circumstances such as are presented by the instant case, it has been held that the "buyer" would not be entitled to such rents and profits. Iowa Railroad Land Co. v. Estate of Boyle, 154 Iowa, 249, 134 N. W. 590, 38 L. R. A. (N. S.) 420; Bostwick v. Frankfield, 74 N. Y. 207.

In view of the fact that the agreement of sale expressly excepted the oil lease then upon the premises agreed to be sold, and that the property was at the time of the signing of the agreement of sale in the possession of the lessee under this lease, and that the "buyer" never had possession after the signing of the agreement nor right to possession under the agreement, it seems conclusive that the "buyer" is not entitled to the oil royalties under the agreement of sale and other evidence before it at the trial. The finding made by the court that the copartnership "wrongfully paid" the royalties to appellant Stevely was an inferential finding on this point. Warden v. Stoll, 210 Cal. 374, 376, 291 P. 835. This is doubly true if we accept appellants' theory as advanced in their brief that respondents occupied a position similar to that of a mortgagee. The effect of the removal of the gas under the terms of the oil lease would deplete the security by removing a part of the thing agreed to be sold. If the "seller" was to waive the right to this part of the security, the agreement should have so provided. The agreement made no such provision.

[3-5] The cause of action as stated in plaintiffs' complaint is one for the recovery of unpaid rents and profits under the express terms of the oil lease. It does not appear from an examination of this pleading that plaintiffs had in mind or attempted to state a cause of

action for the recovery of a designated fund or the recovery of money in an action in the nature of a common count. From the pleadings and evidence it appears that the duty to pay the rents and profits provided to be paid under the oil lease and therein designated as "royalties" had been assumed by the National Gas Syndicate, a partnership, of which appellant George D. Nordenholt was a member. Section 388 of the Code of Civil Procedure provides: "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, *and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability.*" (Italics ours.) Under the provisions of the above-quoted section, the trial court was justified in finding appellant Nordenholt liable for the unpaid royalties. The fact that the National Gas Syndicate attorned to appellant Stevely, and paid the royalties due respondents to him, is not a defense to this action to recover them from the person legally bound to pay them. Calderwood v. Pyser, 31 Cal. 333. Under the circumstances as disclosed by the record, and in view of the fact that the cause of action as stated is one for the recovery of rent or royalties and not for money as such, the evidence fails to support the judgment as rendered against appellant Stevely.

The judgment as to appellant George D. Nordenholt is affirmed, and as to appellant William H. Stevely it is reversed.

I concur: CONREY, P. J.

HOUSER, J.

I dissent. As was shown by their amendment to their answer to the complaint, the most important and, in fact, the controlling defense relied upon by the defendants in the action, was that the plaintiffs "sold to said William H. Stevely, the said premises described in said lease, and all of the rights of the plaintiffs in and to said land, and in and to said lease, and all of the royalties and proceeds of the sale of gas, oil and gasoline extracted from said premises, and that thereafter said plaintiffs had no right, title or interest in or to said land, or the oil or gas or gasoline to be extracted therefrom, or in or to said lease, but held only the bare legal title to said land. * * *"

In reality, the only consequential and disputed issue of fact in the case was whether, on the sale of the property in question, the rights which had already accrued under the terms of the lease, or which rights might thereafter accrue to the lessor, who then was the owner of the property, were reserved to the plaintiffs; or whether such rights were, by the parties to the agreement, intended to be transferred to the purchaser, who is now one of the defendants.

But, although on the trial of the action much evidence was presented relating thereto, the trial court made no direct, or express, finding of fact on that issue—the one essential, determinative issue in the case. It is conceded that the nearest approach made by the trial court to a finding of fact thereon was that the assignees of the lease "wrongfully paid" to Stevely (the purchaser) the royalties which should have been paid to plaintiff. The entire finding of fact, in which the words "wrongfully paid" were used, is as follows:

"That as soon as plaintiffs discovered that the royalties were being paid to defendant Wm. H. Stevely by the National Gas Syndicate, a copartnership composed of George D. Nordenholt, H. P. Taylor, E. L. Petitfils, and R. D. Clark, plaintiffs objected and demanded that said royalties be paid to them, but their demands were ignored and said National Gas Syndicate, a copartnership composed of George D. Nordenholt, H. P. Taylor, E. L. Petitfils, and R. D. Clark wrongfully paid, between the dates of October 1st, 1926, and June 1st, 1927, to defendant, Wm. H. Stevely, the sum of Two Thousand, Three Hundred Eighty-one Dollars and Twenty-two Cents ($2,381.22), and said money should have been paid to the plaintiffs."

To my mind, the latter finding is insufficient as a declaration, either expressly or by implication, of the views of the trial court with reference to the vital fact pleaded by the defendants in their answer to the complaint.

In 24 California Jurisprudence, 940 et seq., where many authorities are cited in support of the rule there stated, it is said that "it has been repeatedly affirmed that where a court renders a judgment without making findings upon *all material issues of fact*, the decision is against law, and constitutes ground for granting a new trial in order that the issues of fact may be determined, or for reversal upon appeal, provided it appears that there was evidence introduced as to such issue and the evidence was sufficient to sustain a finding in favor of the party complaining. * * *" No question is here raised as to the sufficiency of the evidence to sustain a finding of fact in the instant case in favor of the appellant.

Nor am I able to accept the case of Warden v. Stoll, 210 Cal. 374, 376, 291 P. 835, 836, cited in the prevailing opinion herein, as authority in substance that the finding made by the trial court to the effect that the assignees of the lease "wrongfully" paid the royalties which became due under the lease to the purchaser of the property constituted an "inferential

finding" on the issues of whether the rights and the royalties, which theretofore had been reserved to the lessor, passed to the purchaser of the property on the sale thereof. An examination of the record on appeal in the case to which attention has been directed discloses the fact that the action was one in the ordinary form to quiet title to certain real property; that, regarding the tendered issue of ownership thereof, the only allegation of the complaint was that the plaintiff "is now and has been for a long time hitherto the owner in fee simple as her separate property," etc.; and that the answer of the defendants therein consisted of a specific denial of that allegation. Neither in the complaint nor in the answer *was any issue raised regarding the validity of a tax deed*, which appears to have constituted the basis of plaintiff's asserted ownership of the property. In such a situation, regarding the point that the trial court had failed to make a finding of fact on a "material" issue, in discussing the question thus raised, the Supreme Court said: "Appellant contends that the trial court failed to make any finding in reference to the validity of the tax deed presented by her, and contends that this amounts to a failure to find on a material issue. Such a finding, however, is not essential. The finding that plaintiff's claims are without merit is an inferential finding on this point. * * *"

Considering the question of the omission of such an express finding in that case, that is, as to the validity of a tax deed, it is clear that the tax deed in question was merely an item of evidence of the title of the plaintiff, and that, as far as the validity of the tax deed was concerned, in that regard it occupied no different position in its right to be made a part of the findings of fact in the case than did any other relevant evidence. For example, supposing that the case of the plaintiff, instead of having depended upon a tax deed, had depended upon a statutory adverse possession of the property: In such circumstances, it is clear that it would not have been necessary that the facts tending to prove the genuineness, or even the existence, of tax receipts going to show the payment of taxes by the plaintiff, or his predecessors in interest, or the possession of the property by the plaintiff, during the statutory period, should appear among the express findings of fact made by the trial court.

In the instant case, this court is confronted with an entirely different situation. The fact omitted from the findings made by the trial court is not only material, but is indispensable as far as forming a basis for the conclusions of law and a judgment founded thereon is concerned. It was the essential and ultimate fact upon which, not only the cause of action of the plaintiff depended, but as well upon which rested the defense of the several defendants.

From a technical standpoint, it is also apparent that a statement that the royalties in question were "wrongfully" paid to the purchaser of the property is not a finding of fact, but constitutes a conclusion of law. Whether the payment of the royalties to such purchaser was within the rights of the other defendants to the action, or, in other words, whether such a payment was "wrongful," was the ultimate question of law to be determined by the trial court. The placement of such a conclusion of law within the findings of fact could not have the effect of changing its character.

In the prevailing opinion herein, stress is repeatedly laid upon the fact that the purchaser of the property was not placed in possession thereof. How could he be? It was an impossibility. Prior to the sale thereof, the owner of the property had leased it to third persons and had placed *them* in its possession. At the time the sale was made, the lease was still in full force and effect; and consequently the owner himself of the property was neither entitled to its possession, nor able to place his grantor or any other person in possession.

127 Cal.App. 439

LEWIS et ux. v. McCLURE et al.

Civ. 4488.

District Court of Appeal, Third District, California.

Nov. 10, 1932.

Rehearing Denied Dec. 10, 1932.

Hearing Denied by Supreme Court Jan. 9, 1933.

1. Fraud ⇐9.

Where false representations induced modified exchange contract, and but for modification exchange would not have been consummated, there was actionable fraud.

2. Fraud ⇐30.

Where plaintiffs relied on false representations of all defendants and were thereby induced to make property exchange, defendants *held* jointly liable.

3. Fraud ⇐21.

Where, by fraudulent representations made to husband known to be acting as wife's agent with respect to her interest, spouses are induced to exchange property with stranger, proof that representations were made to wife personally is unnecessary as basis for recovery (Civ. Code, § 2332).

4. Fraud ⇐11(2).

Landowner's statements to one contemplating taking lessee's hotel business in exchange for other property *held* to amount to assurance that lessee's false representations respecting value of business and income were entitled to belief, rendering owner liable in damages.

It appeared that prospective exchanging party, in conversation with owner of building and land, related statement previously made to him by lessee to effect that business was worth certain amount and realized certain net profit monthly, and that owner stated he was surprised lessee was not earning more and that rental was not exorbitant for a business making money and that hotel was a "mint to make money."

5. Principal and agent ⇐156.

Record warranted finding that persons other than lessee, misrepresenting value of hotel business to person taking business in exchange from lessee, acted as agents for co-owner of building and chattel mortgagee, rendering co-owner and mortgagee jointly liable with others for fraud (Civ. Code, § 2332).

6. Principal and agent ⇐171(4).

When agent, acting within actual or apparent authority, procures property exchange by fraud, principal, accepting and retaining benefits, is liable in damages, though not personally participating in fraud.

7. Appeal and error ⇐1170(9).

Where evidence supported joint and several judgments against all defendants participating in fraud, instruction on conspiracy *held* not prejudicial, though pleadings and evidence did not show conspiracy (Const. art. 6, § 4½).

8. Fraud ⇐30.

Plaintiffs *held* entitled to judgment against each defendant shown to have participated in fraud, though no conspiracy was proved.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Suit by J. A. Lewis and wife against H. G. McClure, Gladys F. McClure, A. Bloomberg, and others. From a judgment in favor of plaintiffs, all defendants, except defendants McClure, appeal.

Affirmed.

White, Miller, Needham & Harber and Johnson & Lemmon, all of Sacramento, for appellants.

Chester F. Gannon and Ralph H. Lewis, both of Sacramento, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This suit was brought for damages for fraud alleged to have been exercised in procuring an exchange of properties. The plaintiffs secured a verdict against all of the defendants. A judgment was rendered accordingly. From this judgment several of the defendants have appealed. The McClures failed to appeal, and the judgment against them has become final.

The plaintiffs are husband and wife. They owned a lot in Chico upon which a store building and gas station were constructed. This property was valued at $15,000, and was subject to a mortgage for $2,800. The grocery store and gas station were operated by the plaintiffs. Their stock of merchandise was worth $3,500. They also owned ten acres of land near Lakeview, Or., valued at $500. The brothers, A. Bloomberg and L. Bloomberg, own the Anchor Hotel situated on J street in Sacramento. They value this property at $150,000. The defendants H. G. and Gladys F. McClure held a ten-year lease on the hotel property, which expires February 1, 1940. The rent of the hotel was fixed at $1,200 a month. The McClures owned the furniture and equipment of the hotel, which were subject to a chattel mortgage to secure an indebtedness of $2,025 held by the defendant Klein Realty Service, Inc., a corporation. This indebtedness was due and a foreclosure suit was threatened by the mortgagee. The hotel business was not prosperous. The lessees were in default in the payment of rent. Mr. and Mrs. McClure also owned certain apartments on E street in Sacramento valued at $5,500. This property was subject to a mortgage of $2,800.

In April, 1930, a representative of the McClures visited plaintiffs at Chico and proposed an exchange of properties. This agent succeeded in interesting the plaintiffs in the project. He invited them to inspect the Anchor Hotel at Sacramento to discuss the proposed exchange with the McClures. The following Sunday, April 13th, the plaintiffs went to Sacramento, where they met H. G. McClure and were shown some of the rooms of the hotel. McClure related to them an exaggerated and glowing tale of the prosperity of the business. He said the hotel business was worth $30,000 and that he was making a profit of $500 a month from the enterprise. He also told them of the E street apartments which he owned subject to mortgage, and of the hotel furniture which he owned subject to a chattel mortgage of $2,500. He offered to exchange the hotel business and Sacramento apartments subject to their respective mortgages for the Chico and Lakeview properties belonging to the plaintiff, free of incumbrance. Several hours were consumed in this interview. Assuming that an agreement of exchange would be reached, McClure called upon the telephone Mr. Hall, who was a salesman in the employ of the Klein Realty Service Corporation, and requested him to come directly to the Anchor Hotel and prepare an agreement of exchange. This instrument was promptly drawn by Mr. Hall as directed by McClure, and subsequently presented to Mr. and Mrs.

Lewis for their signatures. This document provided for delivery of possession of the properties on the following Wednesday. The plaintiffs deny that they had agreed upon specific terms of an exchange, or that they knew the contents of the instrument. They did, however, sign the document. They then returned to their home at Chico.

The following Wednesday Mr. Lewis went to Sacramento and again interviewed Mr. McClure. He then declined to carry out the agreement to exchange properties. He was dissatisfied with some of the terms of the written document. He discovered by visiting the attorneys who represented the Bloombergs that the mortgage on the hotel furniture, which was held by the Klein Realty Service Corporation, was but $2,025 instead of $2,500, as the agreement recited. Mr. Lewis insisted on interviewing the owners of the hotel to obtain from them an assurance of procuring an assignment of the lease in the event of an exchange of properties. He sought to obtain permission from the owners to alter the hotel front to install a cigar stand therein. Mr. A. Bloomberg came to the hotel and discussed the proposed exchange of properties with Lewis. During this conversation, A. Bloomberg made to J. A. Lewis some of the alleged false representations regarding the hotel business upon which this suit for damages is founded. McClure then told Mr. Lewis the hotel business was worth $45,000; that it was a prosperous business and a regular mint in which to make money. He said the rooms were constantly rented; that many of them yielded double rent for the reason that forty-five of them were occupied by railroad men who slept in the daytime. He assured Lewis that about ninety guests were regularly registered at the hotel each day, that the income from the hotel was $2,800 a month or about $100 a day, and that he derived a net profit of $500 a month. The respondents claim these statements were false and that they were thereby induced to exchange properties to their damage. There is substantial proof to indicate that the value of the hotel business and the value of the rent were greatly exaggerated. The business was operated at a loss. The income amounted to only half the sum represented by McClure. The hotel was patronized by only about half the number of guests he claimed were registered therein.

In discussing the proposed exchange of properties with A. Bloomberg on the 16th of April, Lewis told him what McClure had said regarding the business. Bloomberg substantially confirmed the statement of McClure by saying he was surprised he did not make more profit than was claimed, for they had lately purchased the property for $150,000 after making a complete investigation and that the hotel was a perfect mint in which to make money. He also assured Lewis the sum of $1,200 a month was not exorbitant rent "when you are making money," adding that the hotel was a great place to make money. Bloomberg insisted on the payment of $2,025 in cash to satisfy the chattel mortgage held by the realty company, as a prerequisite to assigning the lease.

On the occasion of the visit of Mr. Lewis to the Anchor Hotel on April 16th, Carl A. Klein, who is a member of the Klein Realty Service Corporation, was called upon and directed by McClure to prepare the second contract of exchange. Mr. Lewis told him that he did not intend to "go ahead with the deal" on the terms which were incorporated in the original agreement. Mr. Klein then said: "You are making a mistake; you are offered an awful good proposition here; we have information that hotel is a good business, we know it sold for over $45,000. * * * It is one of the best leading hotels, best businesses in Sacramento. * * * It is a strictly man's hotel. I never saw anything like it. The thing has been running full all the time. It is just a mint. If you would like to go into the hotel business you cannot be mistaken." This was a substantial confirmation of what Lewis had been told by McClure. Klein also told Lewis the chattel mortgage which his company held would have to be paid. In view of the statements made to Mr. Lewis by McClure, this assurance on the part of Klein tended strongly to induce the plaintiffs to make the exchange. It does appear that McClure, Bloomberg and Klein actively co-operated in procuring the exchange of properties. When the exchange was consummated, the Bloomberg brothers and the realty company divided the money which was paid by Lewis on the chattel mortgage, notwithstanding the fact that this sum appeared to be an indebtedness due to the realty company.

Relying upon these statements of McClure, Bloomberg, and Klein, the plaintiffs again consented to make the proposed exchange of properties upon terms, some of which were radically different from those which were incorporated in the original contract. A new agreement was thereupon prepared for the contracting parties by Mr. Klein according to the terms which were finally adopted. This new contract was ultimately signed by Mr. and Mrs. McClure and by Mr. and Mrs. Lewis. It provided for an immediate transfer of possession of the properties. The new contract was not complete in itself. It is necessary to construe it with the original contract in order to ascertain the entire terms of the transaction. In effect, it is a mere modification of the original contract. It is, however, true that, except for the modifications which were adopted in this second document, the exchange would not have been consummated. It fol-

lows that these false representations which became the inducement for this final modified contract constitute actionable fraud.

This final contract was dated and executed April 16th. The necessary deeds of conveyances to the respective properties were executed. Klein Realty Service Corporation executed a release of their chattel mortgage. An assignment of the ten-year lease of the Anchor Hotel was made to J. A. and Anna E. Lewis and accepted by both A. and L. Bloomberg in the following language: "We hereby accept the assignment of the said lease from H. G. McClure and Gladys F. McClure, his wife, to J. A. Lewis and Anna E. Lewis, his wife." By agreement the documents necessary to consummate the exchange of properties were deposited with a Chico bank to be delivered pursuant to written instructions. The plaintiffs borrowed sufficient money to satisfy the chattel mortgage. It was paid to the bank, as directed, in two checks. One was drawn in favor of the Bloombergs for the sum of $1,200. This check was indorsed and cashed by them. The other check was drawn in favor of Klein Realty Service Corporation for the sum of $825. This check was indorsed and cashed by that realty company.

The plaintiffs took immediate possession of the hotel and operated it for a period of time. They soon discovered they had been grossly defrauded. Their income from that source did not exceed $1,450 a month. They registered not more than half the customers they were assured the hotel possessed. Their operating expenses aggregated $2,300 a month. They sustained a loss of approximately $850 a month. A rescission of the contract of exchange was demanded. This was refused. This suit for damages was then instituted. A jury returned a verdict of $10,000 in favor of the plaintiffs and against all the defendants. A joint and several judgment was accordingly rendered. All defendants, except H. G. and Gladys F. McClure, have appealed from this judgment. The judgment against the McClures therefore became final.

The appellants contend the judgment is not supported by the evidence for the reasons that: (1) The fraudulent representations upon which the plaintiffs rely were made after they had consented to the exchange of properties as evidenced by the original contract; (2) no fraudulent representations were personally made to Anna E. Lewis, one of the joint purchasers and coplaintiffs, and the conveyances of her interest in the properties were therefore not made in reliance upon such alleged fraud; (3) since the judgment is void as to the interest of Anna E. Lewis therein, it is void in toto because it is impossible to determine what proportion thereof her coplaintiff, J. A. Lewis, is entitled to recover; (4) L. Bloomberg insists there is no evidence that he participated in the negotiations for an exchange, and that he is not bound by the alleged misrepresentations made by his brother, A. Bloomberg; (5) all appellants assert the language alleged to have been used by them constitutes mere expressions of opinion and is not actionable fraud.

[1, 2] We are of the opinion the judgment is valid against each of the defendants. The record discloses a conflict regarding the alleged false representations. There are circumstances from which it satisfactorily appears all of the defendants knew the negotiations for an exchange of properties were conducted with J. A. Lewis and Anna E. Lewis as husband and wife, in the consummation of which Mr. Lewis acted as the agent for his wife. The cause was tried on this theory. Both spouses were parties to the contracts of exchange and to the necessary instruments of conveyance. The Anchor Hotel property was transferred to both plaintiffs. The assignment of lease was made to both of them. Each of the defendants profited by the exchange of properties. A. Bloomberg and L. Bloomberg jointly owned the Anchor Hotel. Both signed the acceptance of the assignment of lease to Mr. and Mrs. Lewis. A. Bloomberg acted as the agent for his brother, L. Bloomberg. The Bloombergs shared in the $2,025 paid by the plaintiffs as a part consideration for the exchange. The Klein Realty Service Corporation obtained the balance of this sum. The realty company and the Bloombergs insisted on the payment of this sum in cash as a part of the transaction. They divided the proceeds between themselves, notwithstanding the fact that this money was secured by a chattel mortgage on the hotel furniture executed in the name of the realty company. Mr. Klein, in behalf of his realty company, was active in drawing the papers and helping to procure the exchange. The false representations were made before the final contract was executed. This document contained essential terms except for which the exchange would not have been consummated. It is immaterial that a previous contract was executed which was adopted as a part of the final agreement, and which might have been specifically enforced, except for the presence of fraud. The action is not based upon the original contract alone. Before the exchange was consummated and pending the negotiations therefor, the false representations were made. Mr. Lewis testified that the exchange would have been abandoned except for the acceptance of the terms expressed in the latter instrument. He said: "I told them (the McClures) * * * I did not care to go ahead with the deal, that I could not go through with it that way. * * * That I would come back to Sacramento and let them know what I could do."

Mr. Klein, who appeared as an agent and member of the Klein Realty Service, Inc., then responded: "You are making a mistake; you are offered an awful good proposition here; we have information that hotel is a good business, we know it sold for over $45,000. * * * It is one of the best leading hotels, best businesses in Sacramento. * * * It is a strictly man's hotel. I never saw anything like it. The thing has been running full all the time. It is just a mint. If you would like to go into the hotel business you cannot be mistaken." The plaintiffs relied on these representations, and were induced thereby to make the exchange. Mr. Lewis so testified. Under such circumstances the defendants are jointly liable for the damages resulting from the fraud.

[3] Where a husband and wife are induced to exchange properties with a third person by means of fraudulent representations made to the husband who was known to be acting as agent for his wife with respect to her interest therein, it is unnecessary to prove that the false representations were also made to her personally. Sec. 2332, Civ. Code; Benner v. Hooper, 112 Cal. App. 53, 296 P. 660; Hamilton v. French, 78 Cal. App. 289, 248 P. 281. Section 2332, supra, provides: "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other."

In 26 C. J. 1121, § 47, it is said: "It is not necessary that representations should have been made directly to the complainant, as recovery can be had for representations made to another with the intent or knowledge that they should or would be repeated to complainant."

In 27 C. J. 5, § 116, it is said: "One cannot sue for false representations unless they were made to him with intent that he should act thereon, or were made under such circumstances that the speaker must reasonably have anticipated that plaintiff would hear and act upon them."

In the case of Spadoni v. Maggenti (Cal. App.) 8 P.(2d) 874, 878, wherein a husband and wife were similarly defrauded in an exchange of properties, the court said: "Under the circumstances of this case, it is immaterial whether false representations were made to only one of the plaintiffs without communicating them to the other party. Fraud perpetrated upon either one of joint purchasers of property may warrant a rescission of the conveyance thereof."

In the case of Hunter v. McKenzie, 197 Cal. 176, 239 P. 1090, 1094, it was held that the necessary assumption that a wife relied upon false representations which were made to her husband alone, as an inducement for an exchange of properties, could be inferred from the circumstances of the case. It was there held to be unnecessary to prove by direct evidence that she did make the exchange relying upon the false representations. The court said: "The fact of reliance upon alleged false representations may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party defrauded to enter into the contract than his direct testimony to the same effect."

The record in the present case seems conclusive of the fact that all of the defendants knew the plaintiffs were husband and wife and that J. A. Lewis acted as agent for his wife in negotiating the exchange of properties. The evidence shows they dealt with them as such. It was therefore unnecessary to prove that the false representations were communicated to her. The circumstances indicate that she relied upon these representations in making the exchange of properties.

[4] Mr. A. Bloomberg also made false representations to the plaintiff J. A. Lewis regarding the hotel business which were relied upon by the plaintiffs as inducements for making the exchange of properties, and which created a liability for damages against himself and his brother, L. Bloomberg. The Bloombergs own the Anchor Hotel. They had executed a ten-year lease of the hotel property to the McClures for a rental of $1,200 a month. The lessees were in default in the payment of their rent. The hotel was being operated at a loss. The Klein Realty Service Corporation held a chattel mortgage on the hotel furniture to secure the payment of $2,025. The jurors were entitled to assume from the fact that this sum of money was paid by the plaintiffs and divided between the realty company and the Bloombergs that both of these parties were interested in encouraging the exchanging of properties. All the appellants profited by the exchange. In a conversation which occurred between Mr. Lewis and A. Bloomberg pending the negotiations for the exchange of properties, Lewis related the statement previously made to him by Mr. McClure to the effect that the business was a great success and was worth $30,000; that he had some ninety guests constantly registered; that the regular income was $2,800 a month; and that he realized a net profit of $500 a month. Mr. A. Bloomberg said: "Is that all he is making there? * * * I am surprised he is not making any more than that. * * * This is a good business here. We have known it for a good many years." In reply to the question from Mr. Lewis, "I understand you have just bought the property?" Bloomberg replied, "Yes, * * * (it is worth) $150,-

000." Inquiring about the rent, Mr. Lewis asked, "Isn't $1,200 an enormous amount of money (for rental)?" Bloomberg replied, "Why, no, if you are making money. This hotel is just a mint to make money. We just recently bought the property, and we went into all the details, and knew what we were doing before we bought it." Mr. Bloomberg also assured Lewis that the rent had all been paid. This statement of Mr. Bloomberg's was in the nature of an assurance that all McClure had said to Lewis was true. It is reinforced with the positive declaration that they had fully investigated the hotel business before they purchased it for $150,000, and "we knew what we were doing before we bought it." He added the guaranty that "this hotel is just a mint to make money." These statements amount to an assurance on the part of Bloomberg that Lewis was entitled to believe all that was related to him by McClure.

[5, 6] The record contains sufficient facts to indicate that Carl A. Klein acted as the agent for his Klein Realty Service Corporation in helping to procure the exchange of properties. It also sufficiently appears that A. Bloomberg and L. Bloomberg were jointly interested in the hotel enterprise, and that A. Bloomberg acted as the agent for his brother in helping to procure the exchange of properties. All of these appellants profited by the transaction.

The law is well established that, when an agent acting within his actual or apparent authority procures the execution of a contract or the exchange of properties by means of fraud, the principal is liable for damages incurred thereby, even though the principal is innocent of personally participating in the fraud, when he accepts and retains benefits which accrue from the transaction. In the present case it appears that each of the appellants did profit by the exchange of properties and that sufficient evidence of the agencies of the parties who personally participated in the alleged fraud, is shown.

In 2 Pomeroy's Equity Jurisprudence, 1887, § 909, it is said: "When an agent, in doing the business of his principal, and acting within the scope of the (actual or apparent) authority conferred upon him, makes fraudulent representations or concealments, * * * the principal is liable in the same manner, to the same extent, and for the same remedies as though the fraud were committed by himself personally; * * * (even though) the principal is personally innocent of any fraud, * * * if the principal receives and retains the proceeds of the agent's fraud. * * * The only mode in which the principal, under these circumstances, can escape liability, is by repudiating the acts of his agent, and refusing to accept or retain any benefit of the transaction, immediately upon his discovery of the fraud."

Support of this principle is also found in 2 Mechem on Agency, 1348, § 1776, and in the same volume at page 1548, § 1984. The same doctrine is announced in Hamilton v. French, 78 Cal. App. 289, 248 P. 281, and in Benner v. Hooper, 112 Cal. App. 53, at page 63, 296 P. 660, 664. In the authority last cited the court says: "Upon both principle and authority an agent's knowledge is imputed to his principal (section 2332, Civ. Code; 1 Cal. Jur. 847), and the principal is charged with the fraud of his agent committed in the course of his employment and in the interest of the principal (12 Cal. Jur. 775; Powell v. Oak Ridge Co., 84 Cal. App. 714, 719, 258 P. 636). This rule is uniformly applied when the principal is shown to have accepted and retained the benefits of the agent's fraudulent act."

[7, 8] Prejudicial error is assigned in giving to the jury the following instruction: "In an action for damages resulting from acts of conspirators, each participant in the wrongful act are responsible as joint tort feasors for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor, and regardless of the degree of his activity. And so is the plaintiff here entitled to a joint recovery of damages against such defendants as he can show united or cooperated in inflicting a wrong upon him, if any of them there be (who) did so unite or cooperate."

While it is true that a conspiracy between the defendants was not alleged, and that it was not sufficiently proved, the giving of the foregoing instruction is harmless. The gist of the action is the procuring of the exchange of properties by means of alleged false representations on the part of each of the defendants. This is the purport of the allegations of the complaint. A joint and several judgment was rendered against each of the defendants. The verdict of the jury is based upon an implied finding that each defendant is guilty of the false representations with which he is charged. There is a sharp conflict of evidence respecting the charge of fraud against the several appellants. We have, however, held this judgment is sufficiently supported by evidence to bind each of the appellants and their principals for separately exercising fraud which procured the exchange of properties. The support of the judgment therefore does not depend upon proof of a conspiracy between them. The plaintiffs are entitled to judgment against each of the defendants shown to have participated in the fraud. More v. Finger, 128 Cal. 313, 60 P. 933; Blair v. Guarantee Title Co., 103 Cal. App. 260, 270, 284 P. 719; McPhetridge v. Smith, 101 Cal. App. 122, 281 P. 419. Assuming that

the challenged instruction was erroneously given because a conspiracy was neither alleged nor sufficiently proved, it was not prejudicial. The error is cured by the provisions of article 6, § 4½, of the Constitution.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

127 Cal.App. 424

Ex parte WILLIAMS.

Cr. 2264.

District Court of Appeal, Second District, Division 2, California.

Nov. 10, 1932.

1. Criminal law ⇐42.

Immunity statute *held* not limited to offense in statute prohibiting gaming, but comprehends all offenses concerning gaming or gambling (Pen. Code, §§ 330, 334, 337a).

Pen. Code, § 334, extending immunity to witnesses testifying concerning offense of gaming, is not limited to section 330, prohibiting gaming, but extends also to offenses of pool selling, etc., defined in section 337a; "gaming" or "gambling" being defined as the practice of playing and following up any game, particularly those of hazards, as cards, dice, etc., and being distinguished from "betting," in that gaming always includes a wager, while betting is not gaming, unless the wager be laid upon a game, and the word "game" being defined as every contrivance which has for its object to furnish sport, recreation, or amusement.

[Ed. Note.—For other definitions of "Bet," "Gambling; Gaming" and "Game," see Words and Phrases.]

2. Criminal law ⇐42.

Complaint charging defendants with accepting stake on dog race and with conspiracy to operate pool selling and bookmaking establishment *held* to charge offense of "gaming" within immunity statute (Pen. Code, §§ 334, 337a).

3. Criminal law ⇐42.

Statute granting immunity to witnesses testifying concerning "offense of gaming" grants immunity to witness testifying concerning offense of conspiracy to violate statute prohibiting gaming (Pen. Code, §§ 330, 334).

Original application by Claude Williams for a writ of habeas corpus to secure release from custody upon a commitment for contempt for refusal to answer questions in a preliminary examination.

Writ discharged.

David H. Clark and Harold Judson, both of Los Angeles, for petitioner.

Buron Fitts and Frank W. Stafford, both of Los Angeles, for respondent.

STEPHENS, Justice pro tem.

Certain persons defendant were in the municipal court having their preliminary examination under charges of violation of section 337a of the Penal Code and conspiracy to violate such section. Petitioner was called and sworn as a witness, and upon certain questions being put to him he refused to answer them on the ground that the answers might tend to criminate him; article 1, section 13, of the California Constitution providing that "no person shall be * * * compelled, in any criminal case, to be a witness against himself." Upon this refusal petitioner was adjudged in contempt of court and sent to jail therefor. He claims that he is imprisoned illegally, and is here asking to be released through the writ of habeas corpus.

[1] That the answers to the questions propounded might tend to incriminate petitioner is not questioned, and the constitutional privilege was rightfully exercised unless the offenses named in the charges against said referred to defendants are covered by the immunity statute. The section containing the provision for immunity (Pen. Code, § 334) reads: "No person, otherwise competent as a witness, is disqualified from testifying as such concerning the offense of gaming, on the ground that such testimony may criminate himself; but no prosecution can afterwards be had against him for any offense concerning which he testified."

Hereinafter we shall refer to Code sections chiefly by number, and in every instance the Penal Code of California is meant. We shall occasionally use italics to direct attention particularly to words and passages; they are ours, in every instance.

If this immunity statute is broad enough to cover the two offenses referred to, petitioner cannot avail himself of the constitutional privilege, for the reason that he is forever protected from conviction or punishment for any offense concerning which he may be required to testify. Ex parte Clarke, 103 Cal. 352, 37 P. 230. The basis of the petition here is that section 334 is not coextensive with the Constitution as applied to the facts of this proceeding, and this because the immunity section applies alone to the offense of gaming as defined by section 330, and does not include the offenses defined in 337a, and, even

if it does include the offenses defined in 337a, it does not cover the offense of conspiracy to violate that section. We shall discuss the points in the order mentioned.

It will be of some importance to a complete understanding of petitioner's argument to recall that the three Penal Code sections of which we take particular note, viz. 330, defining gaming and providing a penalty for violation, 334, the immunity section, and 337a, defining the substantive offenses here cognized, are all in chapter 10 of the Code, headed "Gaming." Section 330 comes first, and covers generally a prohibition against the playing of, handling, and dealing certain card games for percentage or for value. It also includes playing with dice or any device for value. This section is subheaded, "Gaming Prohibited—Penalty." Section 334, as above noted, is the immunity section. Section 337a, subheaded "Pool-selling, book-making, bets and wagers," defines six separate offenses: (1) Pool selling and bookmaking; (2) keeping or occupying premises for pool selling and bookmaking or registering bets by device or paraphernalia; (3) holding of stakes for contests; (4) registration of bets on unknown contingencies; (5) owning or occupying premises for certain other purposes; (6) betting on certain contests.

To express the immediate problem in other and perhaps clearer words: Does the immunity go alone to the offenses referred to in section 330, or does it go to all gaming offenses, and are the offenses of 337a gaming offenses?

It is appropriate that we here get a clear understanding of the meaning of the term "gaming." Wharton's Dictionary of Jurisprudence, issue of 1860 (within the period of the early legislation), gives this definition: "Gaming or gambling, the art or practice of playing and following up any game, particularly those of hazards, as cards, dice, eotables, etc." "The terms 'gaming' and 'gambling' are in their criminal sense synonymous * * * and have been used interchangeably in our statutes (Rev. St. 1842, c. 220, §§ 3, 4; Gen. St. 1867, c. 254, §§ 6, 7, 8). The distinction between 'betting' and 'gaming' is that gaming always includes a wager, while betting is not gaming unless the wager be laid upon a game. 'It is the betting upon the game that constitutes gaming, and those game or gamble who thus bet. * * * The word "game" is very comprehensive and embraces every contrivance or institution which has for its object to furnish sport, recreation, or amusement. Let a stake be laid upon the chances of the game, and we have gaming.'" In re Opinion of Justices, 73 N. H. 625, 63 A. 505, 507, 6 Ann. Cas. 689 (quoting Webster's Dict.; Century Dict., and People v. Weithoff, 51 Mich. 203, 16 N. W. 442, 47 Am. Rep. 557. Betting on a horse race by device is held a "game of chance." Pompano, etc., v. State, 93 Fla. 415, 111 So. 801, 52 A. L. R. 51. "An instrument which is adapted and designed for the purpose of playing a game of chance for money and property, and is so used, is a 'gambling device,' within Kirby's Dig. § 1732." Johnson v. State, 101 Ark. 159, 141 S. W. 493, 495. "A 'device or apparatus for gambling' is a device or apparatus designed for carrying on the actual gambling —for determining whether the player is to win or lose, like the wheel of fortune in its manifold modifications, and contrivances of that sort." People v. Engeman, 129 App. Div. 462, 114 N. Y. S. 174, 177.

We shall now briefly review the history of gaming or gambling legislation in our state. When California so unceremoniously pushed herself into the Union as a full-formed state, she had just emerged from a remote pastoral region to the greatest of all mining camps and was host to the world's most venturesome denizens. There was, indeed, little chance for the satisfying society of the family circle, and there were none of the intellectual stimuli of a settled country. Men picked up fortunes from around their feet and valued them lightly, for there were others merely for the taking. Fortunes were the footballs of the period, and the goal was to win by the player's wits or luck. It is not strange, then, to find the Second Legislature, in 1851, passing a gambling *license* law, accepting gaming or gambling as a part of the custom of the day. Betting and gambling were not illegal. Ex parte Roberts, 157 Cal. 472, 108 P. 315, in the concurring opinion on page 478 of 157 Cal., 108 P. 315, discusses the common-law rule on gaming. Therein also section 337a of the Penal Code is construed, but it should be borne in mind that the section has since been extended and now includes a prohibition against betting on certain contests and against stakeholding. By 1855, however, a sobering change in sentiment was strong enough to change the state's attitude toward gambling from legalization by license to disapproval, by "An Act to *Suppress* Gaming" (Hittell's Gen. Laws, § 3322). Two years later the Legislature moved boldly to pass a law entitled "An Act to *Prohibit* Gaming" (Hittell's Gen. Laws, § 3329). The 1857 enactment, but not its predecessor, named the prevailing card games, but provided as well that any one playing or running "any banking game played with cards, dice, or any other device * * * for money * * * or any representative of value, shall be guilty of a felony." Any one permitting such games to be played for money in any place under his control was declared guilty of a misdemeanor. And herein occurs for the first time the forerunner of the immunity section under consideration in the instant proceeding, couched in much of the same phraseology. The 1857 statute was divided into several sections, and the immunity clause thereof used the expression, "concerning the

offenses mentioned in the *foregoing sections.*" In 1860 "An Act to Prohibit Gaming" was again passed, in which all offenses thereunder were made misdemeanors.

The gaming law as above delineated was the unquestioned predecessor of the Code sections under chapter 10 of the present Penal Code entitled "Gaming"; the old statute being broken up and rewritten in separate sections of the Code. The section of the old statute that prohibited gaming (naming many games and referring to others) became section 330. The section of the old statute against owners and occupants of places in which prohibited gaming was carried on became section 331 of the Code. Section 332 is new matter and prescribes the penalty for fraudulent playing. Section 333 is a repetition of the old statute penalizing a summoned witness for absence. Section 334 is the immunity section couched in the same general language but significantly different in one particular: For where the language of the 1860 gaming law was "* * * witness[es] * * * disqualified * * * concerning the offenses mentioned in the foregoing *section* of this act," the Code language is "* * * concerning the offense of *gaming.*" Sections 330 and 334 remain practically the same. Section 335 provides duties of peace officers. Additions to the chapter have since been made, some unquestionably defining offenses of gaming, as, for instance, in 1874 (Amendments to Codes 1873–74, p. 461), when section 336 was enacted declaring it a misdemeanor to permit minors to play games of chance in saloons.

This history demonstrates that the Legislature, after one experience of legalizing gambling by "license," soon changed its attitude and made an attempt to "suppress" and then to "prohibit" gaming. It legislated, through the provisions of section 330, against gambling methods in use at the time, and prohibited gaming in general terms, thereby providing against new or different gambling methods of the future. Conviction was difficult, for witnesses were very likely to be involved in the very charges being investigated or in others related closely thereto. It was necessary, of course, to produce evidence in court, and the constitutional privilege blocked the efforts of the enforcement officers. The first immunity section was directed against all illegal *gaming.* When a chapter was given to gaming in the Code, the sections of the old statute became Code sections. The immunity section had theretofore referred to all offenses mentioned in the act which then included all of the gaming offenses, but, when it was carried into the Code, its provisions were not specifically limited to the prohibitions of section 330 as transplanted from the old act, but, instead, were given the wide application embraced in the term "concerning the *offense* of gaming." Clearly, as it seems to us, this was a generalization purposely designed to cover whatever was then or might thereafter be added to the law relating to that subject. Just as contemplated, the chapter has been added to from time to time, providing other offenses related to games or gambling. It is true that some of the new sections of the chapter relate to bribery in connection with games, and it may be that section 334 is not applicable to them; but it may be noticed that, unlike some of the other immunity provisions of the law, 334 does not purport in its terms to refer to all of the sections of its *chapter,* as section 232, another immunity provision, does, but is specifically limited to the offense of "gaming." It seems to us that this point made by petitioner is not significant of anything here.

We conclude that the effective operation of the immunity section is not limited to section 330, but that it comprehends all offenses concerning gaming or gambling.

Coming now to the second phase of the problem before us, we shall consider whether or not the offenses charged against the referred to defendants are "offenses concerning gaming." We quote from the commitment: "* * * [D]efendants in Count I of said complaint [were charged] with the crime of conspiracy to violate section 337a of the Penal Code * * * in that said defendants had conspired to keep and occupy a certain place and enclosure, stands, rooms, booths and buildings, and certain books, papers, apparatus, devices and paraphernalia for recording and registering bets and purported bets, wagers and purported wagers, and for selling pools and purported pools, upon the results and purported results of certain contests and purported contests in speed and power of endurance of certain beasts, to-wit, dogs, and to make and accept bets and wagers and to sell pools and purported pools upon the results and purported results of said above mentioned contests and purported contests * * * [referring to the overt acts]; in the second count of said complaint the said individuals were charged with the substantive offense of a violation of section 337a of the Penal Code * * * wherein the said defendants were charged with receiving the sum of Two Dollars ($2.00) from one Joseph Doherty to hold and forward the same as a stake, pledge, bet and wager upon the result and purported result of a certain contest and purported contest in speed and power of endurance of certain beasts, to-wit, dogs."

[2] After what has already been said herein, it seems too plain for argument that count 2 as above set forth is of itself an offense of gaming. Exactly the same can be said as to the offenses defined in section 337a, the substantive basis for the conspiracy charge in the first count. It remains only,

therefore, to determine whether or not the conspiracy charge is "an offense concerning gaming."

[3] The overt acts alleged as having been committed are a part and parcel of the offense of gaming. They are plainly "concerning the offense of gaming." If we follow the argument of petitioner in this particular, we should have to hold that, notwithstanding our conclusion that the immunity section would protect a witness in a trial on the substantive offense from prosecution, the witness could nevertheless be prosecuted in a trial upon a conspiracy charge, provable in part at least by the very testimony given by him in the former trial. If such a holding is reasonable and therefore necessary, it would completely destroy the efficacy of the statute in question, for the immunity would not be coextensive with the Constitution. By the most liberal construction this meaning cannot be gotten from the section. What the statute means is that a witness called to testify to facts concerning or relating to the offense of gaming can safely testify for the reason that he is forever free from the possibility of punishment for any crime in the proof of which such testimony would be material. Such a construction is literally what the statute says, and it preserves the whole meaning and intention thereof. Such construction brings the statute within the rule that it must be coextensive with the Constitution.

It may be said that the statute refers less to the name of the offense than to the facts constituting the offense. Any witness who testifies to facts concerning or relating to prohibited gaming is immune from punishment for any offense in the proof of which such facts would be relevant and material. The principle is illustrated in People v. Schwarz, 78 Cal. App. 561, 567, 568, 248 P. 990, 993. That proceeding arose in a charge of conspiracy to obtain money by fraudulent pretenses and representations. The statute there under consideration (St. 1917, p. 673 et seq.) provides for testimony to be taken by the corporation commissioner under oath after issuance of a subpœna, and by section 17 witnesses may not refuse to give testimony because they are excused from prosecution "for or on account of any act, transaction, matter, or thing concerning which [they] shall have been so compelled to testify." At the time such testimony was given, no criminal proceeding had ever been started. Nevertheless the court held that the witness was immune from punishment or prosecution in a subsequent trial of conspiracy because he had testified before the commissioner concerning events and acts which proved to be relevant and material in the subsequent trial. The concluding clause of section 334 of the Penal Code, "but no prosecution can afterwards be had against him for any offense *concerning which he testified*," is in effect the same and as broad as the expression in the statute referred to in the Schwarz Case, to wit: "No person shall be prosecuted * * * for or on account of any act, transaction, matter, or thing concerning which he shall have been so compelled to testify."

The case of People v. Newmark, 312 Ill. 625, 144 N. E. 338, is not in conflict with the views herein expressed. That case is one related in time and fact to People v. Boyle, 312 Ill. 586, 144 N. E. 342, and is entirely in harmony with it. Both give very clear analyses of the principle that the immunity statute when related to the facts at hand must be coextensive with the Constitution. The Newmark Case is one wherein the facts take it outside the operation of the statute, and the Boyle Case is one wherein the facts bring it within the operation of the statute. Ex parte Cohen, 104 Cal. 524, 38 P. 364, 26 L. R. A. 423, 43 Am. St. Rep. 127; Bradley v. Clark, 133 Cal. 196, 65 P. 395; Rebstock v. Superior Court, 146 Cal. 308, 80 P. 65, and In re Tahbel, 46 Cal. App. 755, 758, 189 P. 804, are all in accord with the principles herein lastly treated.

We conclude that the statute grants an immunity coextensive with the Constitution, in accordance with the doctrine of Counselman v. Hitchcock, 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110, and the California cases cited herein.

The writ is discharged.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

127 Cal.App. 779

In the Matter of the Application of Sam CLARK for a Writ of Habeas Corpus.

Cr. 2265.

District Court of Appeal, Second District, Division 2, California.

Nov. 10, 1932.

Application for writ of habeas corpus prayed to be directed to the Sheriff of Los Angeles County to secure the release of petitioner from custody upon a commitment for contempt for refusal to answer questions in a preliminary examination under charges of violation and conspiracy to violate section 337a Penal Code.

Writ discharged.

David H. Clark and Harold Judson, both of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Frank W. Stafford, both of Los Angeles, for respondent.

STEPHENS, Justice pro tem.

The facts of this case are in all essential elements the same as in the case of Ex parte Claude Williams, 16 P.(2d) 172, this day decided by this court. For the reasons stated in the case referred to, the writ herein is discharged.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

127 Cal.App. 579

SOWERS v. SOWERS.

Civ. 8298.

District Court of Appeal, First District, Division 1, California.

Nov. 21, 1932.

1. Venue ⇐69.

Where defendant files answer after moving for change of venue, plaintiff may interpose and have court determine counter motion to retain trial therein.

2. Venue ⇐69.

Filing of demurrer to complaint after filing of answer by defendant, who had moved for change of venue, did not nullify plaintiff's counter motion to retain trial in county of venue (Code Civ. Proc. § 472).

3. Venue ⇐69.

Plaintiff's counter motion, after defendant moves for change of venue to retain trial in county of venue, is addressed largely to discretion of trial court, whose determination will not be disturbed on appeal, unless abuse thereof clearly appears (Code Civ. Proc. § 397, subd. 3).

4. Venue ⇐69.

Court did not abuse discretion in granting divorced wife's counter motion in her suit against former husband for support of their minor daughters to retain trial, place of which defendant had moved to change to county of his residence, in county of venue (Code Civ. Proc. § 397, subd. 3).

The counter motion averred that daughters, who were 18 and 16 years old and attending school, were necessary and material witnesses, by whose testimony plaintiff expected to establish amount required for their future maintenance and support, her inability to support them, and defendant's agreement to do so, and that injustice and great inconvenience to them would result from requiring them to attend trial in county of defendant's residence because their school work would be seriously interrupted.

5. Venue ⇐52(1).

Beneficial interest of minor daughters in result of divorced wife's action against former husband for their support did not require that their convenience be disregarded in passing on plaintiff's counter motion to retain trial, place of which defendant had moved to change to county of his residence, in county of venue (Code Civ. Proc. § 397, subd. 3).

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Bessie Sowers against George A. Sowers. From an order denying defendant's motion to change the place of trial and granting plaintiff's counter motion to retain the trial in the county wherein the action was brought, defendant appeals.

Affirmed.

Inman & West, of Sacramento, and Harry A. Chamberlin and Irvin C. Taplin, all of Los Angeles, for appellant.

George Acret, of Los Angeles, for respondent.

KNIGHT, J.

Defendant appeals from an order denying his motion for change of place of trial based on the ground of nonresidence, and granting plaintiff's counter motion to retain the case on the ground of convenience of witnesses.

The action was brought in Los Angeles county by defendant's divorced wife to obtain a judgment providing for the maintenance and support of their two minor children, whose custody had been theretofore awarded to plaintiff by a divorce decree granted in the state of Arizona, but which contained no provision for their maintenance and support. The complaint in the present action was filed on October 3, 1929. Summons was served on defendant in Sacramento, where he resided; and on October 28th he filed notice of motion for change of place of trial, a demand therefor, and an affidavit of merits. Two days later, to wit, on October 30th, he filed his answer to the complaint, and on November 1, 1929, plaintiff filed her counter motion, accompanied by a supporting affidavit, to retain the trial of the action in Los Angeles county. On the following day, November 2d, defendant filed a demurrer to the complaint. The motions and the demurrer were heard on November 13, 1929, at which time defendant's motion was denied, his demurrer was overruled, and plaintiff's counter motion was granted.

[1] According to the well-established rule, if a defendant, moving for a change of place of trial on the ground of nonresidence, files an answer to the complaint, the plaintiff in

the action is entitled to interpose and have determined in the court in which the action is filed a counter motion to retain the trial of the action in that court; the reason for the rule being that upon filing the answer the facts of the case are at issue and the court is in a position to determine what testimony will be material to those issues. Sheffield v. Pickwick Stages, 191 Cal. 9, 214 P. 852; Gordon v. Perkins, 203 Cal. 183, 263 P. 231; San Jose Hospital v. Etherton, 84 Cal. App. 516, 258 P. 611; Dawson v. Dawson, 83 Cal. App. 119, 256 P. 491; Woods v. Berry, 105 Cal. App. 90, 286 P. 1073; McSherry v. Penn. C. G. M. Co., 97 Cal. 637, 32 P. 711; Pascoe v. Baker, 158 Cal. 232, 110 P. 815; Cook v. Pendergast, 61 Cal. 72; Heald v. Hendy, 65 Cal. 321, 4 P. 27; Armstrong v. Superior Court, 63 Cal. 410; 25 Cal. Jur. 882. In the present case, therefore, immediately upon the filing of defendant's answer, plaintiff was entitled to interpose her counter motion and the trial court in which the action was brought was vested with full legal authority to hear and determine the same.

[2] Defendant argues that "the case was not at issue for the obvious reason that defendant by demurring and answering at the same time did not waive his demurrer," citing section 472 of the Code of Civil Procedure. But, as will be noted, defendant did not demur and answer at the same time. He filed his answer first, and his demurrer was not filed until five days later; and during the interim, following the filing of the answer and prior to the filing of the demurrer, plaintiff interposed her counter motion. Therefore, the cause was at issue as to the facts when such counter motion was filed; and manifestly the subsequent act of the defendant in filing a demurrer did not have the effect of changing the state of the record, nor of nullifying plaintiff's counter motion theretofore filed.

[3, 4] The remaining question relates to the merits of plaintiff's counter motion. The Code provides that such a motion shall be granted when the convenience of witnesses and the ends of justice would be promoted thereby (Code Civ. Proc. § 397, subd. 3); and in dealing with the question of the power of the trial court to be exercised under said Code section it is held generally that much is confided to the discretion of the trial court, and that its determination will not be interfered with on appeal unless it clearly appears that there has been an abuse of such discretion. Pascoe v. Baker, supra. The record here shows that the children involved are girls, aged respectively eighteen and sixteen years; that they were attending school in Los Angeles county, where they had been domiciled for more than two years; and in support of the counter motion it was averred that they were necessary and material witnesses in the case by whose testimony plaintiff expected to establish the amount required for their future maintenance and support and that plaintiff was unable to furnish such support and that previously defendant had agreed to do so; that it would be an injustice and result in great inconvenience to the girls if they were required to attend a trial of the action in Sacramento county because, among other things, their school work would be seriously interrupted. In view of the foregoing circumstances, we are not prepared to hold that the trial court abused its discretion in granting plaintiff's counter motion.

Defendant argues that the testimony of the girls would be cumulative merely of that to be given by plaintiff; and that consequently the presence of the girls at the trial in Sacramento would be unnecessary. But even though their testimony would be cumulative, the nature of the issues of fact raised by the complaint and the answer are such that plaintiff would be entitled to have her own testimony on disputed points corroborated by other witnesses. Furthermore, the presence of the girls in court would doubtless aid the trial judge in determining whether defendant should be required to contribute toward their support, and, if so, what amount.

[5] It is also contended that although the girls are not parties to the action, their beneficial interest in the result of the case is such that their convenience should be disregarded. The contention is without merit for the reason that whatever judgment may be obtained will run in favor of plaintiff and not the girls.

The order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

127 Cal.App. 518

BEVIS et al. v. MURPHEY et al.

Civ. 8765.

District Court of Appeal, First District, Division 1, California.

Nov. 17, 1932.

Evidence ⊂⇒383(7).

Receipt providing purchaser would pay taxes after date of contract *held* not "written instrument between parties" conclusive as to facts recited therein (Code Civ. Proc. § 1962, subd. 2).

Such receipt was not a "written instrument between parties" within Code Civ. Proc. § 1962, subd. 2, providing that the truth of facts recited from the recital in a written instrument between the parties thereto is a conclusive presumption, but was only a receipt for money on account signed by one of the parties, and merely evidence to be considered by the trial court with the other evidence.

[Ed. Note.—For other definitions of "Written Instrument," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Fred J. Bevis and another against Homer W. Murphey and another. From a judgment for defendants, plaintiffs appeal.

Affirmed.

M. C. Spicer and W. O. Graf, both of Los Angeles, for appellants.

Hibbard & Kleindienst, of Los Angeles, for respondents.

BURROUGHS, Justice pro tem.

This action was commenced for the purpose of reforming a written contract for the sale of real estate, executed by the plaintiffs as sellers and the defendants as buyers. Judgment went for the defendants and the plaintiffs have appealed.

That portion of the contract which it was sought to have reformed reads as follows: "Taxes for the current year to be paid by Seller and Seller agrees to pay all assessments levied subsequent to date hereof. Sept. 28, 1928." It is alleged in the complaint that "It was orally agreed between the plaintiffs and defendants that plaintiffs should pay all taxes and assessments levied against said property up to September 28th, 1928, and that defendants should pay all taxes and assessments levied against said property after said date." It was further alleged therein that it was understood and agreed by all the parties to the contract that plaintiffs were to pay all assessments levied "prior" to September 28, 1928, but that the word "subsequent" as used in said contract was so used through the plaintiffs' lack of knowledge of the meaning of that word, and the representations to them by the defendants that the word meant "before"; in other words, that the word meant that the plaintiffs were to pay all assessments levied before September 28, 1928, and that when they signed the contract all the parties believed that the contract so read and was intended to so read. The answer of the defendants admits the making of the contract, but avers that it fully and fairly sets forth the agreement between the parties and that it was understood and agreed that the plaintiffs were to pay certain assessments for street improvements to be made on Cazadore street adjoining the property sold and also pay all taxes thereon for the then current fiscal year and it was understood that the defendants should pay all other taxes levied against the property for the years subsequent to the fiscal year 1928–29. Upon the issues thus raised, the court, after trial, made its findings in favor of the defendants and entered judgment that it was the agreement of the parties that the plaintiffs were to pay the taxes on the property for the current fiscal year 1928–29, and the assessment for street improvements on Cazadore street, which was fixed in the sum of $360.29, and that the defendants should pay all future taxes and assessments.

Appellants say: "We are not unmindful of the established rule of law that where findings of fact are supported by any substantial evidence, such findings will not be disturbed on appeal." They also say: "The only evidence that will sustain the court's findings of fact is the testimony of the respondents. * * * If such evidence can be considered, we are ready to admit that the findings are supported by substantial evidence and they will not be disturbed. * * *" During the progress of the trial, the court admitted oral evidence in support of the defendants' case. Appellants urge that such evidence was erroneously admitted, and that it is rebutted by a receipt written by one of the defendants and signed by one of the plaintiffs, wherein it is stated that "Any taxes or assessments up to this date to be paid by the seller. All taxes or assessments levied against lot after this date to be paid by the buyer." The receipt is dated September 28, 1928. It is contended by appellants that this receipt is a written instrument between the parties, and under the provisions of section 1962 of the Code of Civil Procedure cannot be varied by parol evidence, and is therefore conclusive evidence of plaintiffs' right to a reformation of the contract. But an examination of subdivision 2 of said section of the Code does not bear out the appellants' contention. That provision is that "The truth of the facts recited, from the recital in a written instrument between the parties thereto" is a conclusive presumption.

The receipt upon which the appellants rely in this case is not a written instrument between the parties, but is only a receipt for money on account signed by one of the parties. As was said in Wise v. Collins, 121 Cal. 147, 53 P. 640, 641: "Several objections were taken to testimony in explanation of expressions used in the chattel mortgage. These were based upon the theory that oral testimony was not admissible to vary the meaning of a written instrument. The answer to this is that the document, not having been executed, was in no proper sense a written instrument, within the purview of the rule invoked. Its statements coming from the plaintiffs were admissions on their part which were subject to explanation equally with like verbal admissions." In the light of the foregoing, it is clear that the receipt in controversy is not a written instrument between the parties, but is merely evidence to be considered by the trial court with all the other evidence in the case, and it is to be given such weight as the court deems it entitled to. The cases of Winchester v. Winchester, 175 Cal. 391, 165 P. 965, and Blackledge v. McIntosh, 85 Cal. App. 475, 259 P. 770, cited by appellants, have reference to duly executed deeds wherein the grantors were prohibited from nullifying or limiting the unconditional estate which they had conveyed, and are therefore not in point.

No other question being presented, it follows that the judgment should be affirmed. It is so ordered.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

127 Cal.App. 538

PEOPLE v. RICHMOND.

Cr. 149.

District Court of Appeal, Fourth District, California.

Nov. 17, 1932.

Rehearing Denied Nov. 30, 1932.

Hearing Denied by Supreme Court Dec. 16, 1932.

1. Burglary ⇐45.

Whether motor found in accused's possession was motor that was stolen *held* for jury.

2. Criminal law ⇐511(1).

Evidence corroborating accomplice *held* to support conviction for burglary.

3. Criminal law ⇐899.

Joining in offer of transcript of reporter's stenographic notes of interrogation of accused by officers *held* waiver of objection to reporter's reading notes to jury on ground that notes were secondary evidence.

4. Criminal law ⇐938(1).

Denial of new trial was not error, where no diligence was shown and alleged newly discovered evidence was cumulative or impeaching.

5. Burglary ⇐20.

Indictment alleging accused committed burglary by entering named school with intention to commit theft therein charged public offense, though it did not allege accused entered any house, room, outhouse, or other building.

6. Criminal law ⇐1178.

Accused's failure to argue points mentioned in brief or to cite authorities relieves appellate court of detailed consideration of them.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Stewart Richmond was convicted of burglary, and he appeals.

Affirmed.

Burns & Watkins and David E. Peckinpah, all of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

MARKS, Acting P. J.

Appellant is accused by an information filed by the district attorney of Fresno county of the crime of burglary, alleged to have been committed on the 19th day of October, 1931, by entering the Fort Washington School in Fresno county with intent to commit the crime of theft therein. He was found guilty as charged, and judgment was pronounced upon him. His motion for new trial was denied, as well as a motion in arrest of judgment.

The evidence discloses that some time between about 3 o'clock in the afternoon of Sunday, the 18th day of October, 1931, and 8:30 o'clock in the morning of the next day, a pumphouse on the school grounds was broken into and an electric motor taken therefrom. The motor had attached to it a brass plate with a serial number stamped into it, and was painted black when last seen in the pumphouse. Several months later a motor similar to the one taken from the pumphouse was found in the possession of appellant at a service station which he was operating at Auberry in Fresno county. This motor had a coat of blue paint covering a coat of black, and the brass plate bearing the serial number had been removed.

[1] Appellant maintains that there was no sufficient evidence in the record identifying the motor found in his possession as that taken from the pumphouse on the Fort Washington School grounds. We have examined the record carefully, and do not deem it nec-

essary to set forth in detail the evidence on this question. We are satisfied that the evidence of the identity of the motor was sufficient to require the trial court to submit the matter to the jury. At least one witness testified that the motor in the possession of appellant was the one taken from the Fort Washington School pumphouse.

[2] The direct evidence which connected appellant with the crime of burglary was furnished by Lester Linville. He testified that he participated in the commission of the crime. Appellant maintains that there is no sufficient evidence corroborating the testimony of Linville, an admitted accomplice, to support the judgment against him. In this we cannot agree with him. He was found in possession of the stolen motor from which the brass plate, bearing its serial number by which it could have been identified, had been removed. The motor had been painted blue, and a can which formerly had contained blue paint of the exact color of that on the motor was observed on a shelf near the stolen motor in appellant's service station. It has been repeatedly held in California that circumstances such as these furnish sufficient corroboration of the testimony of an accomplice to support a judgment of conviction. People v. Nikolich, 93 Cal. App. 356, 269 P. 721; People v. Yeager, 194 Cal. 452, 229 P. 40; People v. Negra, 208 Cal. 64, 280 P. 354.

[3] Shortly after his arrest, appellant was interrogated by a deputy district attorney and a deputy sheriff of Fresno county in the presence of a court reporter, who took down the proceedings and afterwards transcribed his stenographic notes. Over the objection of appellant, upon the sole ground that the stenographic notes constituted secondary evidence, the reporter was permitted to read them to the jury. After this was concluded, the following appears in the reporter's transcript:

"Mr. Burns: Now I ask that this deposition be filed as an exhibit in this case for what it is worth.

"Mr. Thomas: I made the offer at the time.

"The Court: It will be admitted in evidence; and you are offering it, Mr. Burns, at this time, then?

"Mr. Thomas: I made the original offer.

"The Court: Let it be marked People's Exhibit 2.

"Mr. Burns: Yes. I made no objection to your offer."

The least that can be said is that counsel for appellant joined in the offer in evidence of the stenographic notes as transcribed by the reporter. This was a waiver of any former error which might have been committed by the court in permitting the reporter to testify, and appellant cannot now be heard to urge such error here. People v. Wignall (Cal. App.) 13 P.(2d) 995.

Appellant complains of several instructions given by the trial court, and also of the refusal to give instructions which he proposed. It is not necessary to extend this opinion by a detailed consideration of each instruction. We have carefully reviewed all instructions given, as well as those proposed and refused. In the rulings of the trial court upon these instructions, we do not find any error sufficiently prejudicial to warrant a reversal of the judgment.

[4] Appellant moved for a new trial, and as one of his grounds specified newly discovered evidence. We have examined the supporting affidavits, and find that the proposed evidence set forth in them is merely cumulative of other evidence offered at the trial, and evidence impeaching the testimony of some of the people's witnesses. There is no sufficient showing why the evidence of the new witnesses, with the exercise of reasonable diligence on the part of appellant, could not have been discovered prior to the trial and produced there. No error was committed in denying the motion for new trial upon this ground. People v. Hewitt, 101 Cal. App. 306, 281 P. 666; People v. Ledbetter, 106 Cal. App. 109, 288 P. 832.

[5] In support of his motion in arrest of judgment, appellant maintains that the information failed to charge a public offense, in that it alleged that he entered "the Fort Washington School" and did not charge that he entered any house, room, outhouse, or other building. A similar situation is found in the case of People v. Pettinger, 94 Cal. App. 297, 271 P. 132, where the defendant was charged with entering "the Murr Bros. Service Station." In that case the court held that the information charged a public offense. Under the authority of the Pettinger Case, we have concluded that the information charged a public offense against appellant, and that his motion for arrest of judgment was properly denied.

[6] In his brief appellant states certain other grounds upon which he believes the judgment should be reversed. He has failed to argue these points or cite authorities supporting them, which relieves us of a detailed consideration of them. People v. Hayes, 72 Cal. App. 292, 237 P. 390.

The judgment and order are affirmed.

We concur: JENNINGS, J.; AMES, Justice pro tem.

ROBBIANO et al. v. BOVET, and three other cases.*

Civ. 8489.

District Court of Appeal, First District, Division 2, California.

Nov. 21, 1932.

Rehearing Denied Dec. 20, 1932.

Hearing Granted by Supreme Court Jan. 19, 1933.

1. Automobiles ⇐244(42).

Motorist suddenly turning into middle traffic lane to pass parked car and colliding head-on with automobile approaching from opposite direction *held* contributorily negligent (St. 1923, p. 557, § 122, as amended by St. 1929, p. 540, § 50).

2. Automobiles ⇐244(12).

Evidence failed to establish that motorist's failure to signal when suddenly turning into middle traffic lane to pass parked automobile caused motorist following to swerve into his extreme left lane and collide with automobile approaching from opposite direction (Code Civ. Proc. § 1960).

Facts disclosed that motorist turning into middle lane had not been observed to signal on passing the parked automobile, but that he was at all times ahead of the motorist following him, and that he at no time slowed down his automobile until motorist following him had collided with the automobile approaching from the opposite direction.

Appeals from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Josephine Robbiano and others against Louis A. Bovet, Jr., in which defendant filed a cross-complaint against John Ragno and another and against John Ragno, as administrator of the estate of Sylvester Robbiano, deceased, and wherein John Ragno, as administrator of the estate of Sylvester Robbiano, deceased, filed a cross-complaint against defendant; and action by Mabel Morgan against John Ragno and another. From adverse judgments, defendant Bovet and plaintiff Morgan appeal.

Judgment for Josephine Robbiano and others against defendant Bovet reversed. Judgment for defendant Ragno affirmed.

For prior opinion, see 15 P.(2d) 207.

John Ralph Wilson, Aylett R. Cotton, and Bianchi & Hyman, all of San Francisco, for appellants.

Clifton Hildebrand, of San Francisco, for respondents Robbiano and others.

Crosby & Crosby, of Oakland, for cross-defendants and respondents Robbiano, Ragno, and others.

Donahue, Hynes & Hamlin, of Oakland, for defendant and respondent Ragno.

STURTEVANT, J.

The above-entitled actions are appeals from judgments in personal injury cases. All of the appeals arose out of litigation involving the same accident. The actions were consolidated for trial, and the appellants have brought up the judgment roll and a bill of exceptions.

The accident occurred on the San Mateo-Hayward bridge about 6:25 p. m. on the evening of November 13, 1930. The bridge runs in a general easterly and westerly direction and has a railing 4 or 5 feet high on each side. It is 27 feet wide, and is divided into three lanes of equal width, the lines being indicated by 6-inch markers. The bridge was lighted at the time of the accident with lights 210 feet apart staggered on opposite sides of the bridge. At the time of the accident, a car occupied by the Joos family headed east was stalled in the southerly traffic lane. Although it was dark, it was light enough that the car was seen by the witnesses at a considerable distance.

On the evening of the accident, Sylvester Robbiano and his brother-in-law, John Ragno, had been visiting in Redwood City, and were returning to their homes in Oakland. Each had his separate car. Robbiano was driving a Buick; Ragno was driving a Nash. As they proceeded easterly across the bridge, Ragno was in front, and Robbiano was following. They were in the south lane, and were traveling at a speed variously estimated at from 35 to 60 miles an hour. As they approached the Joos car, Ragno turned out into the middle lane, passed the parked car, and then returned to the south lane. Robbiano turned out to pass the Joos car, and as he did so another car was approaching from the east. The latter car was occupied by the defendant Louis A. Bovet and Miss Mabel Morgan. They were traveling 35 to 40 miles per hour in a Ford car. A head-on collision occurred between the Buick and the Ford cars. Whether the collision took place in the middle lane or the north lane, and the exact distance of the point of the collision from the Joos car, were controverted facts. The collision was so violent that Robbiano suffered injuries from which he died. His widow and children commenced an action against Bovet. The latter answered and filed a cross-complaint against John Ragno, as administrator of the estate of Robbiano, and against John Ragno and Josephine Robbiano personally. John Ragno, as administrator of the estate of Sylvester Robbiano, filed a cross-complaint against the defendant. Mabel Morgan commenced a separate action against John Ragno and Josephine Robbiano. As above stated, the actions were consolidated for the purpose of the trial.

*For subsequent opinion see 24 P.2d 466.

The jury returned a verdict against the defendant Bovet, and, from the judgment entered thereon, he took an appeal. The trial court granted a nonsuit against Mabel Morgan in favor of Josephine Robbiano. It directed a verdict in favor of Ragno as against Mabel Morgan, and, from the judgment entered thereon, she has appealed.

Robbiano v. Bovet.

[1] The first point made by the defendant is that the deceased was guilty of contributory negligence. He says: "There is therefore only one matter to be determined, namely, was Robbiano exercising ordinary care in suddenly turning into the middle lane at a speed approximately 40 miles an hour without first ascertaining whether the lane was free of approaching vehicles." At the time of the trial, Robbiano was dead. What he did or omitted to do at the time of the accident was never stated by him. The witness Ragno testified that he approached the Joos car, turned to the left, and passed it. He further testified that, when he started to turn to the left to pass the Joos car, Robbiano was practically a block behind him. Continuing, Ragno testified that, after he had passed the Joos car, he turned to his right into the right-hand lane and then continued two blocks and stopped. He also testified that about 150 feet beyond the Joos car Bovet passed him, and that Bovet was in the middle lane. The witness Lyons testified that he was driving a truck from east to west. When he was about five blocks from the scene of the accident, Bovet passed him. At that time Bovet was in the middle lane. Lyons prepared to swing out into the middle lane to pass a lumber truck that was ahead of him. Looking forward to see the conditions, he saw Ragno's car pass the Joos car, and that Ragno's car was being followed by another car about one block further away. When the latter car attempted to turn around the Joos car, it entered the middle lane. In the meantime the Ford car had continued down the middle lane, and the head-on collision occurred. Each car was greatly jammed and broken. The Ford car passed to the west of the Joos car 5 or 6 feet and turned over on its side. The Buick passed to the east and stopped with its nose in the north lane 80 feet from the Ford car. In the testimony given by plaintiff's witnesses, there is no evidence that, from the time the Ford car passed Lyons, five blocks to the east, it got out of the middle lane prior to the moment of the impact. As stated above, the bridge was lighted. There was no evidence to the effect that at the time Robbiano started to turn around the Joos car the Ford car was not clearly visible or that the middle lane was free of on-coming traffic. Section 122 of the California Vehicle Act (as amended by St. 1929, p. 540, § 50) provides: "Sec. 122. * * * The driver of a vehicle shall drive the same upon the right half of the highway and close to the right hand edge or curb of such highway * * * except when overtaking and passing other vehicles, in which event the overtaking vehicle may be driven on the left side of the highway, if such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety; and providing that such overtaking vehicle shall return to the right hand side of the highway before coming within one hundred feet of any vehicle approaching from the opposite direction. * * *"

Taking the evidence most favorable to the plaintiff, Ragno and Robbiano were traveling one block apart (300 feet as one witness estimated the length of a block). Ragno passed Bovet 150 feet east of the Joos car. While Ragno was coming to that point, one-half block east of the Joos car, Robbiano had approached to a point one-half block west of it. At that moment the distance between Bovet and Robbiano was about 300 feet and was decreasing at approximately 100 feet per second as they were approaching each other in the same lane. They were equidistant from, but on opposite ends of, the Joos car. If each car continued without reducing its speed, the two cars would meet practically abreast of the Joos car and not over 100 feet distant therefrom as limited by the statute. It is immaterial under the circumstances whether the left side of the highway was in fact clearly visible to Robbiano. The statute required that he remain upon the right half of the highway unless the left side was both "clearly visible" and "free of oncoming traffic" for the required distance. Under any view of the evidence it is clear that Robbiano left the right side of the highway when the left side thereof was not "free of oncoming traffic for a sufficient distance ahead" to permit him to pass in safety and when it was not possible for him to "return to the right hand side of the highway before coming within one hundred feet" of the Bovet car. It is equally clear that his violation of the statute was a proximate cause of the collision, if not the sole cause thereof. Under these circumstances, Robbiano was guilty of contributory negligence as a matter of law.

The witnesses Bovet and Morgan, the only other eyewitnesses called on the trial, testified that the Ford car was traveling in, and that the collision occurred in, the north lane. The other facts remain as stated above. If we adopt that theory, the conduct of Robbiano was even more reprehensible. No fact proved by the evidence excused him for swerving over into the north lane.

Other points are presented in the briefs; but, in view of the conclusions we have reached on the first point, it is unnecessary to discuss the other points.

The judgment is reversed.

Morgan v. Ragno.

The plaintiff asserts that the action of Mabel Morgan against John Ragno was based upon the contention that Ragno in passing the parked Joos car suddenly swerved to the left, thereby causing Robbiano, driving behind him at great speed, in order to avoid hitting the Joos and Ragno cars, to swerve into the north lane and collide with the Bovet car. In her closing brief she reinforces her contention by asserting that when Ragno made the turn around the Joos car he gave no signal.

In her complaint with much care the plaintiff alleged the position of the different cars on the bridge immediately before the accident. She alleged that Robbiano was following Ragno three car lengths in the rear. Continuing, she alleged: "* * * And said Ragno as he was near the point of the passage of the automobile being driven by him in an easterly direction to his right of said Bovet, driving his Ford automobile in a westerly direction as aforesaid, observed another automobile parked upon said bridge partially to the right of said Ragno's automobile and partially in the path of said Ragno's automobile, as it was then being driven by Ragno, and that in order safely to attempt to pass said parked automobile, said Ragno suddenly and without warning to any person slowed the speed of his Nash automobile and swerved towards the middle of the lane of traffic upon said bridge, whereupon the said Robbiano, driving said Buick automobile, in order to pass at an excessive speed between said Bovet's automobile and said Ragno's automobile, swung the said Buick automobile to said Robbiano's left of said Ragno's automobile in a careless and negligent manner and in so doing ran into and collided with said Bovet's Ford automobile proceeding westerly on said bridge and on said Bovet's right-hand side of said bridge as above set forth." Those allegations were denied in the defendants' answer. On the trial no witness testified that at any time Robbiano overtook and attempted to pass Ragno. The witnesses testified without conflict that Ragno was at all times ahead, and Bovet testified the Ragno car at no time interfered with him. No witness testified that Ragno slowed down his car until after the accident. No witness testified the accident occurred when the Ragno car, the Bovet car, and Robbiano's car were at the same instant attempting to pass each other and to pass the Joos car. The witnesses Morgan, Bovet, and Lyons each testified they saw the Ragno and the Robbiano cars when they were as much as three-quarters of a mile away. Ragno saw the Ford car a block and a half away. No witness testified that Ragno did not give a signal before attempting to pass the Joos car. Bovet testified that he did not see a signal if one was given. The plaintiff called Ragno as a witness. The defendants also called him as a witness. He was examined and cross-examined; nevertheless he was not asked whether he gave a signal or did not give one. The plaintiff was called as a witness in her own behalf, and testified that she was at all times looking directly ahead. The witness Lyons also testified that he was at all times looking at the movements of the Ragno car and the Robbiano car. Neither witness testified that Ragno did not give a signal.

[2] As we understand the brief of the plaintiff, her reasoning is that the witness Bovet testified he did not see Ragno signal. Relying solely on that proved fact, she contends that it will be inferred Ragno did not signal; that it will then be inferred Robbiano did not know that Ragno was going to make the turn; that it will be inferred Robbiano did not see the Bovet car coming from the east; and therefore that Ragno caused the acts of Robbiano. In the absence of more facts legally proved, that line of reasoning is not permissible. Code Civ. Proc. § 1960. When the defendants made a motion for a directed verdict, the record does not disclose that the plaintiff called to the attention of the trial court the theory which she now presents. In ruling on the motion, the trial court remarked: "If the case went to the jury on that present testimony and the jury found against Ragno I would be compelled on motion for a new trial to grant it as to him." The court applied the proper rule. Estate of Baldwin, 162 Cal. 471, 473, 123 P. 267. We think it did not err in applying the rule to the facts before it.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

127 Cal.App. 565

SILVER et ux. v. LOGUE et ux.

Civ. 996.

District Court of Appeal, Fourth District, California.

Nov. 18, 1932.

1. Brokers ⇐31.

That vendors deeded property to brokers *held* not notice removing taint from purchase by brokers.

2. Brokers ⇐37.

In vendors' rescission action, brokers had burden to affirmatively show good faith in purchasing vendors' property themselves, and that they acted without concealment.

3. Principal and agent ⇐69(1).

Agent may not obtain advantage over principal by slightest misrepresentation or concealment (Civ. Code § 2228).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

4. Brokers ⇐37.

In vendors' action to rescind sale to brokers, evidence sustained finding that brokers pretended to be acting as agents and vendors had no actual knowledge to contrary.

5. Brokers ⇐37.

Evidence sustained finding that vendors did not know brokers had bought property for themselves when vendors gave brokers quitclaim deed, so that sale was unratified.

6. Brokers ⇐37.

In vendors' action to rescind sale unwittingly made to brokers, judgment for price for which brokers resold property and commission paid them *held* proper, where vendors tendered back stock received.

Judgment for price for which brokers resold the property and amount paid them for commissions, containing appropriate provision for transfer to vendors of the mortgage which the brokers took back upon the property when they resold it, with a corresponding credit on the judgment, was proper, as against contention that the measure of damages was the secret profit made by brokers, since the action was not for damages or the ordinary action to recover secret profits, but was essentially an action for rescission, and was based upon the theory that in equity brokers held everything they had received, including amount paid as commission, in trust for vendors.

Appeal from Superior Court, Los Angeles County; Raglan Tuttle, Judge.

Action by Herman L. Silver and wife against J. J. Logue and wife. Judgment for plaintiffs, and defendants appeal.

Affirmed.

I. Henry Harris and Patrick F. Kirby, both of Los Angeles, for appellants.

Thorwald Siegfried, of Los Angeles (Rose Hemperly, of Los Angeles, of counsel), for respondents.

BARNARD, P. J.

This is an action to set aside a sale of certain real property upon the ground that the defendants, while pretending to act as agents of the plaintiffs in the sale thereof to a third person, in fact purchased the same themselves without disclosing the real facts to their principals. The defendant Maude B. Logue was the stepmother of the plaintiff Edith J. Silver, and for some years considerable intimacy had existed between the two families. The two defendants, as partners, were engaged in the business of real estate brokers. At the same time, the defendant J. J. Logue was vice president of, and employed as a bookkeeper by, a corporation known as United Fashion Stores, Inc., in which corporation Maude B. Logue was a stockholder.

In July, 1925, Mrs. Silver was the owner of a house and lot in Pacific Grove, Cal. At her request the defendants undertook to try to find a purchaser for this property, with the understanding that they were to be paid a commission if they succeeded. A little later the defendants reported to the plaintiffs that they were unable to find a purchaser for the property for cash, but that they had found a purchaser who would give them $2,500 worth of stock in the above-named corporation for the house; that this purchaser was a woman with a son; that she did not have the cash, but wanted a home; and that she was loath to part with this valuable stock and would do so only on the condition that the defendants would guarantee to later replace the stock for her. The defendants also stated that they knew this was a prosperous corporation; that it was doing a splendid business and would be a wonderful investment; and that they were both in a position to know just what was going on in the business. The plaintiffs agreed to exchange their property for this stock in the corporation, and, at the request of Mrs. Logue, they deeded the property to her in order that she might deed it to the prospective purchaser. The plaintiffs received for the property 40 shares of preferred and 20 shares of common stock in the corporation, taking the same at a price of $125 for each unit of two shares of preferred and one share of common.

About a year later, the defendants secured from the plaintiffs a quitclaim deed to the property, telling them it had been sold and that a mistake had been discovered in the description in the original deed. Some two months later an assessment was levied on the stock of the corporation, which was paid by the plaintiffs, and very shortly thereafter the corporation went into bankruptcy and its stock became worthless. Nearly two years later, the plaintiffs discovered for the first time that the defendants had themselves purchased the property instead of selling it to a third person, and that the shares of stock received for the property were a part of the stock previously owned by Maude B. Logue. In the meantime the defendants had sold the real property in question for $3,000, receiving $300 in cash and taking back a mortgage of $2,700 payable in monthly installments. The plaintiffs made a written offer to the defendants to return the stock received and demanded the return of all the defendants had received, which offer and demand were refused by the defendants. In this action which followed the plaintiffs

sought to establish that the defendants were holding all they had received through the transaction in trust for the plaintiffs, and asked for an accounting and the return of all the money or property received. At the trial, the stock which had been transferred to the plaintiffs was tendered to the defendants and deposited in court for them. The trial court found in favor of the plaintiffs on all disputed points and entered judgment accordingly, from which judgment the defendants have appealed.

Appellants' principal contention is that the essential findings are not supported by the evidence. As stated by them, the only questions arising from the disputed issues of fact are, first, whether Mrs. Logue pretended to be acting as agent instead of as principal in purchasing this real property, and whether the Silvers had actual knowledge that she was buying the property for herself; and, second, whether, assuming that the Silvers did not have such actual knowledge at the time of the sale, they acquired such knowledge and ratified the sale at the time of giving the subsequent quitclaim deed. While appellants state that "to attempt to analyze each finding would be a work of supererogation," they attack in general all of the findings relating to the above questions, basing their attack largely on the ground that the evidence produced by the respondents is unworthy of belief, and must be conclusively held to be overcome by other evidence. It would serve no useful purpose to review all of the voluminous evidence, but it may be observed in passing that nearly all of appellants' argument relates to the weight of the evidence and to pointing out conflicts therein in a manner entirely appropriate in a trial court, but having no place on appeal.

[1] The appellants freely admit that the relationship of agent and principal existed between them and the respondents at the beginning of this transaction, and that during this relationship they informed the respondents that they had found such a woman who wanted a home, and who, not having the necessary cash, would take the property at a valuation of $2,500 and pay for it by transferring stock she owned in this corporation. However, they contend that they later informed the respondents that this woman would not make the deal, and that the respondents then asked them to buy the property themselves and pay for it with a similar amount of their own stock in the corporation. While they so testified, these facts are flatly denied by the testimony of the respondents, and Mrs. Logue admitted in her testimony that she at no time told the respondents that she was buying this property for her own use, explaining this by saying "it wasn't necessary when they knew I was buying it." While the appellants concede, as they must, that there is considerable evidence in the record to the effect that the respondents did not know that the appellants were themselves purchasing the property, they argue that it appears from all of the evidence that the respondents must have known this fact. Among other things, they rely on the fact that the respondents signed a deed in which Mrs. Logue was named as grantee. Not only was a reason for this given, but such a fact in itself does not constitute such notice as is required to remove the taint from a purchase made personally by an agent. Salisbury v. Yawger, 184 Cal. 783, 195 P. 682. Appellants further and particularly rely on the inference that the respondents must have seen the name of Mrs. Logue on two original certificates of stock in this corporation, which they insist were handed to the respondents for the purpose of having the same divided, and the stock represented thereby reissued one-half thereof to the respondents and the other half to Mrs. Logue. In this regard it appears that Mrs. Logue, prior to this transaction, had in her name two certificates, one for 80 shares of preferred stock and one for 40 shares of common stock in this corporation. Appellants testified in part that they gave these certificates to the respondents, and that the respondents carried them to the office of the corporation, where they were taken up and new certificates issued by which one half of this particular stock was transferred to the respondents and the other half retained by Mrs. Logue. From this testimony appellants would draw the inference not only that the respondents read the original certificates and saw that they stood in the name of Mrs. Logue, but also that they knew from this that the appellants were the real purchasers.

[2, 3] If these were the only possible inferences to be drawn from this evidence, it might still be questioned whether the appellants had met the duty resting upon them. Upon the other facts shown, the burden of proof was upon the appellants to affirmatively show their good faith in the transaction and that they acted without concealment. Rubidoex v. Parks, 48 Cal. 215; 2 Cor. Jur. 930. An agent may not obtain any advantage over his principal by even the slightest misrepresentation or concealment. Civ. Code, § 2228.

In Williams v. Lockwood, 175 Cal. 598, 166 P. 587, 588, the court said: "The acts of the agent are judged with almost, if not quite, the same strictness as those of a trustee. Where he deals with his principal, and obtains any benefit through the transaction, the law throws upon him, as upon a trustee, the burden of showing that an adequate consideration was paid, and that no unfair means of any kind were used by him to induce the contract."

In Firestone v. O'Brien, 97 Cal. App. 43, 274 P. 1006, 1008, it is said: "The rule is to place the burden on the agent to make full disclosure promptly."

In Curry v. King, 6 Cal. App. 568, 92 P. 662, 665, it is said: "An agent will not be allowed to deal in his own behalf with his principal with reference to the subject-matter of the agency, unless he makes full, complete, and honest disclosure of the truth of the transaction. He is bound to treat with his principal concerning the property over which he has been vested with authority in the utmost good faith, and so religiously does equity require adherence to this rule that a transaction between them as to the property whereby the agent acquires the ownership thereof is, upon its face, deemed by the law to be fraudulent."

In Cardozo v. Middle Atlantic Immigration Co., 116 Va. 342, 82 S. E. 80, 87, the court uses the following language, which is appropriate here: "It is not enough for the broker or agent to say that he thought his principal was advised as to all the facts, nor is it sufficient if he be able to point out circumstances from which an inference might be drawn that the principal knew or had means of knowledge. It may be true that the principal has suffered no injury by reason of his ignorance of the facts, but the law makes no such inquiry. In order to remove temptation from the path of agents, as far as can be done, it stamps, from motives of public policy, all such dealings with the seal of its condemnation. * * * In such cases the amount of consideration, the absence of undue advantage, and other like features are wholly immaterial."

[4] Even if such inferences as the appellants would draw were sufficient to meet the proof of good faith required on their part, the evidence upon which these inferences are based is so conflicting and unsatisfactory that the trial court was justified in drawing contrary inferences therefrom. Not only did the respondents testify that they did not know or even suspicion that the appellants were buying the house or that the stock they received came from them, and not only did the appellants admit that they did not in so many words tell the respondents what the situation was, but there is no evidence in the record to the effect that the respondents read the original certificates which the appellants say they handed to them, that these were read to them, that their attention was called to the fact that they stood in the name of Mrs. Logue, or that the respondents saw her name thereon. In fact the evidence that the certificates were handed to them at all is far from satisfactory. While at one time Mrs. Logue testified that she went to the home of respondents, handed them the certificates, and then went with them to the office of the corporation to have the transfer made, at another time she testified that she took them to the office of the corporation and then gave them the certificates. It must be borne in mind that, in addition to the confidential relation between these parties, both through agency and family relationship, one of the appellants, J. J. Logue, was the vice president of the corporation and its bookkeeper, that at the particular time he was largely in control of what was done by the corporation, and that as vice president he even signed the new certificates which were issued to replace the old. While the new certificates are dated the same day the old certificates were turned in, it appears that the respondents were given a temporary receipt, the giving of which is neither contradicted nor explained. The secretary of the corporation, who was present when the old certificates were brought in, testified as to what occurred at that time and, according to his testimony, all the instructions he received were given him by the appellants. Even with the added testimony of this more or less outside party, there is not a word of evidence in the record that at that time anything was said which would call the attention of the respondents to the matter of whose stock was being turned in and in part reissued to them, or that they were not receiving the full amount of the stock represented by the old certificates. While he testified that the appellants told him that Mr. Silver "had some stock which he wanted to transfer," and that he transferred it, his testimony contains no reference to any directions to divide the stock and reissue half thereof to Mrs. Logue as well as a portion to the appellants. The inference could well be drawn that such instructions were given when the respondents were not present, or that these details were privately arranged by Logue as an officer of the corporation. All of this, with the other evidence and with the reasonable inferences, fully justified the court in finding that the respondents did not know at the time that the stock they were receiving had previously been owned by the appellants.

Without going at length into the evidence, there are two items thereof which in themselves furnish strong support for the findings complained of. There is evidence that the house sold by the respondents was supposed to have been furnished, that, shortly after the respondents delivered the deed to her, Mrs. Logue told them that the purchaser of the property was dissatisfied with the amount of furnishings left in the house, and that this purchaser wanted a number of additional sheets, pillow cases, blankets, and bedding of different kinds, and that, upon Mrs. Logue's representation that these articles were necessary to satisfy the purchaser, the respondents furnished and deliv-

ered them to her for the purchaser. Again, after the deal was fully completed, Mrs. Logue signed and delivered to the respondents a receipt reading as follows:

"$125.00 Sept. 14, 1925.

"Received of Edith J. Silver One hundred twenty five dollars, being commission in full for sale of Pacific Grove property.

"Mrs. J. J. Logue, Agent."

It is significant that, although Mrs. Logue admitted signing this receipt and that it contained the word "commission" when she signed it, she stated she did not remember that the word "agent" was there when she signed, explaining: "If the word 'agent' had been put there before my signature, I would have signed under it." It fully appears that Mrs. Logue was a real estate agent of long experience, and the trial court could well have refused to place much reliance on this somewhat incredible attack on the receipt. Why she should have been paid a commission for selling the property if she was known to have been buying it herself, and why she should have then so signed as an agent is not satisfactorily explained, and this receipt furnishes strong corroboration of the abundant oral evidence produced by the respondents.

[5] As to the second question, in connection with the disputed issues, while there is evidence that about a year later the appellants asked for and received from the respondents a quitclaim deed in order to correct a mistake in the original deed, and that they then told the respondents the property had been sold, there is no evidence that they told them, when it was sold, that they themselves had sold it or that they had held title during the intervening years. The appellants were in the real estate business, and, if the respondents considered the matter at all, it is as reasonable to assume that they thought the appellants, as agents, had resold the property for the third party to whom it had been sold, as to assume that they must have known from the meager statement made to them that the appellants were then selling it for themselves. There is nothing in this portion of the evidence to compel the trial court to disbelieve the evidence of the respondents that they did not know at that time nor for a long time thereafter that the appellants were the purchasers of the property.

We have not attempted to review all of the evidence, and are well aware of the fact that there is much evidence in the record which would tend to support findings contrary to those made. This portion of the evidence, stressed by the appellants, merely presents a conflict which has been resolved against them by the trial court. A reading of the entire record not only discloses that the findings attacked are supported by ample evidence but, in our opinion, by a preponderance thereof.

[6] The only other point requiring consideration is a claim that the judgment is excessive. The judgment was for $3,125, with interest, which included the $3,000 for which the appellants sold the property and the $125 paid them for a commission. The judgment contained appropriate provisions for the transfer to the respondents of the $2,700 mortgage which the appellants took back upon the property when they sold, with a corresponding credit on the judgment. It is argued that the measure of damages in such a case is the secret profit made by the agent, that this profit amounted to $500 only, and that the judgment could not exceed that amount. It is further argued that the respondents previously received stock of the value of $2,500, and that the judgment rendered gives them a double recovery. It may first be observed that there is no evidence to show that the stock in question was worth $2,500 at the time it was received by the respondents. There is evidence that about nine months before the transaction here in question an audit was made of the corporation affairs, upon the strength of which audit a dividend was paid some months before this transaction occurred. While there is evidence that this audit showed that, at the time it was made, the common stock was worth $10 or $12 a share, there is neither evidence as to what the preferred stock was worth at that time nor as to what any of the stock was worth at the time of the sale involved here, although it does appear that it was entirely valueless about a year later. However, we think it is immaterial what the stock was worth at the time of the transfer. The rule of damages contended for by appellants and the cases cited in support thereof have no bearing here. This is not an action for damages or the ordinary action to recover the secret profits made by an agent in violation of his fiduciary relationship. This is essentially an action for rescission, although the ordinary form of rescission could not be had since the property had been transferred to an innocent third party. This action was one to compel the appellants to account not only for the profits they had received, but for all they had received, including the amount paid as a commission. It is based upon the theory that, in equity, the appellants held these sums in trust for the respondents. Whether or not the respondents received anything of value, they tendered back what they had received, and, at the time of the trial, delivered the same into court for the appellants. It having been found upon sufficient evidence that these agents purchased this property from their principals under circumstances where the principals were justified in believing and believed that the property was

being sold to a third party, and where the true facts were not disclosed to the principals, both the form of the action and the judgment are, under well-settled principles, consistent with the rules of equity, and are sustained thereby. Curry v. King, supra; Williams v. Lockwood, supra; Firestone v. O'Brien, supra; Burke v. Bours, 92 Cal. 108, 28 P. 57; Whitaker v. Brainard, 113 Cal. App. 705, 298 P. 1042; Pomeroy's Eq. Jur. (3d Ed.) vol. 2, § 959, vol. 3, § 1047; 1 Cal. Jur. 789.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

127 Cal.App. 576

GRAUBERGER v. LIGHT et al.

Civ. 8760.

District Court of Appeal, First District, Division 1, California.

Nov. 19, 1932.

1. Appeal and error ⇐907(3).

Findings adverse to plaintiff appealing on judgment roll alone could not be reviewed.

2. Attorney and client ⇐130.

While attorney cannot assume position adverse to client without client's consent, attorneys employed by widow with knowledge of their previous employment by claimant of husband's estate could recover for services rendered.

This was so since there was no concealment or bad faith on the part of the attorneys and the widow suffered no prejudice by reason of the relation of the attorneys with the claimant.

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by Lena R. Grauberger against J. E. Light and another. From an adverse judgment, plaintiff appeals.

Affirmed.

W. Frank Shelley, of Los Angeles, for appellant.

James F. McBryde, of Glendale, for respondents.

PER CURIAM.

The plaintiff appeals from a judgment entered in favor of defendants in an action to rescind a contract. The appeal is presented on the judgment roll alone.

The defendants are attorneys, and plaintiff is the widow of Fred Grauberger, deceased, who left estate in Colorado and California. By the contract in question plaintiff employed the defendants to represent her in all matters connected with the settlement of her husband's estate in Colorado and in any litigation growing out of the same, and agreed to pay them for their services 25 per cent. of all property secured to her from the estate. The complaint alleged in substance that she entered into the contract without independent advice, and was induced to do so by the false representations of one of the defendants; that they rendered no service thereunder, and had accepted employment as attorneys for a third person who was seeking to enforce a claim against her husband's estate. These averments were denied, the answer further alleging that the action was barred by laches. Defendants also sought to recover a balance of $497.99 unpaid under the contract, which they alleged they had fully performed.

The court found in accordance with the answer, and entered judgment denying a rescission and for the recovery by the defendants of the above sum.

Plaintiff claims that the transaction was tainted with fraud and that the court erred in awarding judgment against her.

[1] As stated, the appeal is presented on the judgment roll alone. Consequently, the findings which are contrary to plaintiff's contention cannot be reviewed. Spring Valley Water Co. v. County of Alameda, 88 Cal. App. 157, 263 P. 318; Pearson v. Crummer, 97 Cal. App. 707, 276 P. 153. The same is true of her claim that the attorneys accepted employment from another and used their knowledge of her affairs to her disadvantage. The court found, however, that an attachment was levied on plaintiff's property in California. In this connection the court found that before the execution of the contract plaintiff had been appointed the administratrix of her husband's estate in California, in which proceeding attorneys other than defendants have at all times represented her. The claim mentioned was filed by defendants on behalf of the claimant before they became plaintiff's attorneys in connection with the Colorado estate. This claim was based on a note executed by plaintiff and her husband, and was allowed by her as administratrix. It was also found that plaintiff, knowing that defendants represented the claimant mentioned, solicited them to represent her in the Colorado matter and that by the consent of all parties they agreed to do so; further, that she stated her desire to pay the note, but wished to procure the money necessary from the property in Colorado; that in the action filed against her plaintiff was represented by counsel other than defendants, and at no time did defend-

ants use their knowledge of her affairs to her disadvantage, but acted in good faith, the two transactions being separate and distinct and no adverse interest being affected.

[2] While, as urged by plaintiff, an attorney may not assume a position adverse to his client without the latter's consent (6 Cor. Jur., Attorney and Client, § 105, p. 619), here it is clear from the findings that the defendants were employed by plaintiff with full knowledge of their previous employment by the claimant, that there was no concealment or bad faith on their part, and that she suffered no prejudice by reason of their relations with the claimant.

The findings support the conclusions of the trial court, and the judgment is accordingly affirmed.

127 Cal.App. 542

PEOPLE v. WALLEN.

Cr. 2242.

District Court of Appeal, Second District, Division 1, California.

Nov. 18, 1932.

1. Criminal law ⇐254.

Court trying defendant without jury did not err in declining to view premises where alleged offenses were committed.

2. Sodomy ⇐6.

Court did not err in taking testimony as to alcoholic odor in boy's breath on trial for committing sodomy with him and contributing to his delinquency (Pen. Code, § 288a).

3. Criminal law ⇐984.

Finding of guilty on both counts of information, charging sodomy and contribution to minor's delinquency, *held* not error, though both described same transaction, where second count also specified acts not involved in sodomy charge (Pen. Code, § 288a).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Homer Wallen was convicted of violating Penal Code, § 288a, and contributing to the delinquency of a minor, and he appeals.

Affirmed.

George R. Maury, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CONREY, P. J.

The defendant has been convicted on both counts of an information which, in the first count, charged violation of the provisions of section 288a of the Penal Code, and in the second count charged the offense of contributing to the delinquency of a minor. Defendant appeals from the judgment and from an order denying his motion for a new trial.

[1, 2] As applied to the record in this action, the grounds of appeal stated in the brief for appellant are frivolous. The cause was tried before the court without a jury. The court did not err in declining to go out and view the premises described in the evidence as being the place where the offenses were committed. The court did not commit any error in taking the testimony of the witness Romer concerning the presence of an alcoholic odor in the breath of the boy with whom the offense was committed; and it does not appear that any objection was made to the reception of that evidence.

[3] The court did not err in finding the defendant guilty on both counts of the information. While the second count described the same transaction as that set forth in the first count, it also contained further specifications of acts which would constitute contribution to delinquency of the minor and which were not involved in the transaction described in the first count. The defendant was not found "guilty of two crimes composed of but one act." For discussion of similar question see People v. Snyder, 74 Cal. App. 138, 239 P. 705.

The foregoing statements cover, in substance, all of the grounds of appeal presented on behalf of the defendant.

The judgments of conviction are affirmed, and the order denying motion for new trial is affirmed.

We concur: HOUSER, J.; YORK, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

WESTERN OIL & REFINING CO. v. VENAGO OIL CORPORATION et al.*

(two cases).

Civ. 4575, 4639.

District Court of Appeal, Third District, California.

Nov. 22, 1932.

Hearing Granted by Supreme Court Jan. 20, 1933.

1. Mines and minerals ⇐73.

Right of entry to explore for oil vests in lessee upon execution of ordinary oil and gas lease, but title to minerals is inchoate, not vesting until minerals are reduced to possession.

In other words, the oil and gas lease is to be distinguished from the ordinary lease in that the lessee, under such oil and gas lease, does not acquire a vested interest in the oil and gas in place prior to its development, but only a right to enter and develop the well and remove the oil when so developed.

2. Mines and minerals ⇐74.

Oil and gas lessee's assignment of per cents. of minerals "hereafter produced and saved" created no right against subsequent assignee of lease, even if assignee knew of per cent. assignments.

3. Mines and minerals ⇐54½.

Oil lessee's mortgage of oil to be produced created no lien upon oil proceeds subsequently accruing (Civ. Code, § 2955).

4. Mines and minerals ⇐54½.

Valid chattel mortgage cannot be created as to unproduced minerals.

Appeals from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Actions in interpleader by the Western Oil and Refining Company, against the Venago Oil Corporation and others, all of whom filed cross-complaints. Judgment for the Venago Oil Corporation, and the other defendants appeal.

Affirmed.

Bailie, Turner & Lake, of Los Angeles, John H. Burke, of Long Beach, Wallace Collins, of Los Angeles, and Harry A. Houser and Lewis N. Whealton, both of Long Beach, for appellants.

Arthur G. Baker, Mark F. Jones, G. J. Oppegard, and W. L. Engelhardt, all of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Through various undisputed transfers a leasehold interest in certain gas and oil properties was vested in F. M. Miller, a cross-defendant and respondent herein, and upon which properties he undertook to drill an oil well.

In order to obtain funds to carry on the development work and prior to the production of oil and gas, he issued and disposed of for cash certain per cents. or interests in specified units of oil and gas which might be produced, saved, and sold under the terms of his lease. These interests were evidenced by written instruments and disposed of to various parties through brokers. The holders of such units are referred to herein as Campbell and associates.

Prior to February 1, 1929, Miller, being in need of certain drill pipe with which to complete the drilling of said well, entered into an agreement with the Standard Pipe & Supply Company (hereafter referred to as Standard), whereby Standard, in consideration of 2 per cent. of the proceeds from the production of said well, less a certain cash deduction, agreed to furnish a specified amount of pipe, and in a second agreement between Miller and Standard, the pipe company leased to Miller 6000 feet of pipe for a period of 55 days from February 1, 1929, at an agreed rental of $2,500 and a further charge of $40 per day for each day the pipe was retained after the expiration of the specified period. As security for said $2,500 and any charge for overtime the pipe might be retained and as security for all other obligations then due Standard, Miller granted and assigned unto standard an additional 10 per cent. of all oil, etc., which might be produced and saved from the real property in question.

About March 13, 1929, Miller, together with two others, formed the Venago Oil Corporation for the purpose, among others, of taking over and completing the well. These three incorporators became the directors and officers of the corporation and filed a petition with the commissioner of corporations requesting that certain qualifying shares be issued to them as incorporators and that they be permitted to sell certain other per cents. at a specified amount.

On the same day, Miller executed a purported assignment to C. Sand, reciting that on January 21, 1929, he (Miller) had assigned and transferred the lease in question to C. Sand, as security for the repayment of certain money, and that C. Sand had become the purchaser of said lease and that Miller desired to transfer to C. Sand all his right, title and interest in said lease or sublease.

Immediately thereafter C. Sand conveyed to Venago Oil Corporation 67½ per cent. of all right, title, and interest in and to all oil, etc., produced from said premises, the balance thereof having been reserved by prior lessors; also, at the same time, C. Sand conveyed to the Du Cal Company all

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 24 P.2d 971, 977.

right, title, and interest in and to the sublease, subject to the assignment to Venago Oil Corporation of 67½ per cent. of all oil, etc., produced from the premises, and a few days later, Miller assigned to Du Cal Company all his right, title, and interest in and to said sublease. Thereafter, and on August 10, 1929, the Du Cal Company, Inc., assigned its interest in the lease to Venago Oil Corporation, and contemporaneously therewith C. Sand also conveyed all her interest in the lease to Venago Oil Corporation, thereby vesting in said Venago Oil Corporation the title to both the rights to the oil and the leasehold interest.

On March 29, 1929, the original incorporators assigned their subscriptions of one share each of stock in the Venago Oil Corporation to Mark F. Jones, G. J. Oppegard, and M. A. Egan whereupon these stockholders were elected officers and directors of Venago Oil Corporation and have ever since remained as such.

As soon as Jones and his associates acquired the assignment of the lease and the stock subscription, the commissioner of corporations was notified of that fact and also notified of the fact that the corporation had rescinded a resolution previously adopted pursuant to which the corporation had asked for permission to issue securities in place of those theretofore issued by Miller, and the various unit holders were also notified that the corporation would not recognize the units previously issued by Miller to them.

Thereafter, and on August 15, 1929, the well was completed and brought into production and upon demand of Standard and the unit holders the Western Oil & Refining Company, which was the purchaser of the crude oil production of the Venago Oil Corporation from the property here in question, withheld the funds claimed by the holders of interests and commenced this action in interpleader.

The trial court held that Venago Oil Corporation was entitled to all the funds for two reasons: First, that units or per cents. so issued did not convey any rights to the oil in place, were personal property, and merely the personal undertakings of Miller, and that when the lease was assigned to the Venago Oil Corporation, the assignee took the land free of any lien by reason thereof; and, secondly, that the units were securities issued contrary to the provisions of the Corporate Securities Act (St. 1917, p. 673, as amended) and were therefore void.

The holding of the trial court was, in effect, that all production belonged to Venago Oil Corporation, which had completed the well and produced and captured the oil and gas, and that prior to such production and capture, the oil and gas were incapable of being sold, transferred or encumbered by the percentage instruments issued by Miller to Standard or Campbell and associates, and the Venago Oil Corporation, having acquired the sublease and having produced and captured the oil and gas, was not bound in law or equity to pay to Standard or the unit holders any part thereof, nor the proceeds therefrom.

The first point to determine is the nature and extent of the estate and interest conveyed and transferred by Miller to Standard and Campbell and his associates and the effect thereof as between Western, Venago, and these claimants.

Appellants devote considerable time to the establishment of the proposition that Miller was vested with a leasehold interest and that an instrument creating such relationship was entitled to be recorded and to the protection given by the statute covering recordation. Counsel for Venago Oil Corporation concede such to be the law in an ordinary lease, but claim that as to an oil and gas lease a different rule applies. So, therefore, it is necessary to determine the nature of such a lease and what principles are applicable to oil and gas in place and prior to capture; in other words, has oil in place a potential existence before it has been captured, and does it form a proper subject of immediate sale?

In Brookshire Oil Co. v. Casmalia, etc., Co., 156 Cal. 211, at page 215, 103 P. 927, 928, the Supreme Court considering an oil case said:

"This instrument does not vest in the so-called lessees any present title in the land. It grants only the right to do certain things thereon and to take certain mineral substances therefrom, and no title to such substances passes from the original owner until the same is severed from the realty. In regard to such agreements it is said: 'The title is inchoate and for purposes of exploration only, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract.' Venture Oil Co. v. Fretts, 152 Pa. 451, 460, 25 A. 732; Steelsmith v. Gartlan, 45 W. Va. 27, 34, 29 S. E. 978, 44 L. R. A. 107; Lowther Oil Co. v. Miller, etc., Co., 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433; Huggins v. Daley, 99 F. 608, 48 L. R. A. 320, 40 C. C. A. 12; Gadbury v. Ohio, etc., Gas Co., 162 Ind. 14, 67 N. E. 261, 62 L. R. A. 895; Eaton v. Allegany Gas Co., 122 N. Y. 417, 25 N. E. 981; Funk v. Haldeman, 53 Pa. 229, 242; Union, etc., Co. v. Bliven, etc., Co., 72 Pa. 173; Grubb v. Grubb, 74 Pa. 25, 33; Thornton on Oil, § 53.

"With regard to possession of the land, the agreement gives it for special purposes only, and so far as may be necessary and convenient for such purposes and no farther.

The right of possession is limited to the possession necessary to enable the lessees to search for the minerals they are allowed to take, until such minerals are found, and thereafter to the possession of only the part required for the convenient operation of the works they may construct and use for the extraction and removal of the minerals."

The same rule is substantially laid down in the case of Graciosa Oil Co. v. Santa Barbara County, 155 Cal. 140, 99 P. 483, 486, 20 L. R. A. (N. S.) 211, as follows: "There are material differences between such estates for years and the right and privilege to bore for and extract oil held by the [lessee] under its oil lease. See Thornton on Oil, §§ 47, 48. The plaintiff [lessee], it is true, does not own an absolute present title to the oil strata in place. Such an absolute estate in an underlying stratum may be created and the estate of the owner of the overlying land and of the owner of the subterranean stratum will be as distinct and separate as is the ownership of respective owners of two adjoining tracts of land. For purposes of separate ownership, land may be divided horizontally as well as superficially and vertically. Jones on Real Prop. § 537; State v. Moore, 12 Cal. 56, 70. But the contract in question vests no present title in a stratum in place. It leaves the title to the oil in the landowner until it is brought to the surface. The right vested in plaintiff is an estate for years, so far as necessary for the purpose of taking oil therefrom, and it carries with it the right to extract the oil and remove it from the premises. This right constitutes, for the term prescribed, a servitude on the land and a chattel real at common law. Civ. Code, § 801, subd. 5; section 802, subd. 6; Harvey C. & C. Co. v. Dillon, 59 W. Va. 605, 53 S. E. 928-937 [62 L. R. A. (N. S.) 628], and cases there cited; Thornton on Oil Leases, § 51."

Standard cites in support of its contention the case of Chandler v. Hart, 161 Cal. 405, 414, 119 P. 516, Ann. Cas. 1913B, 1094, where the court had under consideration an oil lease, similar in general terms, to the one here before the court, but with this material difference, that in the cited case, the consideration had been paid in full and there was nothing further to be done or performed by the lessee, which is quite different from the case at bar, which contains a provision for the payment of royalties based upon production.

Neither is the case of Chandler v. Bowman, 100 Cal. 221, 279 P. 1041, cited by appellant, considered in point, for in that case the conveyance was in the form of a deed, and there, also, the consideration had been paid in full.

The case of Black v. Solano Co., 114 Cal. 170, 299 P. 843, 845, discusses at considerable length some of the points here raised. It is there said:

"Under the ordinary lease, the title to the oil at the time the plaintiff and the defendant each acquired the respective rights here involved was in the owner of the land, not in the lessees.

"They, it is true, had an estate for years in the land, with the right to go upon it and prospect for and extract the oil. Until found and severed from the realty, it was not theirs, and did not become theirs until brought to the surface, when it became personal property. Graciosa Oil Co. v. Santa Barbara County (1909) 155 Cal. 140, 99 P. 483, 20 L. R. A. (N. S.) 211; Brookshire Oil Co. v. Casmalia, etc., Co. (1909) 156 Cal. 211, 103 P. 927; Taylor v. Hamilton (1924) 194 Cal. 768, 774, 230 P. 656. The oil was, however, potential personal property and so the subject of a sale (as distinguished from an executory contract to sell). 'In such case, the sale is absolute and perfect when made, vesting the property in the purchaser the moment it comes into existence.' Merrill v. California Petroleum Corporation (1930) 105 Cal. App. 737, 288 P. 721, 723. See, also, Hamilton v. Klinke (1919) 42 Cal. App. 426, 183 P. 675; Sun-Maid Raisin Growers v. Jones (1929) 96 Cal. App. 650, 274 P. 557.

"In view of these principles, it is necessary to conclude that there was nothing more than a present sale of potential personal property accomplished by the transfer on which plaintiff relies. That which is the subject of the deal is 'five per cent. (5%) of any and all oil * * * produced, sold and saved.' There is here no hint of any attempt to pass title to the oil while it was a part of the realty; that is, before it was 'produced, sold and saved.' Nor is there a suggestion of a transfer to plaintiff of any right to go upon the land for any purpose. There was not created here any estate or interest in real property, nor was the title or possession of real property affected. There is a line of reasoning employed in the recent case of Richfield Oil Co. v. Hercules Gasoline Co. (1931) 112 Cal. App. 431, 297 P. 73, 76, which further supports this conclusion. The agreement there under review was an executory contract for the sale and purchase of oil between the plaintiff and the owner of the land. The question presented was, Did the contract create an interest in real property? Plaintiff contended that it had an interest in the land because the agreement established a 'profit à prendre.' In disagreeing with this position, the court said: 'This contract confers no right upon the plaintiff to enter the premises and develop oil or to sever the oil from the realty. It is a plain executory contract for the sale of personal property of and when that property should come into the possession of the vendor. The exclusive right to develop and produce the oil is left with the vendor. He retains exclusive possession and title of and to the realty, and hence of the oil in the ground, until the oil is severed and delivered

to the tanks maintained by him on his own premises.' See, also, Bartholomae Oil Corp. v. Delaney (1931) 112 Cal. App. 314, 296 P. 690.

"We conclude, therefore, that the recordation of plaintiff's agreement did not give defendants constructive notice of its existence or terms."

See, also, People v. Associated Oil Co., 211 Cal. 93, 294 P. 717, and Bandini Petroleum Company v. Superior Court, 110 Cal. App. 123, 293 P. 899.

[1] Other cases might be cited, but the rule appears to be that, under the ordinary oil and gas lease, the right of entry upon land for the purpose of exploring for oil vests in the lessee upon the execution of the lease, but the title to the oil and gas is inchoate, and does not vest until the oil and gas are reduced to possession. In other words, the oil and gas lease is to be distinguished from the ordinary lease in that the lessee, under such oil lease, does not acquire a vested interest in the oil and gas in place prior to its development, but only a right to enter and develop the well and remove the oil when so developed.

[2] Standard also contends that Venago Oil Corporation took with constructive notice of the Miller assignments. But, even conceding that to be the case, an examination of the transfers from Miller to Standard reveals the fact that Miller did not assign any interest in the leasehold, or to any rights to oil and gas in place, but only to a share of the oil and gas "produced and saved."

The essential portions of the agreement between Miller and Standard are as follows:

"That I, F. M. Miller, a single man, for value received, have granted, bargained, sold, assigned and transferred and do hereby grant, bargain, sell, assign and transfer unto Standard Pipe and Supply Company, a corporation, two per cent. (2%) of all gas and oil or other hydrocarbon substances hereafter produced and saved from (describing premises) * * * after the well or wells on said property has or have been completed and put on production subject to an existing contract for the sale of such production to the Western Oil and Refining Company.

"[Signed] F. M. Miller."

An analysis of the foregoing reveals that the agreement was an assignment of the cash to be received from 2 per cent. of any oil or gas that might thereafter be produced and saved from the property described, and all that was done or attempted to be done was to assign a share in the proceeds, which might be received from the sale from the production of the well, but Miller, being unable to recover any oil or gas, abandoned the project, and no rights have accrued under the assignment.

[3] Miller, in a second agreement, also attempted to mortgage 10 per cent. of the proceeds for the purpose of securing to Standard the payment of $2,500 for certain equipment leased to Miller, but the commodity attempted to be mortgaged not being in esse and being upon a fund to be acquired in the future is not subject to mortgage and created no lien upon the fund. Section 2955, Civ. Code.

[4] Furthermore, the rule seems to be that a valid chattel mortgage cannot be created as to minerals yet unproduced.

"It has been held that growing trees, fruit, grass and shrubs, although unlike crops and other yearly products of the soil in that they are a part of the realty until severed therefrom, may nevertheless be conveyed by a chattel mortgage, the mortgage working a severance; but this rule has not been applied to such articles as are parts of the soil itself, such as clay for the making of bricks and ores that have not been mined." 11 Cor. Jur. § 55, p. 445.

In the case of Townsend Brick & Contracting Co. v. Allen, 62 Kan. 311, 62 P. 1008, 52 L. R. A. 323, 84 Am. St. Rep. 388, the Supreme Court of Kansas had before it a question of the validity of a chattel mortgage which was given by a lessee to his lessor covering clay and material taken from the premises and the brick manufactured to secure the payment of rental. The court held, among other things, that the attempt to give a chattel mortgage upon the clay in the bank was ineffectual, "because there was no severance, no setting apart by markings or otherwise, and, being in its natural state, it must be regarded as realty."

In our study of the present controversy, the case of Merrill v. Cal. Pet. Corp'n, 105 Cal. App. 737, 288 P. 721, has been brought to our attention. In that case, Lake was the owner of an oil lease on a royalty basis and entered into an agreement to sell to defendant, at the market price, all of the oil produced and saved under the lease. Thereafter, Lake sold and assigned to Merrill 12½ per cent. of all oil produced, saved, and marketed from said premises under his lease; it being stipulated that Lake had sold all of the oil that might be produced to California Petroleum Company. California Petroleum Company refused to recognize the assignment to Merrill and he brought this action. The court there held that the effect of the instrument was to assign an interest in personal property, and as such the title passed, but whether or not there was a conveyance of any interest in the land or the leasehold was not involved. No issue arose in that case between the holders of a royalty interest or the rights of a lessor or lessee under an oil lease, nor of a sale of oil in place, such as we have for consideration in the case before us.

We have also examined the case of Jones v. Pier (Cal. App.) 12 P.(2d) 646, which we find to be an action by plaintiff to quiet title to 1 per cent. of all oil extracted from certain real property. It appears that prior to the assignment to plaintiff, his assignor was the owner of a tract of land and the assignor, with others, joined in a community lease conveying their property for oil exploitation. Thereafter, one of the parties to the community brought an action to quiet title against the lessees of the community interest, but this court held that community lease could not be terminated by one joint lessor without the joining or concurrent act of all the joint lessors, and, inasmuch as the lease was in full force and effect, plaintiff was entitled to have his title to 1 per cent. quieted as against his lessor.

The foregoing case does not discuss the title to oil and gas in place nor the rights of the holders of royalty interests as against adverse claimants, and is, therefore, not in point in the present case.

It is also contended by Venago Oil Corporation that the various transactions between Miller and Standard and also the percentage holders, appearing here as defendants, cross-complainants and appellants, come within the provisions of the Corporate Securities Act, as amended in 1925 (St. 1925, p. 962) and the issuance thereof not having been authorized by the commissioner of corporations are, therefore, void. If, however, the conclusion of this court is correct that the assignments from Miller to Standard and Campbell conveyed no interest to the oil in place, but were merely the personal undertakings of Miller to become and be effective only when the oil was captured by him, we need not pass upon the validity or invalidity of the transaction, as affected by the Corporate Securities Act.

However, an examination of the testimony shows that the per cents. here issued to Campbell and associates were offered to the general public. In answer to a question asked by counsel for the Venago Oil Corporation, one of the brokers called by Campbell as a witness testified he bought the per cents. to retail to the public and sold them to whomever possible. It is also beyond question that the well was "undeveloped" at the time of the transfer, and prior to the time oil was actually produced by the Venago Oil Corporation.

It is next urged by Standard that the agreement between Miller and Standard were valid in equity irrespective of what may be the legal effect thereof. That rule is based upon the equitable principle that if Miller had developed the oil, he was bound in good conscience to execute such instruments as would carry out the principal agreement of the parties, but Miller did not produce the oil and the trial court found upon competent evidence that there was no fraud or collusion between Miller and his successor, Venago Oil Corporation, and that he had no interest or estate in the corporation or the product of the well. It is true that Miller conveyed and transferred to Venago Oil Corporation his right, title, and interest in this property, but, as before indicated, until the oil had been captured Miller had nothing to convey but a right of entry.

The sufficiency of the findings are attacked, but we fail to find wherein they are deficient, in view of the fact that we are not passing upon the terms of the Corporate Securities Act.

It appears from the record that Joseph McDonnell, Dan Howk and Louis F. Monken intervened in the above-entitled action before the trial thereof, and issues were joined in said action upon said intervention, and judgment was rendered adversely to the said interveners; that in due time these interveners filed their notice of appeal, wherein they appealed from said judgment to the Supreme Court of this state, but no further steps or action of any kind were taken by said interveners to perfect said appeal, and the time having long since expired for the taking of any steps to perfect said appeal, the said appeal of the interveners is hereby dismissed.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

127 Cal.App. 410

FRANK GRAVES SASH, DOOR & MILL CO. v. KEENER et al.

KAROLY v. SAME.

CO-OPERATIVE BLDG. MATERIALS, Inc., v. SAME.

Civ. 8653.

District Court of Appeal, First District, Division 2, California.

Nov. 10, 1932.

Appeal and error ⇐766, 792.

Where appellants' brief of 118 pages contains no headings showing points relied on, and reading of brief leaves matter in doubt, court will dismiss appeal on own motion (Rule VIII of the Rules of the Supreme and District Courts of Appeal).

Appeals from Superior Court, Los Angeles County; Myron Westover, Judge.

Separate actions by the Frank Graves Sash, Door & Mill Company against Rosemary Keener and another, by Nickolas Karoly against Kate Keener and another, and by the Co-Operative Building Materials, Inc., against Rosemary Keener and another, which were consolidated for purpose of trial. From judgment for plaintiffs, Rosemary Keener and Kate Keener appeal.

Appeal dismissed on court's own motion.

H. M. Mayes, of North Hollywood, for appellants.

Edward C. Mills, of Los Angeles, for respondents.

SPENCE, J.

Actions were brought to foreclose mechanics' liens, and were consolidated for the purpose of trial. Plaintiffs had judgment, from which judgment defendants Rosemary Keener and Kate Keener appeal.

Appellants have filed an opening brief 118 pages in length. It is absolutely devoid of a single heading "showing the nature of the question to be presented or the point to be made," as required by Rule VIII of the Rules of the Supreme Court and District Courts of Appeal. The only headings in the brief are "Statement," "Findings of Fact and Conclusions of Law," "Judgment," "Evidence," and "Argument." In other words, a reading of the headings does not disclose in any manner the points upon which appellants rely. After reading appellants' brief, we are still in doubt as to what these points may be.

The above-mentioned rule has been in effect for many years, and its requirements have been repeatedly called to the attention of the bar. We cite but a few of the more recent cases. Landa v. Steinberg (Cal. App.) 14 P.(2d) 532; Roy Tong v. Sun Realty Co. (Cal. App.) 14 P.(2d) 127; Estate of Dawson (Cal. App.) 13 P.(2d) 758; Milano v. Bulleri (Cal. App.) 13 P.(2d) 521, and cases cited. Under the terms of the rule, an appeal may be dismissed upon the court's own motion where appellant fails to comply therewith. We have been reluctant to take such action in the past, but we deem this a proper case in which to do so.

The appeal is dismissed.

We concur: NOURSE, P. J., STURTEVANT, J.

made by present directors on or about August 1, 1928, which revealed the facts relied upon.

3. Limitation of actions ⇐100(12)

Means of knowledge are equivalent of knowledge in determining whether action for fraud was brought within time limited (Code Civ. Proc. § 338, subd. 4).

4. Appeal and error ⇐1040(2).

Sustaining demurrer without leave to amend *held* not reversible error, absent request by plaintiff for permission to amend.

PRESTON, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by the Consolidated Reservoir & Power Company against Robert R. Scarborough and others. From a judgment entered upon an order sustaining demurrers to the second amended complaint without leave to amend, plaintiff appeals.

Affirmed.

Prior opinion (Cal. App.) 9 P.(2d) 304.

James Farraher, of Los Angeles, for appellant.

Lawler & Degnan, Scarborough & Bowen, and Pierson, Kegley & Gangestad, all of Los Angeles, for respondents.

216 Cal. 698

CONSOLIDATED RESERVOIR & POWER CO. v. SCARBOROUGH et al.

L. A. 11407.

Supreme Court of California.

Nov. 23, 1932.

1. Limitation of actions ⇐179(2).

Facts from which conclusion that pleader did not discover facts constituting fraud until less than three years before action was commenced must be affirmatively pleaded (Code Civ. Proc. § 338, subd. 4).

2. Limitation of actions ⇐179(2).

Corporation's complaint against former directors based on fraudulent transaction *held* deficient in not alleging circumstances leading to discovery of fraud less than three years before commencement of action (Code Civ. Proc. § 338, subd. 4).

Complaint was deficient in not alleging facts and circumstances leading to discovery of fraud within three years permitted by Code Civ. Proc. § 338, subd. 4, for bringing action, since only allegation touching matter was that it was not known or discovered by stockholders of corporation or present directors until an investigation of affairs of corporation was

WASTE, C. J.

This is an appeal from a judgment entered upon an order sustaining demurrers to the second amended complaint without leave to amend.

The action sounds in fraud, and has for its purpose the recovery of certain damages and properties which it is averred the plaintiff has respectively suffered and lost by reason of an asserted fraudulent conspiracy between the defendants. The alleged fraudulent transactions of which complaint is made occurred in 1924. This action was commenced more than four years thereafter. In brief, the second amended complaint alleges that the plaintiff corporation was the owner of certain described real and personal properties of a designated value; that in the year 1924 this property was diverted from and lost to the plaintiff by reason of a fraudulent scheme and conspiracy between the defendants by means of which conspiracy the properties described were improperly employed to cover and satisfy the defalcations of one of the defendants in a matter in which the plaintiff corporation had no interest or connection; that this result was accomplished by means of false and fraudulent representations being made to the board of directors of the plaintiff corporation by three of the defendants who

were then members of said board; that it was falsely represented to such board that the property was being used to care for certain debts of the corporation; that in furtherance of such conspiracy and in order to conceal the fraudulent character of the transactions leading up to the dissipation of the plaintiff's properties, the defendants caused the minutes of the meetings of the board of directors, at which these transactions were consummated, to remain silent thereon; "that the fraud hereinabove alleged was not discovered until on or about the first day of August, 1928, for the reason that the minutes of the said meetings of the said Board of Directors fail to disclose the transactions or the facts hereinabove alleged, and for the further reason that the defendant directors and said Robert R. Scarborough [who was not a member of the board] concealed the facts hereinabove related from the stockholders of the plaintiff corporation; that the facts hereinabove alleged were not known or discovered by the stockholders of the corporation or the present directors until an investigation of the affairs of the corporation was made by the present directors on or about August 1, 1928, which revealed the said facts;" and that as a result of such fraudulent conspiracy the plaintiff has suffered damage and loss of a character and to an extent specified in the prayer of the complaint.

To this complaint the defendants demurred both generally and specially. Each demurrer, among other things, raises the bar of the statute of limitations. The trial court sustained the demurrers without leave to amend, whereupon plaintiff prosecuted this appeal.

[1] Examination of the complaint satisfies us that it states a good cause of action for damages for fraud. We therefore turn our attention to the proposition of whether or not the action is barred by reason of the running of the period prescribed in section 338 of the Code of Civil Procedure. Subdivision 4 of that section provides that an action for relief on the ground of fraud or mistake must be brought within three years of the time the cause of action accrued, but "the cause of action in such case [is] not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." The rules of pleading governing the statement of a cause of action for fraud committed more than three years prior to the commencement of suit are now well settled. They are admirably stated in the leading case of Lady Washington C. Co. v. Wood, 113 Cal. 482, 486, 45 P. 809, 810, from which we quote: "The right of a plaintiff to invoke the aid of a court of equity for relief against fraud, after the expiration of three years from the time when the fraud was committed, is an exception to the general statute on that subject, and cannot be asserted unless the plaintiff brings himself within the terms of the exception. It must appear that he did not discover the facts constituting the fraud until within three years prior to commencing the action. This is an element of the plaintiff's right of action, and must be affirmatively pleaded by him in order to authorize the court to entertain his complaint. 'Discovery' and 'knowledge' are not convertible terms, and whether there has been a 'discovery' of the facts 'constituting the fraud,' within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded. As in the case of any other legal conclusion, it is not sufficient to make a mere averment thereof, but the facts from which the conclusion follows must themselves be pleaded. It is not enough that the plaintiff merely avers that he was ignorant of the facts at the time of their occurrence, and has not been informed of them until within the three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them,—as that they were done in secret, or were kept concealed; *and he must also show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge*, so that the court may determine whether the discovery of these facts was within the time alleged, and, as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts."

The following appears in Wood v. Carpenter, 101 U. S. 135, 140, 25 L. Ed. 807: "In this class of cases the plaintiff is held to stringent rules of pleading and evidence, 'and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made.' * * * A general allegation of ignorance at one time and of knowledge at another [is] of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. * * * A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it. * * * There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself. *The circumstances of the discovery*

must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence."

The foregoing is quoted with approval in Phelps v. Grady, 168 Cal. 73, 141 P. 926. Other cases recognizing the above principles are: Original M. & M. Co. v. Casad, 210 Cal. 71, 74, 75, 290 P. 456; Newport v. Hatton, 195 Cal. 132, 146, 231 P. 987; Victor Oil Co. v. Drum, 184 Cal. 226, 239–242, 193 P. 243, 250; Nichols v. Moore, 181 Cal. 131, 132, 183 P. 531; Galusha v. Fraser, 178 Cal. 653, 657, 174 P. 311, 312.

The case last above cited clearly and concisely states the law. It is there declared: "Where the plaintiff sues for relief on the ground of fraud, and seeks exemption from the three-year period of limitation for the reason that he did not discover the fraud until after it was perpetrated, he must not only show [1] that he did not discover the fraud until within the three years next before the action was begun, and [2] that the fraud was committed under such circumstances that he would not be presumed to have had knowledge of it at the time, but [3] *he must also set forth the times and circumstances under which the facts constituting the fraud came to his knowledge, so that the court may determine from the allegations of the complaint whether the discovery was within that period.*"

[2, 3] Tested by the rules set down in the cited cases, we are of the view that the complaint in the case at bar is deficient and that the trial court therefore properly sustained the demurrers thereto. It may be conceded that the present complaint satisfies the first two requirements above enumerated, in that it alleges that the fraud was *discovered* within three years of the commencement of suit and that it was committed under such circumstances as to preclude any presumption of knowledge on plaintiff's part at the time of its commission. But, as already indicated, the cases recognize and declare the existence of a third essential to a valid and proper pleading in a case of this character, viz., an allegation as to the circumstances surrounding the discovery of the fraud complained of. Such an allegation is necessary in order that the trial court might readily determine whether or not the facts and circumstances leading to the discovery of the fraud existed for more than three years prior to the commencement of suit. It is well settled, of course, that the means of knowledge are the equivalent of knowledge. Victor Oil Co. v. Drum, supra; Lady Washington C. Co. v. Wood, supra; Bancroft v. Woodward, 183 Cal. 99, 108, 190 P. 445, 449. As stated in the case last above cited: "Where a party has knowledge of facts of a character which would reasonably put him upon inquiry, and such inquiry, if pursued, would have led to a discovery of the fraud or other ground for rescission, he will be charged with having discovered the fraud or other ground as of the time he should have discovered it; that is, as of the time when he would have discovered it if he had with reasonable diligence pursued the inquiry when he should have done so."

In the instant case the only allegation touching the third requirement, the circumstances surrounding the discovery of the fraud is that it was "not known or discovered by the stockholders of the corporation or the present directors *until an investigation of the affairs of the corporation was made by the present directors on or about August 1, 1928, which revealed the said facts.*" For all that appears on the face of the complaint, the facts leading to the inquiry and investigation which uncovered the fraud may have been available to the present board of directors for more than three years prior to the institution of this action. In other words, if, as alleged, an investigation of the affairs of the corporation in 1928 uncovered the fraud complained of, it is entirely conceivable that a similar investigation undertaken prior to the running of the statute might have likewise disclosed such fraud. It was incumbent upon plaintiff to allege the circumstances of the discovery in order that the trial court might determine whether or not the information prompting and leading to the investigation was available to plaintiff for more than three years prior to the institution of this action. The complaint here utterly fails to allege any facts showing why such investigation was not made at an earlier date and, if sooner made, why it would not have disclosed the fraud prior to the running of the period of limitations. True, the complaint alleges the secretive character of the fraud and conspiracy, but if, as alleged, an investigation disclosed the same in 1928, it was for the plaintiff to show why it could not have been discovered earlier. Any other conclusion would permit a defrauded party, having at all times the means of knowledge at his disposal, to complain of such fraud long after the running of the period of limitations by the simple expedient of alleging that an investigation within three years of the commencement of suit uncovered the fraud. This would place a premium on dilatory tactics and would relieve a party of exercising that diligence required by the law.

We find nothing in Victor Oil Co. v. Drum, supra, relied on by plaintiff, that is opposed to the conclusion here announced. As quoted in the plaintiff's opening brief herein, the complaint in the Victor Oil Company Case alleged "that said defendants concealed from plaintiff and from all subscribers for stock of plaintiff, other than themselves, at all times during the transaction aforesaid, and at all other times herein mentioned, the existence of a conspiracy and confederation as

above alleged and the existence of their aforesaid agreement to divide the sum of $5,000 cash and said 50,000 shares of said purchase price between the defendants and the fact that George Coffin et al. had an interest adverse to plaintiff in the sale of land as hereinabove stated. That plaintiff had no information or knowledge of said conspiracy or agreement * * * or said secret profits or of the division of profits between defendants until the month of December, 1913." The decision in that case supports rather than undermines our disposition of the present case, for there, as here, it was intimated that the complaint was defective because of its failure to allege the circumstances of the discovery of the fraud. However, inasmuch as the point had *not* there been raised by demurrer, and the defect had been cured by the evidence adduced upon the trial of the cause, it was held that the defendants had not been misled by the insufficiency of the complaint in this particular. The decision states: "As to the third requirement, that the circumstances of the discovery be shown, the complaint contains nothing, and it may well be that it was defective in this respect. But the evidence makes it plain that the circumstances under which it was discovered, a revelation of the facts by Drum after an investigation had been set on foot by the then officers of the plaintiff, *did not involve a knowledge of facts upon which the plaintiff could be charged with a discovery prior to the three-year statutory period.* The defendants were not misled by the defect of the complaint, and the situation is therefore one where the pleading perhaps is technically lacking, but where there is no lack in the evidence and the opposite party was not misled. In such a situation the error, if there was one, was not prejudicial and is not ground for a reversal."

Plaintiff can derive but little comfort from Lightner Min. Co. v. Lane, 161 Cal. 689, 120 P. 771, 774, Ann. Cas. 1913C, 1093, for, unlike the present case, the point now under discussion was not raised by demurrer. The gravamen of that action was an *underground* trespass upon plaintiff's mine. The cause came before the court on its merits. After reviewing the evidence, it was concluded that "the plaintiff did not discover the trespass, nor did it have any reasonable means of making such discovery, until June 1, 1901, when its own workings encountered the wrongful excavation of the defendants." The present case is before us on demurrer to the complaint. In the absence of the necessary and material allegation reciting the circumstances surrounding the discovery of the fraud, we cannot say that reasonable means of making such discovery were not available to the plaintiff for more than three years prior to the commencement of this suit.

In Original M. & M. Co. v. Casad, supra, sufficient was alleged, including the circumstances under which the fraud was discovered, to warrant the conclusion that the facts pleaded, if sustained by the evidence, were adequate in law to excuse the plaintiff therein for failure to earlier discover the fraud complained of.

[4] What we have said makes it unnecessary for us to consider the other grounds of demurrer. Whether the defect in the second amended complaint could be cured by amendment, and whether the court below abused its discretion in sustaining the demurrers without leave to amend, are questions with which we need not concern ourselves. The fact that a demurrer is sustained without leave to amend does not constitute reversible error in the absence of a request or application by the plaintiff for permission to amend. Haddad v. McDowell, 213 Cal. 690, 692, 3 P.(2d) 550, 552; Philbrook v. Randall, 195 Cal. 95, 105, 231 P. 739; Barker v. Freeman, 85 Cal. 533, 535, 24 P. 926. Plaintiff in the case at bar did not request or make application for permission to amend.

The judgment is affirmed.

We concur: LANGDON, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; TYLER, Justice pro tem.

PRESTON, J.

I dissent.

I think the complaint sufficient.

216 Cal. 787

CONSOLIDATED RESERVOIR & POWER COMPANY (a Corporation), Plaintiff and Appellant, v. William M. BOWEN, Executor of the Estate of James G. Scarborough, Deceased, et al., Defendants and Respondents.

L. A. 11532.

Supreme Court of California.

Nov. 23, 1932.

In Bank.

Appeal by plaintiff from an order of the Superior Court of Los Angeles County, Marshall F. McComb, Judge, sustaining demurrers without leave to amend in an action for damages for fraud.

Prior decision 9 P.(2d) 525.

James Farraher, of Los Angeles, for appellant.

Lawler & Degnan and Scarborough & Bowen, all of Los Angeles, for respondents.

PER CURIAM.

This is an appeal from a judgment entered upon an order sustaining demurrers to the complaint without leave to amend.

The facts here involved, and the complaint and demurrers, are, in all material respects similar to those involved in the case of Consolidated Reservoir & Power Company v. Robert R. Scarborough (Cal. Sup.) 16 P.(2d) 268, this day decided. For the reasons set forth in the opinion in that case, it is hereby ordered that the judgment herein appealed from be and same is affirmed.

I dissent: PRESTON, J.

126 Cal.App. 510

Caleb G. CULLEN, Petitioner, v. The BOARD OF EDUCATION, etc., et al., Respondents.

Civ. 8695 (1–2).

Supreme Court of California.

Nov. 28, 1932.

In Bank.

Application for writ of mandate prayed to be directed to the Board of Education, City and County of San Francisco, to compel reinstatement of petitioner as a teacher in evening high school. Writ granted.

On application for hearing.

Hearing denied.

For opinion of District Court of Appeal, see 15 P.(2d) 227.

Andrew F. Burke, of San Francisco, for petitioner.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for respondents.

PER CURIAM.

The petition for hearing is denied.

In denying a hearing, however, we withhold approval from that portion of the opinion of the District Court of Appeal which holds that the two employments of petitioner constitute but one position.

126 Cal.App. 514

Edgar S. ANDERSON, Petitioner, v. The BOARD OF EDUCATION, etc., et al., Respondents.

Civ. 8696(1–2).

Supreme Court of California.

Nov. 28, 1932.

In Bank.

Application for writ of mandate prayed to be directed to the Board of Education, City and County of San Francisco, to compel reinstatement of petitioner as principal of an evening high school. Writ granted.

On application for hearing.

Hearing denied.

For opinion of District Court of Appeal, see 15 P.(2d) 774.

Andrew F. Burke, of San Francisco, for petitioner.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy, both of San Francisco, for respondents.

PER CURIAM.

The petition for hearing is denied.

In denying a hearing, however, we withhold approval from that portion of the opinion of the District Court of Appeal which holds that the two employments of petitioner constitute but one position.

CHUTUK et al. v. SOUTHERN CALIFORNIA GAS CO. et al.*

Civ. 7489.

District Court of Appeal, Second District, Division 1, California.

Nov. 23, 1932.

Hearing Granted by Supreme Court Dec. 27, 1932.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

On rehearing.

Rehearing denied.

For former opinion, see 15 P.(2d) 782.

Albert J. Sherer and Earl E. Howard, both of Los Angeles, for appellants.

Thomas J. Reynolds and L. T. Rice, both of Los Angeles, for respondent Southern California Gas Co.

PER CURIAM.

By the petition for rehearing herein it appears that, although the only witness who testified with reference to the matter stated that the service pipe in question "was located one foot east of the property line," by reference to an exhibit on file (to which the attention of this court was not heretofore directed by either of the parties to the appeal), for the first time it now appears that, when installed, instead of the service pipe having been one foot east of the property line, it was one foot west thereof. But from the exhibit it does not appear at what point the capped riser was placed at the time the gas service was discontinued. It is clear that at least it was a few inches outside the building. However, even

*For subsequent opinion see 23 P.2d 285.

assuming that the contents of the exhibit, rather than the direct statement of the witness, correctly indicates the location of the riser, the conclusion regarding the liability of the defendant is unaffected thereby.

The petition for a rehearing is denied.

127 Cal.App. 616

GARRISON v. BLANCHARD et al.

Civ. 8647.

District Court of Appeal, First District, Division 2, California.

Nov. 22, 1932.

Rehearing Denied Dec. 22, 1932.

Hearing Denied by Supreme Court Jan. 20, 1933.

1. Judgment ⇐12, 486(2).

Judgment rendered against party who was dead when action was commenced is void and may be collaterally attacked.

2. Judgment ⇐489.

Neither doctrine of laches nor statute of limitations applies to collateral attack upon judgment void because of want of jurisdiction.

3. Descent and distribution ⇐90(2).

Full knowledge of claims of others to property involved, or facts sufficient to put him on inquiry, was essential to impute laches to heir.

4. Judgment ⇐12.

Where death of defendant in suit to quiet title before commencement thereof was established by admissions of pleadings, stipulations, and findings, judgment quieting title was void.

5. Judgment ⇐489.

There is no time limiting collateral attack on void judgment.

6. Mortgages ⇐538.

Decree of foreclosure and judgment quieting title, valid on face, but void because defendant in actions was dead when actions were commenced, could not be collaterally attacked as against bona fide purchasers of property involved.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Suit by Charles C. Garrison, administrator of the estate of Charles Seaton, deceased, against Josephine Blanchard, Flora Ellis, and others, in which defendants filed a cross-complaint. From a judgment quieting the title of cross-complainant, Flora Ellis, against the claims of plaintiff, plaintiff appeals.

Affirmed.

Arthur C. Fisher and John C. Packard, both of Los Angeles, for appellant.

John H. Miller, of San Francisco, and Sparling & Teel, of Los Angeles, for respondents.

GRAY, Justice pro tem.

In this action, commenced by appellant to quiet title to real property located in the city of Los Angeles, respondent Flora Ellis recovered judgment, decreeing that she was the owner of such property and quieting her title thereto against appellant's claims. On this appeal from that judgment all parties are in accord as to the facts, which are established by stipulations, judicial records, and uncontroverted testimony, but differ seriously as to their legal effect. Chronologically these facts are as follows:

On his death, at Indianapolis, Ind., on March 11, 1910, Charles Seaton owned the property, then an unimproved lot, having acquired title by a grant deed dated October 17, 1888, for an expressed consideration of $275. As his sole heir, he left an adult son, S. M. Seaton, residing in the same city and knowing of his father's title to the property. Thirteen years after, to wit, on April 23, 1923, Southern California Bond & Finance Corporation, as plaintiff, commenced an action to foreclose a street assessment lien against the property, naming Charles Seaton as defendant. Such defendant was served by publication of summons, and his default was entered on September 27, 1923. The property was sold for $80.11 on January 21, 1924, to the same plaintiff under a decree of foreclosure, entered October 24, 1923. This purchaser conveyed, by a grant deed, reciting a valuable consideration and dated March 31, 1925, the title to the defaulting defendant Josephine Blanchard, the wife of the corporation's president. She, on April 22, 1925 (over fifteen years after his death), filed a complaint against Charles Seaton, as defendant, to quiet her title to the property. His default, based upon an affidavit of personal service, was entered and, on May 14, 1925, a judgment, quieting her title was granted. The decree of foreclosure and judgment quieting title each appeared regular and valid upon their faces. Thirteen days later, Johephine Blanchard and her husband conveyed the property to respondent, C. E. Rawson, in consideration of a mortgage thereon for the full purchase price of $2,500. Immediately thereafter Rawson commenced the construction on the property of a residence of the reasonable value and cost of $7,500 and, upon its completion, to wit, on September 18, 1925, sold the property, so improved, to respondent Flora Ellis for $12,500, of which $2,500 was represented by said mortgage, subsequently fully paid by her. Each respondent, at the time of his or her purchase,

procured an unlimited certificate of title, from a title insurance company, showing that title to the property, as appearing from the records of Los Angeles county, was vested in his or her seller. Possession of the property, at the time of each sale, was also consistent with the record title.

On May 17, 1926 (more than a year after the granting of the decree quieting title), upon nomination of S. M. Seaton (deceased's son and sole heir), T. C. Gould was appointed special administrator of the estate of Charles Seaton, qualified upon the same day, and continued to so act until the appointment and qualification of appellant as general administrator of the estate, on September 6, 1928. On the day of his appointment, the special administrator was, by ex parte order, substituted as defendant in the quiet title action, and served, upon plaintiff's attorney in that action, notice of motion to vacate the default decree upon the grounds that, since Charles Seaton had died on March 11, 1910, prior to the filing of the complaint, he had not been served personally, as alleged in the affidavit of service and that such decree was null and void. After a hearing, in which both parties were represented by their attorneys, and at which such death was established without conflict, the court granted such motion on May 27, 1926. Thereafter the special administrator filed an answer, a trial was had and, on April 26, 1928, appellant recovered judgment, quieting the estate's title to the property. Neither respondents were notified of the motion or trial, nor were made parties thereto nor participated therein nor had knowledge thereof. The complaint in the present action was filed on May 19, 1926, but when respondents were served does not appear, although Flora Ellis answered on July 20, 1926.

[1-3] The present action to quiet title is a collateral attack upon the judgment quieting the title of Josephine Blanchard against the claims of Charles Seaton to the property. Newlove v. Mercantile Trust Co., 156 Cal. 657, 105 P. 971. A judgment rendered against a party in an action, who dies after its commencement but before the rendition of judgment is voidable and may not be collaterally attacked. A judgment rendered against a party, who died before the action is commenced, is void and may be collaterally attacked. Hogan v. Superior Court, 74 Cal. App. 704, 241 P. 584; 33 C. J. 1107; 15 R. C. L. 619 et seq.; notes 126 Am. St. Rep. 622, 49 L. R. A. 153; Black on Judgments, § 203. In an action to foreclose a lien upon the estate of a deceased ward, where the record settling the guardian's account showed that notice thereof was given by posting, evidence is admissible to show that the legal representative of the ward's estate was not in existence to receive notice during a necessary part of the ten days required. Livermore v. Ratti, 150 Cal. 458, 89 P. 327. The reception of such evidence constituted a collateral attack upon the order of settlement. If a corporation ceased to exist, because of dissolution (Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P. 335), or forfeiture of charter (Llewellyn Iron Works v. Abbott Kinney Co., 172 Cal. 210, 155 P. 986; California Nat. Supply Co. v. Flack, 183 Cal. 124, 190 P. 634), before the commencement of the action, a judgment against it is a nullity and may be collaterally attacked. Neither the doctrine of laches nor the bar of the statute of limitations has any application to a collateral attack upon a judgment void because of want of jurisdiction. Estate of Pusey, 180 Cal. 368, 181 P. 648. Nor can a dead man be charged with laches, for how could he have notice or knowledge of the facts which required action on his part or further, how could he act? Crossman v. Vivienda Water Co., supra. As to the deceased's sole heir, the record discloses an unexplained delay of over sixteen years in procuring the administration of his father's estate in this state, but is silent as to his knowledge or notice of the claims of Josephine Blanchard to the property. Full knowledge of the facts or of sufficient facts to put him on inquiry is an essential element to the imputation of laches to such heir. 10 Cal. Jur. 528. The case of Akley v. Bassett, 189 Cal. 625, 209 P. 576, where laches was held to bar relief from a judgment void, for lack of jurisdiction, is distinguishable because there the attacking party, while a minor, had been personally served with summons, although no service had been made upon her parent, guardian or other person designated by section 411 of the Code of Civil Procedure, and with full knowledge of the facts, had acquiesced for seventeen years after majority.

[4, 5] Relying upon the facts that the judgment quieting title appears valid on its face, since jurisdiction was apparently acquired of the deceased by a purported personal service of summons, respondents invoke the rule that, since recitals as to jurisdiction are conclusive on collateral attack, a judgment valid on its face cannot successfully be so attacked. The cases enunciating this rule were concerned with judgments, in which there was a living party of whom the court could have acquired jurisdiction, but of whom it only acquired apparent but not actual jurisdiction because of lack of service of process or unauthorized appearance of an attorney. Because of the death of Charles Seaton, before the action's commencement, there was no defendant over whom the court could acquire or exercise jurisdiction. Assuming, however, that such judgment was not subject to collateral attack, if objected to, yet since the death was established by the admissions of the pleadings, stipulations of the parties, and the unquestioned findings of the court, the

judgment was void. Hill v. City Cab, etc., Co., 79 Cal. 188, 21 P. 728; People v. Harrison, 107 Cal. 541, 40 P. 956; Follette v. Pacific L. & P. Corp., 189 Cal. 193, 208 P. 295, 23 A. L. R. 965; Akley v. Bassett, supra; La Paloma Land Co. v. Shannon, 89 Cal. App. 469, 265 P. 295. Although held inapplicable under the facts, this rule was recognized in Lake v. Bonynge, 161 Cal. 120, 118 P. 535, and in Smith v. Jones, 174 Cal. 513, 163 P. 890. If the judgment were not subject to collateral attack, the motion of the special administrator to vacate the judgment made over one year after its rendition came too late. Canadian, etc., Co. v. Clarita, etc., Co., 140 Cal. 672, 74 P. 301; Smith v. Jones, supra. But, as the judgment was void, the motion was properly granted, since there is no time limiting a collateral attack on a void judgment. However, the vacation of the judgment and the subsequent entry of another judgment quieting appellant's title are false quantities in the present action because those proceedings were had after respondents' acquisition of title without notice thereof and further because the same matters were relitigated in the present action.

[6] Under the undisputed facts, it must be taken as true that both respondents Rawson and Ellis were each bona fide purchasers for value without knowledge or notice of the title of Charles Seaton or the invalidity of the title of Josephine Blanchard. No consideration has been given to this all-important factor, in what has been previously said. "As between the parties to the action, a judgment fraudulently obtained will be set aside and held for naught when the fraud is made to appear. But there would be no security in titles acquired at judicial sales if the rights of a bona fide purchaser, without notice, could be overthrown by subsequent proof that the judgment was obtained by fraud, or that the record, which showed a due service on the defendant, was in fact false. The repose of titles, and indeed every consideration of public policy, demands that a purchaser at a judicial sale, without notice, under proceedings regular on their face, and by a Court of competent jurisdiction, should be protected as against mere errors of the Court, and against secret vices in the proceedings founded on fraud, accident, or mistake, and which can only be made to appear by the proof of extrinsic facts not appearing on the face of the record. No prudent person would purchase at a judicial sale, if he incurred the hazard of losing his money, in case it afterwards should be made to appear that the judgment was obtained by perjury or other fraudulent practices, or that the record on which he relied, as proving a service on the defendant, was in fact false." Reeve v. Kennedy, 43 Cal. 643, 650. A judgment quieting title, which was obtained by a publication of summons based upon a false affidavit and complaint, but which was valid on its face, will not be vacated at the instance of the defrauded party, as against a subsequent bona fide purchaser of the land, who acquired it upon the faith of the judgment, for a valuable consideration, and without notice or knowledge of any fact tending to show fraud in procuring the judgment. Doyle v. Hampton, 159 Cal. 729, 116 P. 39. A judgment, foreclosing a mortgage, executed by an insane person, granted upon her default, after personal service of summons, but, without appointment of a guardian for her, cannot be collaterally attacked by her heirs in an action against a bona fide grantee of the mortgagee, who purchased at the foreclosure. Dunn v. Dunn, 114 Cal. 210, 46 P. 5. The superior title of an innocent purchaser, acquired in good faith and for value, under a judgment, not void on its face, as against the claims of a party, defrauded by such judgment was recognized in Stern v. Judson, 163 Cal. 726, 127 P. 38, and in Newport v. Hatton, 207 Cal. 515, 279 P. 134. While the judgments involved in the above cases were rendered against living persons rather than a dead man, as in the instant case, yet the same reasons of policy there invoked should also protect, from collateral attack, the present judgment, which is also valid on its face. Appellant should seek redress for the wrong from the parties inflicting it rather than from respondents, who did not cause or participate therein and who had a right to rely upon the judgment. Dunn v. Dunn, supra; Doyle v. Hampton, supra.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

127 Cal.App. 544

WATERFORD IRR. DIST. v. MODESTO IRR. DIST. et al.

Civ. 3794.

District Court of Appeal, Third District, California.

Nov. 18, 1932.

Hearing Denied by Supreme Court Jan. 16, 1933.

1. Waters and water courses ⊂=254.

Whether power company's contract to sell water right merged in deed thereof must be determined from instruments and parties' situation, conduct, and intention.

2. Waters and water courses ⊂=254.

Burden was on irrigation districts, purchasing power company's interest in water right, previously sold to another such district for irrigation purposes, to establish contention that vendee accepted subsequent deed in full performance of contract.

3. Waters and water courses ⇐254.

Power company being prohibited as public utility from disposing of operative property without Railroad Commission's consent, presumption is that parties to contract for sale of water right by it for irrigation purposes did not contemplate merger thereof in subsequent deed not approved by commission.

4. Waters and water courses ⇐217.

Power company and irrigation district, directed by Railroad Commission to execute deed conforming to approved agreement for sale of water right by company to district, could not depart from terms of such authority.

5. Waters and water courses ⇐217.

Irrigation district, being prohibited from accepting property, unless clearly authorized, particularly when coupled with obligation, could not accept deed not conforming to its contract to purchase water right as required by Railroad Commission's order.

6. Deeds ⇐94.

While terms of contract to convey property are merged into conveyance, contract, to conditions of which special reference is made by conveyance reciting purpose to fulfill them, may be examined to ascertain such conditions and parties' intention.

7. Waters and water courses ⇐254.

Irrigation districts, purchasing power company's interest in water right, previously sold to another such district for irrigation purposes under contract obligating company to use and pay for water not required by district, *held* obligated to pay therefor, though subsequent deed recited district's agreement to permit company to use such water; contract not being merged in deed.

8. Waters and water courses ⇐254.

Irrigation districts, assuming power company's obligations to another such district by agreement wherein company conveyed water right to them, subject to rights granted such other district by deed, given to fulfill terms of prior contract requiring company to pay for water turned back by latter district, *held* bound by such covenant.

9. Stipulations ⇐14(10).

Stipulations of counsel for parties to irrigation district's action against other such districts for breach of contract to pay for use of water that Railroad Commission approved contract for sale of water right to plaintiff, and that deed thereof was filed with commission, did not preclude plaintiff from disputing claim that deed was approved by commission.

Appeal from Superior Court, Stanislaus County; Leon R. Yankwich, Judge.

Action by the Waterford Irrigation District against the Modesto Irrigation District and another. Judgment for defendants, and plaintiff appeals.

Reversed.

Dennett & Zion, of Modesto, and Walter C. Fox, Jr., Homer Hankins, and Chickering & Gregory, all of San Francisco, for appellant.

L. J. Maddux, P. H. Griffin, and Griffin & Boone, all of Modesto, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment in favor of defendants and respondents Modesto irrigation district and Turlock irrigation district, and against plaintiff and appellant Waterford irrigation district. The action is one for damages for breach of contract arising from the failure of the defendants to pay the rental for the privilege of using the water right hereinafter referred to.

The Sierra & San Francisco Power Company was the owner of a water right to 66 second feet of the flow of the Tuolumne river, known as the La Grange ditch water right; it being subject only to an obligation of the power company to divert up to 6 second feet for a prior use for certain mining and municipal purposes. The power company was also the owner of the La Grange dam and power house, and the system of diversion through the La Grange ditch was so constructed that the 66 second feet referred to could be diverted above the dam and carried to a point above the power house, where it could be dropped through the power house for the purpose of generating electricity, or carried on to the districts for irrigation purposes.

On January 14, 1919, the Sierra Company, for the sum of $170,000, entered into a written contract with the Waterford irrigation district to sell to the district for irrigation purposes only the use of this 66 second feet for a period of 6 months of each year subject to the prior right to 6 second feet above referred to, the district being given the privilege at its option of determining within certain limits when the use of such water would begin, and, upon 30 days' notice to the Sierra Company, the district could turn back to the power company not less than 30 second feet for a period of not less than 30 days at the beginning or the ending of the 6-month period. For the rental of the water so returned, the power company agreed to pay a rate computed on the basis of one-sixth of 5½ per cent. of $170,000 for 60 second feet per month.

Pursuant to this agreement, the Waterford district took over the water rights during the irrigation season of 1919. It elected to turn back the entire 66 second feet during

a 30-day period, and the district was paid therefor by the power company at the stipulated rate.

The Sierra Company, as a public utility, could not sell, lease, or otherwise dispose of its operative property without the consent of the Railroad Commission, and on October 22, 1919, the commission approved the terms of sale as set forth in the agreement, but it was not until January 24, 1920, that a deed granting the rights covered in the agreement was finally executed and placed of record.

In 1921 the Modesto and Turlock districts acquired from the Sierra Company all its interests in and to its power house, dams, machinery, water rights, etc., including its interest in the La Grange ditch right of 66 second feet, subject to the rights of the Waterford district. One of the considerations for this agreement was the express stipulation by the Modesto and Turlock districts that they assume any and all obligations which the Sierra Company might have to the Waterford district.

In 1927 the Waterford district gave notice to the defendant districts, as successors of the Sierra Company, that it elected to turn back the water for a certain 30-day period, but the defendant districts failed to use any part of the water so turned back, and it was allowed to waste. After demand and refusal had been made, plaintiff instituted this action for the recovery of $1,558.33 as the stipulated compensation to be recovered for water turned back for such a period. The defendant districts claimed they were not obliged to pay for water turned back which they did not use, and, upon the trial of the issues so raised, the trial court adopted that as the contract of the parties, and gave judgment accordingly. The correctness of that interpretation is now before this court.

This controversy arises by reason of a difference in the wording of certain portions of the agreement and deed referred to above, and, for a clearer understanding of these differences, those portions of the two instruments relied upon by the respective parties are set forth.

That portion of section 4 of the contract which is important to this discussion is as follows:

"* * * The party of the first part (Power Company) agrees to use such water not so required, provided the water not so required shall * * * exceed thirty second feet."

(Then come the provisions regarding the notice to be given by the purchaser and the rate to be paid by the seller for the water turned back.)

"* * * Stating that it (Irrigation District) does not desire to use the water for such specified month or months, and thereupon the party of the first part shall be entitled to use such water and shall become obligated to pay the party of the second part, its successors and assigns, for the use of such water for said specified month or months at the specified rate. * * *"

The essential portions of cause 4 of the deed are as follows:

"* * * The party of the second part hereto (Irrigation District) agrees to permit the party of the first part (Power Company) to use such water for said period of time."

(Then come the provisions with regard to the notice to be given by the purchaser and the rate to be paid by the seller for the water turned back.)

"* * * stating that it does not desire to use said water for such specified month or months, and thereupon the party of the first part shall be entitled to use such water and shall become obligated to pay the party of the second part, its successors and assigns, for the use of such water for said specified month or months at the aforesaid rate. * * *"

It will be observed that the latter part of the paragraph quoted from the agreement is identical with the comparable provision of the deed. The only difference between the two quoted portions of the instruments is that in the agreement the power company agrees to use such water returned; whereas in the deed the irrigation district agrees to permit the power company to use the water not required for irrigation.

[1, 2] Let us first consider the question of merger. Whether the stipulations of the contract here in question merged in the subsequent deed is a question to be determined by an examination of the instruments, and the situation, conduct, and intention of the parties, and the burden is on the vendor to establish its contention that the vendee accepted the deed in full performance of the prior agreement.

Here we have an agreement providing for the quantity of water, its periods of use, and other terms and conditions of sufficient detail and completeness to enable the parties thereto to carry on under it for over a year, during which time considerable correspondence was carried on between the parties as to the method of operation thereunder. It was during this period prior to the execution of the deed that appellant first released to the power company some of the water it had purchased, which the power company accepted and paid for at the stipulated amount. It is true, however, as pointed out by respondents, that the water so returned was put to a beneficial use by the power company, but we do not believe that is material to a solution of the problem.

[3] The presumption must be that the parties did not contemplate a merger, for the Sierra Company, being a public utility, could not sell, lease, or otherwise dispose of any of its operative property without the consent

of the Railroad Commission. The parties appreciated the necessity of obtaining the approval, for, in the agreement, it was stipulated that it "* * * is made subject to the approval of such Commission or other public bodies of the State of California as may be necessary."

[4] In the deed is contained the following: "This deed and agreement is made with the approval of the Railroad Commission of the State of California by its order duly given and made on the 22nd day of October, 1919. * * *" The commission made no order approving the deed, and we must assume that the parties were complying with the order of the commission referred to in the agreement when they drafted the deed, and that their intention was that the deed was in accordance with the agreement as approved by the commission. If the deed is not in conformance with the agreement, it must be to that extent void. When the terms of the agreement were approved, and the parties were directed to execute a deed in conformity therewith, they were not at liberty to depart from the terms of such authority, even if they had so desired. Sierra, etc. P. Co. v. Universal Elec., etc., Co., 197 Cal. 376, 241 P. 76; Napa Valley E. Co. v. Calistoga E. Co., 38 Cal. App. 477, 176 P. 699.

[5] So, also, were the powers of the irrigation district strictly limited. It could neither dispose of its property nor accept property particularly when coupled with an obligation, unless authorized so to do by clear authority. The contract in question contained the authorization to the officers of the district to accept a deed in accordance therewith, but beyond that their authority did not extend, and, if the deed differed in any material respect from the agreement, it could not effect a merger.

[6] It is also provided in the deed that it is made in fulfillment of the obligation imposed upon it by the prior contract, which indicates the intent of the parties, and by such reference makes it proper to examine the agreement to see what terms are referred to.

"It is true that when a contract to convey is followed by a conveyance the terms of the contract are merged into the conveyance and the latter becomes the measure of the rights of the parties. Bryan v. Swain, 56 Cal. 616, 617. But, when the conveyance makes special reference to the conditions of the contract and recites that it is made for the purpose of fulfilling the same, it is proper to examine the contract to see what conditions are referred to. But in any event the contract gave the right to select the lots after the land had been deeded to the company and platted for sale. This contract was valid when made because the company was not then a public utility. The subsequent deeds to the original owners were merely evidence of the company's recognition of its contractual obligation. The original contract was admissible to show the intention of the parties." Newell v. Redondo Water Company, 55 Cal. App. 86, 202 P. 914, 916.

[7] As previously noted, the agreement provides that the power company agrees to use such water not so required, followed by the further condition "and (Power Company) shall become obligated to pay * * * for the use of such water."

The deed recites that irrigation district "agrees to permit party of the first part to use such water," followed by the same condition as in the agreement, "and (Power Company) shall become obligated to pay * * * for the use of such water."

It appears from the testimony that until the season of 1927 the power company had paid for the water so released, as had also the successor in interest, Pacific Gas & Electric Company, and the defendant irrigation districts as assignee of the rights of the power company, although it also appears that it was not until 1927 that the water was allowed to spill back into the river instead of being put to use by any of the parties.

It is also of some force, as bearing upon the contention of appellant, that, if respondents were to accept or refuse the proffered water at their option, it would not then have been necessary to insert in the agreement and deed the provisions that the district must release the water in periods of not less than 30 days, either at the beginning or ending of the irrigation season, and that the amount so released should exceed 30 cubic feet per second, and that the basis of compensation of the amount so to be paid for such use was one-sixth of 5½ per cent. of the purchase price, i. e., $170,000 for the use of 60 second feet of water for a period of one month, and that the appellant would give respondents at least 30 days' prior notice of its election not to use such water, all of which detailed provisions, it would seem, would be unnecessary if the respondents had the option of using the water or allowing it to waste, for, if they had the option of accepting or rejecting the proffered water, it would need no elaborate formula as to the price of water, because the parties could bargain as to the amount of water and the value thereof upon each occasion of its release. It would also seem reasonable that, if respondents could accept or reject the water at their option, there would be some provision in the contract between the parties whereby respondents would be required to notify appellant of their election either to use and pay for the water or to allow it to go unused.

The reasonable construction to place upon the contract, we believe, is that the power company agreed to use the water not required by the district for irrigation, in consideration of the district restricting its use solely

to irrigation, thereby eliminating itself as a competitor in the field of electric power, and that the power company would therefore pay its proportion of the carrying charge during the time the district did not need the water for irrigation. Inasmuch as the deed was made in fulfillment of the obligations imposed by the contract, which was approved by the order of the Railroad Commission, in October, 1919, three months before the execution of the deed, we must hold there was no ambiguity in the agreement or deed and that the respondents are obligated thereunder to pay for the water not required by appellant.

[8] Respondents admit that, as successors in interest of the Sierra Company, they are liable to perform the obligations imposed by the deed, but deny that they are bound by any additional covenants which may be found in the contract. This position is based upon the language of the assumption of the obligations of the Sierra Company. The assumption is an agreement between respondents and the Sierra Company wherein certain water rights are conveyed, including the La Grange water right, which is conveyed subject to "the right granted by the Sierra Company * * * by deed bearing date January 24, 1920. * * *" On the other hand, the respondents herein covenanted to assume "all the obligations of the Sierra Company and the Pacific Company with respect to the said Waterford Irrigation District. * * *"

If the latter blanket assumption is not sufficient, nevertheless, the narrow construction of respondents by reference to the deed of January 24, 1920, will not avail them, for in the deed direct reference is made to the prior contract, and they are placed on notice as to the terms of the agreement in partial fulfillment of which the deed was given.

It was said in Newell v. Redondo Water Company, supra: "But, when the conveyance makes special reference to the conditions of the contract and recites that it is made for the purpose of fulfilling the same, it is proper to examine the contract to see what conditions are referred to."

The correspondence in evidence between the parties had prior to the execution of the deed shows a familiarity by the respondents of the terms of the agreement, and the fact that for a year prior to the deed the water was diverted under the agreement and transported through the canals of the respondents brings to them actual notice of the existence of the agreement.

[9] Respondents urge that certain stipulations entered into between counsel for the respective parties during the action preclude appellant from disputing the claim that the deed was approved by the Railroad Commission, but a reading of the record shows that what the parties agreed to was that the Railroad Commission made an order approving the contract, and that the deed, when executed as provided in the contract, was to be filed with the Railroad Commission, and that the deed was so filed.

Respondents also contend that, inasmuch as appellants, in a prior action between the parties and others to quiet title to the water here in question, set up and relied upon the validity of the deed here before us, and also in the present action that appellant pleaded the due execution of the deed and contract, raised an estoppel against appellant on the question of the validity of the deed, so far, at least, as the authorization by the Railroad Commission is concerned. But appellant is not attacking the validity of the deed, but is here defending that instrument, claiming that it is in conformity with the contract and the previous order of the Railroad Commission.

For the reasons given, we believe that the agreement and the deed were not merged; and that the respondents are obligated to pay for the water released by appellant in accordance with the terms of the contract. Therefore the judgment is reversed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

127 Cal.App. 629

DODDS v. GIFFORD.

Civ. 4615.

District Court of Appeal, Third District, California.

Nov. 22, 1932.

1. Appeal and error ⇐854(6).

Appellate court will not review granting of new trial on doctrine trial judge abused discretion, where new trial was granted solely for errors of law.

2. Appeal and error ⇐977(3).

New trial ⇐6.

Granting of new trial is largely discretionary with trial court, and will not be disturbed in absence of abuse of discretion.

3. Negligence ⇐12.

Rule that person faced with sudden peril need not exercise same degree of care as one having time to exercise judgment applies only when emergency is not brought about by such person's own negligence.

4. Automobiles ⇐246(21).

Instruction in guest's suit against host that person faced with sudden peril need not

exercise same care as one having time to exercise judgment *held* misleading (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

Such instruction was misleading, where guest contended that host was negligent in failing to inspect the highway on the left-hand side for vehicles before turning out to pass automobiles ahead, and that it was such negligence that placed her in peril on the wrong side of the highway.

5. Automobiles ⇐246(36).

Instruction that guest could not recover against host if host drove at high speed, if guest could have objected, but failed to do so, and if speed contributed to accident, *held* erroneous (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

Such instruction was erroneous because it was based upon the hypothesis that the automobile was running at a high speed, while the evidence showed its speed was not over 30 miles per hour, and because it omitted the question as to whether the speed was so high as to require guest to protest.

6. Automobiles ⇐168(1).

Automobile's high rate of speed is not necessarily unlawful.

7. Automobiles ⇐245(40).

Whether automobile was running at such high speed as to require guest passenger to protest *held* for jury (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

8. Appeal and error ⇐1064(1).
Automobiles ⇐246(36).

Instruction guest could not recover against host if host attempted to pass cars ahead, and guest appreciated danger in time to have objected, or to have speed reduced, *held* misleading and prejudicial (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

Such instruction was misleading and prejudicial because it failed to specify any act or omission of the host which was assigned as dangerous, and did not even assume automobile was traveling at high speed, and omitted guest's contention that host failed to look for approaching cars before attempting to pass line of cars ahead.

9. Automobiles ⇐245(2).

Whether act or omission of motorist constituted negligence should be left to jury.

10. New trial ⇐39.

Where instructions were erroneous and prejudicial court must grant new trial if instructions resulted in miscarriage of justice (Const. art. 6, § 4½).

11. New trial ⇐39.

Trial court is invested with reasonable discretion in determining whether erroneous instructions result in miscarriage of justice (Const. art. 6, § 4½).

12. New trial ⇐39.

Granting new trial for giving of erroneous instructions *held* not abuse of discretion (Const. art. 6, § 4½).

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Mrs. S. C. Dodds against Myrine Gifford. Judgment was rendered for defendant. From an order granting a new trial, defendant appeals.

Affirmed.

Myrick & Deering and Scott and J. J. Harrington, all of San Francisco, for appellant.

H. K. Landram, of Merced, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from an order granting a new trial in a suit for damages in an automobile casualty case, after a judgment had been rendered in favor of the defendant.

The plaintiff was riding as a guest with the defendant, who was operating her own car. They were driving southerly along the state highway between Delhi and Atwater. It was a clear evening in November. The automobile lamps were lighted. The highway was straight and level. They were trailing a truck and two other machines which were traveling at a rate of fifteen or twenty miles an hour. Both parties were familiar with the roadway in that vicinity. They were friends. The plaintiff had no occasion to question the defendant's ability as a cautious driver. The plaintiff neither possessed nor assumed control over the operation of the machine. The defendant attempted to pass the machines which were proceeding ahead of her car. No automobile lights were observed approaching on their left-hand side of the paved highway. Turning to her left, the defendant had traveled a distance equivalent to two or three city blocks without being able to pass the preceding cars, when suddenly she came upon the abutments of a concrete bridge, which she had not previously seen. There was room to pass the machines on this bridge, but the space was scant, and the defendant brought her car to a standstill within a few feet of the bridge. Almost immediately after the defendant had stopped her machine, an automobile driven by one Canisso, approaching from the south crashed into her car in a head-on collision. The defendant admitted she was so intent on watching the truck and other machines on her right-hand side that she did not observe the approaching machine until the collision occurred. The plaintiff sustained

severe personal injuries as a result of the accident.

Suit for damages was instituted against the defendant for gross negligence under the provisions of section 141¾ of the California Vehicle Act (as added by St. 1929, p. 1580), as it then existed. The operator of the other machine which was involved in the collision was not a party to the action. The answer charged the plaintiff with contributory negligence. The cause was tried with a jury. A verdict was rendered in favor of the defendant. A motion for new trial was granted. From the order granting a new trial, the defendant has appealed. In support of this order, the respondent contends that the new trial was properly granted on account of error which was committed in giving to the jury certain prejudicial instructions at the request of the defendant.

[1, 2] Where a motion for new trial is made solely upon the ground of errors of law, and it is granted on that theory, a court of appeal will not review the cause on the doctrine that a mere discretion of the trial court has been abused. Cochran v. O'Keefe, 34 Cal. 554. The general rule, except in the mere consideration of questions of law, is that the granting of a new trial is largely discretionary with the trial court, and the order will not be disturbed in the absence of a clear abuse of discretion. 2 Cal. Jur. 905, § 533; Peri v. Culley, 119 Cal. App. 117, 6 P.(2d) 86. In the present case the motion for new trial was made upon the ground of "insufficiency of the evidence to support the judgment," as well as for errors of law. The minute order of court granting the new trial recites that it is based upon the giving of erroneous instructions. Having determined as a matter of law that the giving of certain instructions was erroneous, it became the duty of the court to deny the motion for a new trial, unless, in the opinion of the court these erroneous instructions resulted in a miscarriage of justice. The granting of a new trial necessarily infers that the court, in its discretion, assumed that the erroneous instructions did cause a miscarriage of justice. This result could be determined only by applying the erroneous instructions to the facts as they appear in the record. This involved the exercise of a discretion on the part of the trial court.

We are of the opinion that certain instructions which were given by the court at the request of the defendant, are prejudicially erroneous, and that a new trial was therefore properly granted. The following instruction was given to the jury: "Where a person is placed suddenly in a position of peril without sufficient time to consider all the circumstances, the law does not require of him the same degree of care and caution as it requires of a person who has ample opportunity for the full exercise of his judgment and reasoning faculties."

[3, 4] This instruction respecting the reasonableness of the conduct of one who is suddenly confronted with imminent danger lacks one very essential element. In an emergency one may be relieved of the application of the general rule of conduct which would ordinarily constitute negligence only when the emergency is not brought about by his own lack of reasonable care. 19 Cal. Jur. 598, § 36; Graves v. Kern County Transp. Corp., 112 Cal. App. 261, 271, 296 P. 902. In the case last cited it was held that an instruction similar to the one which was given in the present case was fatally defective because it omitted the qualifying provision that the rule does not apply to one who brings the peril upon himself by his own lack of care. The foregoing instruction which was given to the jury in this case is misleading because the plaintiff contended that the defendant was guilty of negligence in failing to inspect the highway on her left-hand side for approaching vehicles before she turned out from behind the machines which preceded her automobile; that it was the negligence of the defendant which placed her in peril on the wrong side of the highway. This instruction was therefore erroneous and prejudicial.

[5] The jury was also instructed at the request of the defendant that, "if you should find that the defendant, the driver of the automobile in which plaintiff was riding, was driving it at a high rate of speed, and if you also find that the plaintiff knew of that fact in time to have objected and to have left the automobile, or to have the speed reduced to a lawful rate prior to the accident, and if you further find that she made no objection to the speed and made no request to be permitted to leave the automobile, and if you find that the accident was proximately caused in whole or in part by such unlawful rate of speed, then I instruct you that the plaintiff is not entitled to recover any damages from defendant, and your verdict must be in the defendant's favor."

[6, 7] This instruction is also erroneous. It is based upon the hypothesis that the machine was running at a high rate of speed. It reads, in that regard: "If you should find that the defendant * * * was driving at a high rate of speed, * * * your verdict must be in the defendant's favor." The evidence shows the defendant's machine was traveling not more than twenty-five or thirty miles an hour in attempting to pass the other automobiles. It may not be said as a matter of law that an automobile which is running only twenty-five or thirty miles an hour is traveling at such a high rate of speed as to become so dangerous that a passenger is necessarily required to warn the driver against carelessness. It is apparent that a high rate of speed is not necessarily unlawful or dangerous. The question as to whether the machine was running at a dangerous rate of

speed, or at such a high rate of speed as to require the plaintiff to protest, was a problem for the determination of the jury. The instruction omits this necessary element. It is fatally defective.

[8, 9] A similar instruction was likewise given in which the jury was directed to render a verdict in favor of the defendant "If you should find that the defendant * * * attempted to pass a line of cars, * * * and if you find also that the plaintiff knew of the facts and appreciated her danger in time to have objected, or to have the speed reduced." This instruction fails to specify any act or omission of the driver of the machine which is assigned as dangerous. It does not even assume that the automobile was traveling at a rapid rate of speed. The plaintiff's contention that the defendant failed to look for approaching cars before she attempted to pass the line of cars, is not even suggested in this instruction. The question as to whether any particular act or omission on the part of the driver constituted negligence should be left for the exclusive determination of the jury. This instruction is misleading and prejudicial. A similar instruction which was given in the case of Dowd v. Atlas T. & A. Service Co., 187 Cal. 523, 202 P. 870, was held to be erroneous.

These are formula instructions which omit essential elements necessary to a full recitation of hypothetical facts upon which a court is warranted in directing a verdict. Such instructions have been repeatedly condemned by the Supreme Court. Douglas v. Southern Pacific Co., 203 Cal. 390, 264 P. 237; Robinet v. Hawks, 200 Cal. 265, 272, 252 P. 1045; Pierce v. United Gas & Electric Co., 161 Cal. 176, 184, 118 P. 700.

[10-12] Since these instructions were erroneous and prejudicial, it was the duty of the court to grant a new trial if the judge was satisfied they resulted in a miscarriage of justice. The question as to whether instructions are erroneous is a pure problem of law. The question as to whether erroneous instructions result in a miscarriage of justice depends upon their application to the facts of the particular case as they are disclosed by the record. In determining whether erroneous instructions result in a miscarriage of justice, the trial court is invested with a reasonable discretion. Section 4½ of article 6 of the Constitution provides that a new trial shall not be granted on account of misdirection of the jury, "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." The granting of a new trial for the giving of erroneous instructions necessarily infers that the trial court in the exercise of its discretion determined that these instructions did result in a miscarriage of justice. It does not appear this discretion was abused in granting the new trial. This court is therefore powerless to interfere with the ruling of the trial judge in that regard.

The order granting a new trial is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

127 Cal.App. 583

WHITTAKER v. E. E. McCALLA CO.

Civ. 8769.

District Court of Appeal, First District, Division 1, California.

Nov. 21, 1932.

1. Pleading ⇐428(6).

Order excluding evidence on ground amended complaint failed to state cause of action *held* equivalent to order sustaining general demurrer.

2. Pleading ⇐17.

Matters of substance must be alleged in direct terms and not by way of recital or reference, much less by exhibits merely attached to pleadings.

3. Vendor and purchaser ⇐123.

Allegation that, as part of consideration, vendor agreed to install certain improvements, and that he failed to do so, *held* sufficient to raise issue.

Allegations that vendor agreed to install water, gas, electricity, oiled and graveled streets, concrete curb and gutter, but failed to do so, were sufficient as against contention that complaint was fatally defective because it contained no allegation that real property was part of subdivision being improved by vendor, and that the improvements were a part of general improvement scheme, or that it was an individual lot on which such improvements would be necessarily installed by public authority and for which the vendor was to pay the cost of installation.

4. Vendor and purchaser ⇐123.

Allegation that purchaser discovered vendor's breach on October 15, 1929, and that notice of rescission was given on October 26, 1929, *held* to raise issue of diligence in rescinding contract.

5. Vendor and purchaser ⇐116.

Although purchaser seeking to rescind merely had contractual right to obtain interest in land, tender of quitclaim deed *held* sufficient offer to return benefits received.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

6. Vendor and purchaser ⊂⊃123.

Complaint of purchaser seeking to rescind for vendor's failure to perform obligation to install improvements *held* to state cause of action.

Complaint alleged contract between parties, statement of conditions to be performed by vendor, failure to perform such conditions, date of discovery of breach, date of service of notice of rescission, together with offer to return everything of value received by purchaser, that purchaser had fully performed, statement of amount paid on contract, and demand for its return.

7. Courts ⊂⊃472(6).

Superior Court, and not Los Angeles municipal court, *held* to have jurisdiction of suit to rescind realty purchase contract and recover $528.62 paid thereon.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Samuel Whittaker, also known as S. Whittaker, against the E. E. McCalla Company. Judgment for defendant, and plaintiff appeals.

Reversed and remanded for trial.

Garner White, of Inglewood, for appellant.

C. E. McDowell, of Los Angeles, for respondent.

BURROUGHS, Justice pro tem.

[1] This is an action to rescind a contract for the purchase and sale of real property. When the cause was called for trial on the issues of fact joined by the pleadings, the court, upon the objection of the defendant, refused to allow the plaintiff to introduce any evidence, on the ground that the amended complaint failed to state facts sufficient to constitute a cause of action. Such ruling was equivalent to an order sustaining a general demurrer. Moore v. Douglas, 132 Cal. 399, 64 P. 705; Spaeth v. Ocean Park, etc., Inv. Co., 16 Cal. App. 329, 116 P. 989. Judgment was thereupon entered that the plaintiff take nothing by his action, and defendant recover its costs. The plaintiff has appealed.

Two questions are presented for consideration: Does the amended complaint state a cause of action, and, if so, had the superior court jurisdiction of the action? Among other matters, it is alleged in the amended complaint that on or about January 5, 1928, the defendant agreed to sell, and the plaintiff to buy, a tract of land, being lot 133, tract 10259, Book 151, pages 73 to 78, inclusive, Map Records of Los Angeles county, in accordance with a certain agreement which is attached to the complaint. It is further alleged that said agreement provides: "It is understood and agreed by the buyer and seller that the purchase price of the property described in this agreement for sale of real estate, includes the following improvements: water, gas, electricity, oiled and graveled streets, concrete curb and gutter on outside of streets." It is further alleged: "That none of the aforementioned improvements, except electricity, have been installed on the property described herein pursuant to said contract, or adjacent to the property so that it may be of use in connection with the property described herein." It is further alleged that before the filing of the complaint, to wit, on or about October 26, 1929, a rescission of the contract was served on the defendant; a copy of the notice of rescission being attached to the said complaint. From this notice appears the breach of the agreement as above pleaded, together with the statement: "* * * Please take notice that the undersigned hereby rescinds the contract described herein and offers to give to the E. E. McCalla Company, a corporation, a quitclaim deed, conveying all right, title and interest of the undersigned in and to the property described in the said contract, upon payment of the sum of $528.62 to the undersigned, being all of the money paid to the E. E. McCalla Company, a corporation, on said contract."

It is further alleged that the plaintiff discovered that none of the improvements had been installed on said lot on or about October 15, 1929, and that on October 26, 1929, "plaintiff offered, in writing, to return everything of value to the defendant, upon return of $528.62 to this plaintiff." This is followed by an allegation of full performance of the terms of the contract on the part of the plaintiff, and of the payment of all sums due under the contract, and of an offer to return everything of value to the defendant, including a quitclaim deed, upon payment to him of the sum of $528.62, that being the sum paid to the defendant on the contract. The prayer of the complaint is for a rescission and cancellation of the contract, and a return to plaintiff of the moneys paid under it.

To further epitomize, there is alleged: The contract between the parties; a statement of the conditions to be performed by the defendant; the failure to perform those conditions; the date of the discovery of the breach of said conditions; the date of service of notice of rescission of the contract, together with an offer to return everything of value received by the plaintiff; an allegation that the plaintiff had fully performed his part of the contract; a statement of the amount paid under the contract, followed by a demand for its return.

[2] Respondent seeks to invoke the rule that matters of substance must be alleged in direct terms, and not by way of recital or reference, much less by reference to exhibits attached to

pleadings, citing, in support of this rule, Panter v. National Surety Co., 36 Cal. App. 44, 171 P. 803. There is no doubt that this is a sound rule of pleading, but, notwithstanding the complaint under consideration is not a model pleading, its allegations as above set forth are sufficiently clear to be understandable.

[3] It is also contended that the amended complaint is fatally defective because there is nothing therein to show that the real property was part of a subdivision being improved by the defendant, and that the improvements were a part of a general scheme to improve a subdivision sold by the defendant, or that it was an individual lot on which such improvements would be necessarily installed by public authority, and for which the defendant was to pay the cost of installation. We think such a showing is entirely immaterial as a part of the pleading. The facts pleaded are that, as a part of the consideration, the defendant agreed to install these improvements, and he has failed to do so or to have them installed.

[4] Respondent also contends that it does not appear from the amended complaint that the plaintiff promptly or otherwise rescinded the contract with the defendant upon learning of his right to do so. In answer, so far as time was concerned, it is sufficient to say it is alleged that the discovery of the breach of the contract was made on October 15, 1929, and notice of rescission was given on October 26, 1929. This raised the issue of diligence in rescinding the contract.

[5, 6] It is further claimed that the tender of a quitclaim deed was not equivalent to an offer to return everything of value, as the relation created between the parties by the contract gave plaintiff no interest in the real property, but was merely a contractual right to obtain such an interest. Conceding this to be true, notwithstanding that fact, there can be no question that such a deed would convey all the right of plaintiff to the defendant. In Peiser v. Bradbury, 138 Cal. 570, 72 P. 165, it was held that a deed operated as an assignment of a contract of sale. Furthermore, the last paragraph of the amended complaint reads as follows: "Plaintiff hereby offers to give everything of value to the defendant, including a quitclaim deed conveying all right, title and interest of the plaintiff in and to the property described in the contract, upon payment of the sum of $528.62 to the plaintiff, being all of the money paid to defendant on the contract," which is a sufficient tender. We are of the opinion that this amended complaint states a cause of action.

[7] It is next advanced by the respondent that under the authority of Taback v. Greenberg, 108 Cal. App. 759, 292 P. 279, the judgment should be affirmed because, the amount here involved being less than $2,000, the original jurisdiction of the action was in the municipal court of the city of Los Angeles, and not in the Superior Court of that county. The distinction between the cited case and the one at bar is this: In the cited case the action was to recover the sum of $550, the contract which was the basis for the consideration had already been rescinded; in the case at bar, the cause of action alleged is for a rescission of the contract with the recovery of the sum of $528.62 as incidental thereto. Under such circumstances, the relief here sought, the rescission of a contract, falls within the equitable jurisdiction of the Superior Court.

We are of the opinion that the judgment should be reversed and the cause remanded for trial. It is so ordered.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

127 Cal.App. 593

GAMBREL v. DUENSING.

Civ. 4641.

District Court of Appeal, Third District, California.

Nov. 21, 1932.

1. Automobiles ⇐168(1).

Motorist approaching animals must reduce speed so as to be able to avoid injury on account of unexpected movement of animals (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30).

This rule applies more strictly to one approaching from the rear where the animals are on the side of the motorist approaching than as against one who is approaching facing the animals where the animals are not on his side of the highways, since animal which can see object approaching is not so likely to be startled as when noise made by automobile is heard only approaching from the rear.

2. Negligence ⇐12.

While one is not to be held to strictest accountability when confronted with imminent danger, such rule does not lift responsibility from shoulders of one failing to exercise reasonable precautions, where circumstances are such as to present to reasonable person apprehension that sudden peril might be presented.

3. Automobiles ⇐245(49).

Negligence of defendant motorist in turning to left of highway to avoid overtaken equestrian and horse which had fallen on pavement, and in striking on-coming automobile, *held* for jury (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30).

4. Appeal and error ⇐1002.
Jury's findings on conflicting evidence are conclusive on appeal.

5. Release ⇐57(2).
Evidence established that release for injuries sustained in automobile collision was executed without knowledge that injury would impair eyesight, hence release could be set aside (Civ. Code, § 1542).

6. Appeal and error ⇐1064(1).
Alleged error in instruction regarding release *held* not to require reversal, where mistake in execution of release was so satisfactorily established that no prejudice could have resulted.

7. Damages ⇐208(3).
Whether injury sustained in automobile collision caused loss of eyesight *held* for jury.

8. Trial ⇐140(1).
Credibility of witnesses is for jury.

9. Damages ⇐132(14).
$15,000 damages for loss of sight in one eye and loss of 75 per cent. of efficiency of remaining eye *held* not excessive.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by Lilly Gambrel against L. E. Duensing. Judgment for plaintiff, and defendant appeals.

Affirmed.

Clark, Nichols & Eltse, of Berkeley, for appellant.

Sheridan Downey, of Sacramento, and Orrin J. Lowell, of Auburn, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment in this action against the defendant for the sum of $15,000, for and on account of personal injuries alleged to have been received in an automobile accident which occurred on the 8th day of January, 1931, and further alleged as having resulted from the negligence of the defendant. From the judgment entered after the denial of the motion for a new trial, the defendant appeals.

The record shows that on the 8th day of January, 1931, the plaintiff in this action, accompanied by her son, Louis Gambrel, was driving in a southerly direction on the state highway extending northerly from the town of Roseville, at the same time the defendant was driving northerly on the same highway. Prior to the accident, the defendant was driving her automobile northerly on the right-hand side of the paved portion of the highway, and the automobile in which the plaintiff was riding was being driven southerly, and, at the time of the impact, almost entirely, off the westerly portion of the paved highway, being the right-hand side of the highway on which the automobile in which the plaintiff was riding was being propelled.

The record shows that, when the defendant was some two or two and one-half times the distance of an ordinary city block from the point of collision, she observed two men on horseback ahead of her near where the collision took place. The horses were on the right-hand side of the highway when first observed, one being on the easterly edge of the highway, the other entirely off the paved portion. As she approached the horses, she decreased her speed to about 12 or 15 miles an hour; that, when she was a short distance from the horses, the rider of one of the horses looked backward and reined the horse to the right. At this instant the horse slipped and fell, a portion of the body of the horse striking upon the paved portion of the highway; that at this same time, in order to avoid a collision with the horse and the rider, the defendant turned her automobile to the left, and, in so doing, crossed the paved portion of the highway and collided with the automobile in which the plaintiff was riding which was traveling in a southerly direction. The collision took place about opposite the horses, or just a trifle after the defendant's automobile had passed them.

On the part of the plaintiff, testimony was introduced to the effect that the driver of the automobile in which the plaintiff was riding, noticing that the defendant was losing control of her automobile, turned off the paved portion of the highway, and that in so doing sufficient space was given between the horses and the automobile in which the plaintiff was riding for the defendant to pass by with safety. The plaintiff's testimony also was to the effect that just prior to the collision the defendant's automobile was moving at the rate of about 45 miles per hour, and that the automobile in which the plaintiff was riding was traveling at about 35 miles per hour. There is also testimony in the record to the effect that the speed of neither automobile was slackened prior to the collision.

Upon this appeal, the appellant urges absence of negligence on the part of the defendant, contributory negligence on the part of Louis Gambrel, agency, and joint venture on the part of Louis Gambrel and the plaintiff, errors in instructions on the subject of release, and absence of evidence to support the damages awarded.

Section 113 of the California Vehicle Act (as amended by St. 1927, p. 1436, § 30) requires: "Any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not

greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person."

[1] In considering the question of negligence, it is necessary to bear in mind that the obstruction which led to the collision in this case, or, according to the testimony of the record, upon which the jury was entitled to act, was on the side of the highway being used and occupied by the defendant; that under such circumstances it was necessary that the defendant should have her automobile under such control as to enable her to prevent injury to person or property. Every person propelling an automobile upon the highway must take into consideration all the hazards attendant upon approaching animals, and we think especially when approaching from the rear, and must reduce the speed of the motor vehicle so as to be able instantly to avoid injury on account of any sudden or unexpected movement of the animal toward which the automobile is being driven. We also think it is clear that this rule applies more strictly to one approaching from the rear where the animals are on the side of the one approaching, than as against one who is approaching facing the animals where the animals are not on his side of the highway. And also the fact must be taken into consideration that, where the animal can see the object approaching, it is not so likely to place itself in front of the approaching automobile, or to be startled by it, as when the noise made by the automobile is only heard approaching from the rear. These we think are proper questions to be considered by a jury in determining whether an automobile driver is or is not complying with the requirements of section 113 of the California Vehicle Act.

The record also presents the further question that there is testimony to the effect that there was a clear passage afforded between the automobile in which the plaintiff was riding and the horses just referred to, which, had the defendant reduced the speed of her car so as to have proper control thereof, she might have passed the horses without injury to any one. If, by reason of not having reduced her speed sufficiently to have her automobile under the required control, the defendant became confused, and, as testified by one of the witnesses, lost control of her car, and was unable to propel the same along the clear passage afforded by the automobile in which the plaintiff was riding being driven off the highway, then and in that case the question of the defendant's negligence was established, and her responsibility for all attendant injuries fixed.

In support of appellant's contention that turning her automobile to the left was not negligence, attention is called to the case of Uhl v. Fertig, 56 Cal. App. 718, 206 P. 467, and 3 Cal. Jur. 841. The text in 3 California Jurisprudence, supra, is to the effect that "one suddenly confronted with an unexpected danger may use such means for avoiding it as would appeal to a person of ordinary prudence in a like situation, without being held to strict accountability as to whether the course chosen is the most judicious or not. And the fact that he errs in judgment, miscalculates the space in which he may move, or momentarily forgets and encounters another danger, does not necessarily warrant the conclusion of contributory negligence, because, afterward, it may appear that he might have avoided both perils by choosing a different course. While it is often true that in cases of sudden circumstances of danger a person does the very act that he ought not to do to save himself from being injured, yet where the party causing those circumstances acted negligently and the injured person did not himself intentionally or from culpable carelessness contribute thereto, the latter will not be held responsible for any injury he may sustain merely because he did not act prudently or with good judgment in an effort to escape injury."

In the case of Uhl v. Fertig, supra, the defendants swerved to the left in order to avoid a collision with an automobile coming onto the highway from the defendants' right. While not so stated in the opinion, the inference to be drawn from the circumstances is to the effect that, if the defendant had not swerved to the left, the plaintiff, by accelerating the speed of his automobile, would have passed by the danger zone, and there would have been no collision between the plaintiff's automobile and the one being driven by the defendant. In that case, however, the sudden peril was presented by the plaintiff himself. Nor was there anything presented to the defendant a sufficient length of time before the collision to enable the defendant in that case to bring his automobile under such control as to prevent "injury to person or property."

[2] While a person is not to be held to the strictest accountability, as shown by the text quoted from California Jurisprudence, supra, when suddenly confronted with imminent danger, if the circumstances are such as to present to a reasonable person apprehension that such sudden peril may be presented, as by the unexpected movement of an animal, and due precautions are not taken to enable one to avoid injury, we do not see how it can be argued that the rule of imminent or sudden danger affords any excuse. In other words, if one who fails to exercise ordinary precautions when ap-

proaching or about to pass an animal is suddenly confronted with additional peril by reason of the movement of that animal, and injury results therefrom, responsibility is not lifted from the shoulders of the one failing to exercise such reasonable precautions.

[3, 4] Instead of guiding her automobile through the vacant passageway between the horses and the automobile in which the plaintiff was riding, the record shows that the defendant turned her car to the left across the highway at an angle of about 45 degrees, and, further, that her brakes had not been applied before the horse shied and went down on its haunches on the highway. These circumstances presented to the jury the question of whether or not the defendant, if she had exercised proper control of her automobile, could have passed between the horses and the automobile in which the plaintiff was riding without injury to any one, and the finding of the jury upon such facts is conclusive upon appeal. While we might agree with the appellant that the driver of the automobile in which the plaintiff was riding should have slackened the speed of his car, yet the fact was presented to the jury that such driver went off the paved portion of the highway sufficiently far to admit of the defendant passing the horses safely. This fact gave the jury a right to conclude that the failure of the defendant to have her automobile under proper control, and to propel it through the open passageway was the proximate cause of the injury. By reason of what appears in the record, as just stated, it is unnecessary to consider the appellant's contention that the plaintiff and Louis Gambrel, the owner and driver of the automobile in which the plaintiff was riding, were engaged in a joint enterprise.

Appellant further contends that the plaintiff in this action is barred by reason of a certain instrument purporting to release the defendant and the State Farm Mutual Auto Insurance Company from liability, in consideration of $350, which was signed by the plaintiff. The record shows that, on the second day after the accident, two representatives of the insurance company just named called upon the plaintiff, and also upon Louis Gambrel, and obtained their signatures to the instrument hereinafter considered, and delivered to Louis Gambrel a check drawn in his favor for the sum of $350. As against this contention, the respondent relies upon section 1542 of the Civil Code, which reads: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor;" and at the time of the release being executed the plaintiff did not know or appreciate the fact that the injury received in the collision upon which this action is based existed. This injury is set forth in paragraph IV of the complaint as follows: "That as a result of said accident plaintiff received a blow upon her forehead which resulted in a hæmatoma over the left eye; injury to both left and right eyes which has resulted in a total loss of vision in the left eye and a seventy-five per cent loss of vision in the right eye."

It is further contended that the release was signed when the plaintiff was not in a physical or mental condition to properly apprehend the effect of the instrument which was being signed by her, and that the obtaining of her signature under such circumstances constituted a fraud. The circumstances of signing the release are shown by the following excerpts from the testimony:

"Q. Mrs. Gambrel, it has been plain here that you and Louis signed a release of all your right to claim damages for $350.00; do you remember signing some papers for men who came there representing an insurance company? A. Yes, sir.

"Q. How many men came to see you? A. Two.

"Q. When did they come to see you? A. The second day after the accident.

"Q. What was your mental and physical condition at that time? A. I couldn't read at all; they read it.

"Q. How did you feel? A. I was just nervous and all to pieces; I didn't realize or know what they were reading about.

"Q. State to the jury whether or not you were suffering any pain? A. Pain in my head was still bandaged, my nose, I didn't know whether I was sitting or standing; they couldn't keep me in bed I was so nervous.

"Q. Was Louis in the same room with you? A. He was in bed, wasn't able to stand on his feet.

"Mr. Downey: At this time had you consulted with any lawyer about this case? A. No sir.

"Q. Did you have any business man or other person there to advise you? A. No sir.

"Q. You state you did sign some paper? A. Yes sir.

"Q. Was it read to you? A. Yes, they read it; I didn't pay much attention to it.

"Q. Did you understand what they read? A. No sir, I didn't; my head hurt too bad.

"Q. Did they tell you what kind of paper you were signing? A. A receipt.

"Q. Did they tell you how much? A. Yes, they left a check for $350.00.

"Q. To whom was it made payable? A. To my son.

"Q. Did they make statements to you why they made the check payable to your son? A. No, sir.

"Q. Didn't they tell you any reason they were giving him the check instead of you? A. No, never said a word about it.

"Q. Did they make statements to you as to what this $350. was to cover? A. It was to cover our expenses up until that time. * * *

"Louis Gambrel, direct examination: Q. Were you present, of course you were present, but you and your mother, the second day after this accident signed some kind of paper when a check for $350. was given to you? A. Yes.

"Q. What was your mental and physical condition at that time? A. It was so sudden right after the accident I was feeling pretty low; I was laying in the front room on the bed; pretty weak from loss of blood, my head was throbbing, I didn't care whether I died or not, to tell the truth, I didn't pay much attention to it; I didn't feel like reading it; I couldn't read it if I wanted to; they read it off to us. I took it as a receipt for the check they were going to leave; they hadn't made out the check yet.

"Q. It sounded to you like a receipt the way they read it? A. Yes.

"Q. That is what you thought it was? A. Yes.

"Q. Was your mother close to you? A. Yes, sir, both in the front room.

"Q. Were you lying on the bed? A. Yes.

"Q. Could you hear what your mother said and what they said? A. Yes.

"Q. Do you remember the names of the two men? A. No, sir.

"Q. What was your mother's physical and mental condition? A. She was pretty, in pretty serious condition; her head bandaged up, her eyes black from above her eyes to the lower cheek bones, it was bandaged across the bridge of her nose, a bump in the middle of her forehead.

"Q. Was she suffering pain? A. Yes.

"Q. Was she able to read this receipt? A. Yes, sir.

"Q. Did she read this receipt? A. No, sir.

"Q. Or the paper you signed there? A. No, sir.

"Q. Did these men make any statement to you as to what kind of paper it was you and your mother were signing? A. No, sir, they didn't; in fact, they just read it off; I didn't understand it; I took it as just they were leaving a receipt for the check of $350. they were leaving when they left.

"Q. You took it from what they said to you and what they read to you? A. Yes.

"Q. Did they tell you what the $350. was made up of, what it was to cover? A. Yes, to cover the damages of the car, the hospital bill in Roseville, and any private bills up to that time.

"Q. Did they make any statement about any subsequent injuries or damages? A. They said when they left the check if there was any other damages that they were willing to make another payment.

"Q. To whom was the check made that was left there? A. Made to me personally.

"Q. Did you cash that check? A. No, sir."

That there was a mistake of the parties as to the extent of the injuries suffered by the plaintiff, and especially as to the injury upon which this action is specially predicated, unquestionably appears in this case. The damages which entered into the $350 as the basis of the settlement was apportioned as follows: $180 for damages to the automobile, and the remainder for hospital bills, doctors' fees, etc.

There is further testimony in the record to the effect that neither the plaintiff nor Louis Gambrel would have signed the release had they known of the resulting injury to the plaintiff's eyesight. The release signed by the plaintiff and Louis Gambrel is in the words and figures following, to wit: "We, Mrs. Lilly Gambrel & Louis Gambrel, of the city of Yuba City, County of Sutter, State of Calif., for and in consideration of the sum of three hundred fifty dollars paid to us by State Farm Mutual Auto. Ins. Co., the receipt is hereby acknowledged, do hereby release and discharge C. E. & L. E. Duensing and State Farm Mutual Auto. Ins. Co. of the City of Bloomington, County of McClean, State of Ill. from any and all claims or demands of any nature whatsoever accruing prior to this date, and particularly from all claims and demands arising out of accident 99 highway 1½ miles north of Roseville, Calif. on or about the 8th day of Jan. 1931, in or near the city of Roseville, County of Placer, State of Calif."

[5] Irrespective of the question of fraud, or of any undue influence, or whether the plaintiff was in a physical or mental condition to fully comprehend and appreciate the legal consequences of signing the paper which she thought was a receipt, the fact of mutual mistake is fully disclosed by the record. The plaintiff had no knowledge whatever at the time of signing the release that her eyesight had been impaired, or would become impaired by reason of any injury that she had suffered. If the representatives of the insurance company had any knowledge of such fact, then their concealment thereof amounted to a fraud. We do not need to cite authorities that a release can be set aside for a mistake of fact, as section 1542 of the Civil Code provides for such procedure.

The next contention of the appellant is that the court committed reversible error in its instructions to the jury. In making this contention, the appellant complains of the mass of instructions handed to the trial court to be given to the jury. The record discloses that of the instructions read to the jury twenty-six were requested by the appellant and only fifteen by the plaintiffs; and, further, that the instructions requested by the appellant are very much longer that those requested by the plaintiff. No further answer need be given to the somewhat intemperate language used by the appellant in referring to offered instructions.

The error insisted upon by the appellant in the giving of instructions is that some of them are broader than the issues covered by the testimony, to wit: After instructing the jury, at the request of the defendant, as follows: "The jury is instructed that the cause of action of plaintiff, Lilly Gambrel, is barred by reason of the release executed by her, unless you further find the following facts to be true: 1. You must find either that the release was procured from her by fraud; 2. Or at the time she executed the release she was a victim of an injury actually received in an accident, the existence of which was unknown to her"—the court, at the request of the plaintiff, gave the following instruction: "I instruct you that a party to a contract, and a release is a contract, may rescind the same if: the consent of the party rescinding or any party jointly contracting with him, was given by mistake or obtained through duress, menace, fraud or undue influence, exercised by or with the connivance of the party as to whom he rescinds or of any other party to the contract jointly interested with such party." This instruction, of course, includes more than mistake and fraud, but is in fact only a comprehensive statement of the provisions of the Civil Code setting forth the basis for rescission. There is nothing in the instruction indicating that there was any testimony in the case upon which the jury might find duress, menace, fraud, undue influence, or mistake. The jury was thereafter instructed as to what constituted undue influence, and also to the effect that an assent to a contract obtained by fraud was not binding. The jury was instructed that it might take into consideration the mental and physical condition of the plaintiff at the time of the execution of the alleged release.

[6] The instructions complained of go only to the release and not to the extent of the injury, and, if the injury, as alleged by the plaintiff, and found by the jury, resulted in the loss of eyesight to the plaintiff, the defense of mistake in the execution of the release is so satisfactorily established that no prejudice can be said to have resulted to the defendant by reason of the court giving the instructions complained of, especially in view of the fact that the jury was specifically directed that they could only relieve the defendant from her signature to the release by reason of fraud or mistake. On either one of these grounds the record contains sufficient testimony to support the verdict of the jury.

In 2 California Jurisprudence, 1026, the rule which we think applicable to this cause is thus stated: "A judgment will not be reversed because of the giving or refusing of instructions which do not harm the appellant. To justify a reversal, under the Constitution it must appear, from a consideration of all the evidence, that any error in this respect resulted in a miscarriage of justice. It is not necessary to invoke the remedial provisions of the Constitution to show that errors of the instructions are harmless where the verdict would be the same with correct instructions, etc. * * * The giving of an instruction upon an abstract proposition of law not entirely applicable to the case will not warrant a reversal where it is apparent that no injury resulted therefrom." See, also, Marston v. Pickwick Stages, 78 Cal. App. 526, 248 P. 930, and the cases cited in that opinion, which are so complete as not to need further consideration.

The contention that Louis Gambrel was a necessary party to this action does not appear to us to be tenable or to require any extended consideration.

[7] It is finally contended that the damages are excessive, and that the testimony does not sustain the plaintiff's contention as to loss of her eyesight being attributable to the injury resulting from the collision. In this particular the record shows that there was a large swelling on the forehead of the plaintiff as a part of injuries suffered by her; that it was necessary to keep her eyes bandaged for a number of days; that prior to the collision her eyesight had been good; use of glasses had not been necessary; that from the time of the receipt of the injuries complained of attendant upon the collision the eyesight of the plaintiff has gradually deteriorated until there is practically a total loss of vision of the left eye, and only about 25 per cent. efficiency of the right eye. Dr. Jones, a physician called by the plaintiff, testified that in his opinion the loss of sight was attributable to the injury. This opinion was based upon a hypothetical question stating the facts set forth in the record. While the appellant contends that the hypothetical question does not contain a true statement of the facts, it does appear that no objection was made thereto at the time of the trial.

[8] It is also contended by the appellant that the facts testified to by the plaintiff

are and were untrue. The jury, however, were the sole judges whether the facts detailed by the witnesses were or were not true. Against the testimony of the plaintiff and Dr. Jones, the defendant introduced two physicians who testified that in their opinion the loss of eyesight was attributable to other causes. Again, as to what should be the true deduction from the conflicting testimony was a problem for the jury and not for the court. The testimony does show that the plaintiff did a few days' more work after the injury than she testified that she remembered. This again went only to the credibility of the witnesses, to be passed upon by the jury.

[9] We do not need to cite authorities to the effect that $15,000 damages for the loss of one's eyesight is not excessive, and this is true, even though one eye still retains 25 per cent. of its normal efficiency. No reasonable person would give up the loss of eyesight in one eye, and the loss of 75 per cent. of the efficiency of the remaining eye, for the amount of damages awarded in this case.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

127 Cal.App. 489

TROY v. TROY.

Civ. 8725.

District Court of Appeal, First District, Division 2, California.

Nov. 15, 1932.

Rehearing Denied Dec. 15, 1932.

Hearing Denied by Supreme Court Jan. 12, 1933.

1. Appeal and error ⇐628(2).

Appeal will not be dismissed for delay in settling bill of exceptions, where trial court denied respondent's application for order terminating proceedings below (Rules of Supreme Court and District Courts of Appeal, rule 6).

2. Execution ⇐72.

Order granting motion for execution in stated sum "or in such sum as the court may determine is still due" on judgment *held* not meaningless as fixing no sum; motion being sufficiently definite and certain.

3. Execution ⇐72.

Addition of names of successive assignees of plaintiff's claim did not vitiate latter's motion for execution on judgment for her (Code Civ. Proc. § 385).

4. Evidence ⇐265(4).

Plaintiff's admission in receipt for sum paid by defendant on judgment affirmed on appeal that it drew no interest from day remittitur was filed until discharge of order restraining payment thereof fully supported defendant's claim of suspension of interest during such time (Civ. Code, § 3538).

5. Execution ⇐72.

Conflicts in evidence on hearing of motion for execution are addressed to trial court.

6. Interpleader ⇐18.

Defendant not admitting plaintiff's claim until filing of remittitur after affirmance of judgment for plaintiff could not interplead claimants bringing actions, in which garnishments served on defendant were issued, against plaintiff.

7. Execution ⇐72.

Trial court's implied finding on hearing of motion for execution that there was no causal connection between defendant's omission to pay judgment, affirmed on appeal, and garnishments, issued in actions against plaintiff and served on defendant, *held* not error; inference being that defendant tendered sufficient bond to stay judgment on appeal.

8. Interest ⇐52.

Interest on amount of recovery *held* properly computed at 6½ per cent. until date of judgment and at 7 per cent. thereafter until injunction against payment thereof was served on defendant (Civ. Code, § 3538).

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Hortense S. Troy against Robert P. Troy. Judgment for plaintiff, and, from an order granting her motion for execution, defendant appeals.

Modified, and affirmed as modified.

Robert P. Troy, in propria persona, and H. H. McPike, both of San Francisco, for appellant.

Walter H. Sprague, of Los Angeles, for respondent.

STURTEVANT, J.

On March 20, 1922, the plaintiff was awarded a judgment against the defendant for $17,000, with interest at 6½ per cent. per annum from the 1st day of January, 1916. The defendant appealed. The judgment was affirmed. Troy v. Troy, 72 Cal. App. 757, 238 P. 143. The remittitur issued and was filed in the county clerk's office July 27, 1925. Thereafter, on September 8, 1925, the defendant paid $27,587 on the judgment. When he made

that payment, the plaintiff's attorneys delivered to him a receipt in words and figures as follows, to wit:

"Partial satisfaction of judgment and receipt for $27,587.00 on account of judgment.

"We, the undersigned attorneys for plaintiff herein, the plaintiff herein and all parties claiming any interest in the judgment which was made given and entered herein on March 20, 1922, hereby acknowledge that Robert P. Troy the defendant herein, has paid to us the sum of $27,587.00 to be applied to the payment of said judgment and in partial satisfaction thereof to said extent, and that we have received said sum from him and have applied the same to the partial satisfaction of and the partial payment of said judgment to said extent, and that to the extent of and in the sum of $27,587, said judgment is paid and satisfied and discharged, and the clerk of the above entitled court is hereby authorized and directed to enter partial satisfaction of record of said judgment to the extent of and in the sum of $27,587.00, which however, we claim to be a partial payment only of said judgment, which still remains unpaid and unsatisfied to the extent of $2,010.72 which last named sum we contended is still due, owing and unpaid from him under and by virtue of the terms of said judgment:

"We admit that said judgment does not draw any interest from the 27th day of July 1925 until the restraining order which prevents him from paying said judgment, is to that extent discharged, in the action in the above entitled court, No. 158,499, wherein The Hibernia Savings and Loan Society is plaintiff and Hortense S. Troy et al. are defendants.

"The parties hereto being unable to agree as to the exact amount which is due under the terms of said judgment, we agree to the end that a judicial determination of said amount may be rendered, to apply to the above entitled court on motion duly made on five days notice to said defendant, for the issuance of a writ of execution against the property of said defendant for the amount of said judgment which we claim is still due and owing and unpaid from said defendant, and we agree that we will proceed to make and present said motion to said court within thirty days after the delivery of this partial satisfaction of judgment to said defendant.

"Dated, September 3d, 1925."

Thereafter on September 10, 1925, the plaintiff applied for an execution in the sum of $2,010.72. The application was heard on October 16, 1925. The plaintiff introduced evidence both oral and documentary. The defendant was called as a witness and was examined and cross-examined. On his direct examination, the defendant testified that he applied to the Hibernia Savings Bank for a loan of $10,000 to assist him in paying off the judgment; that loan was not consummated until September 8, 1925, when interest commenced to run on said loan. However, he testified also that he had cash and credit sufficient to enable him to pay the judgment without the loan. He had $26,000 in cash in his possession, but did not have the full amount of cash to pay the judgment. In this connection he testified that he had $20,000 in currency in his office; that his office was at 1776 Bush street, which was also his residence. No one else resided there. He had no permanent employees there. He obtained the $20,000 from the Bank of California and the Anglo California Trust Company. He testified positively that no part of the $20,000 was in a safe deposit box. On his cross-examination he testified that several garnishments had been served on him, and gave the dates and amounts of the garnishments. He also testified that certain injunctions had been served on him, and introduced copies thereof. Continuing his cross-examination, the defendant testified that he had overpaid the judgment in the sum of $1,474.48; that said overpayment arose by reason of the fact that, when he made the payment of $27,587, he made no deduction of interest during the time that he was under restraint of the garnishments hereinabove referred to. Thereafter, on the 5th day of January, 1926, the motion for an execution was granted. From the order granting that motion, the defendant has appealed.

[1] The plaintiff by way of a preliminary objection contends the appeal should be dismissed because of the delay in settling the bill of exceptions. The contention may not be sustained. The plaintiff applied to the trial court for an order terminating the proceedings below, but the application was denied. No such order has been made. That being so, the plaintiff's contention must be ignored in a court of review. Rule VI of the Supreme Court and of the District Courts of Appeal; Crocker v. Crocker, 76 Cal. App. 606, 245 P. 438.

[2] The defendant contends that the order granting execution was meaningless because it did not fix any sum. The plaintiff's motion asked for an execution "in the sum of $2,010.72 or in such sum as the court may determine is still due, owing and unpaid on said judgment." The trial court's order included the language, "It is ordered by the court that said motion be and is hereby granted." As the entire proceeding before the trial court was had for the purpose of fixing the sum, we think it is clear that the motion was sufficiently definite and certain and that the order granted the motion as made.

[3] It is next asserted that the motion was not made by any authorized party. The plaintiff assigned her claim to Charles Matthews, and in turn he assigned it to Francis J. Hen-

ey. The motion purported to be made by the plaintiff and Charles Matthews and Francis J. Heney. It could have been made in the name of the plaintiff without the addition of the other names. Code Civ. Proc. § 385. Adding those names to the plaintiff's did not vitiate.

The judgment as rendered in the original action contained the following expression: "Now, therefore, by reason of the law and the premises, it is ordered, adjudged and decreed, that said plaintiff have and recover of and from said defendant the sum of seventeen thousand dollars ($17,000), together with interest thereon at the rate of 6½% per annum from the 1st day of January, 1916." The defendant contends that said judgment in effect provides that the rate of 6½ per cent. will continue from the 1st day of January, 1916, until the judgment is paid. He cites and relies on United States Nat. Bank v. Waddingham, 7 Cal. App. 172, 93 P. 1046. The case does not so hold. At page 175 of 7 Cal. App., 93 P. 1046, 1047, the court said: "The judgment as framed *apparently* entitles the plaintiff to continue to enjoy the benefit of the 2 per cent. per month interest clause until execution on the judgment." (Italics ours.) However, without passing on the point as to the actual effect of the judgment, the court on appeal having jurisdiction to do so proceeded to correct the alleged irregularity. Wilbur v. Abbot, 58 N. H. 272, was an action based on a judgment. The defendant interposed a demurrer that the complaint did not state a cause of action because the judgment was not for a sum certain. At page 273 of 58 N. H., the court said: "The judgment declared on recites that a certain sum of money was recovered with lawful interest from a certain day. All judgments for the recovery of money must state the sum recovered with certainty. That is certain which may be made certain; and it is sufficient if the sum recovered can be definitely and certainly ascertained by an inspection of the record, and without going outside for aid. Stokes v. Sanborn, 45 N. H. 274. The date from which the interest is to be computed is given in the record, and the amount can be made certain without going beyond it." To the same effect are, Blodgett v. Hudson, 6 Boyce's (29 Del.) 462, 100 A. 571; Hill v. Lyles (Tex. Civ. App.) 81 S. W. 559. And see Civil Code, § 3538. It is the ordinary practice in California to state the amount of the principal and the amount of interest and give judgment for the combined sums. Thereupon the statute enters in and interest on that judgment runs at 7 per cent. In Watson v. Lawson, 166 Cal. 235, 135 P. 961, the action rested in part on a judgment theretofore rendered. In determining the meaning of that judgment at page 241 of 166 Cal., 135 P. 961, 964, the court quoted with approval: "When it admits of two constructions, that one will be adopted that is consonant with the judgment that should have been rendered on the facts and the law of the case."

[4] As recited above, the remittitur was filed in the trial court on July 27, 1925. Prior to that date an injunction issued out of another court that restrained the defendant from paying the judgment. That injunction continued in force until the date of the payment hereinabove mentioned. The defendant claims that he was not liable for interest during the period July 27, 1925, to September 8, 1925. In the receipt or partial satisfaction of the judgment the plaintiff admits, "That said judgment does not draw any interest from the 27th day of July, 1925, until the restraining order which prevents him from paying said judgment is to that extent discharged in the action in the above entitled court, number 158499, wherein the Hibernia Savings and Loan Society is plaintiff and Hortense S. Troy et al., are defendants." That admission fully supports the defendant's claim of suspension from July 27, 1925, to September 8, 1925.

[5-7] The defendant was served with several garnishments which issued out of other actions in which Mrs. Troy was sued for money. He did not pay any of the moneys into the court, but continued this litigation, kept the moneys, and presumably made use thereof. Kenton Ins. Co. v. First National Bank, 93 Ky. 129, 19 S. W. 185. True it is he testified that $20,000 was kept in his office. That raised a conflict in the evidence, but the conflicts were addressed to the trial court. At no time prior to July 27, 1925, did the defendant admit the claim of the plaintiff; therefore at no time was he in a position to interplead the respective claimants. Conner v. Bank of Bakersfield, 183 Cal. 199, 203, 190 P. 801. Furthermore, it may be inferred that the appeal was taken in the ordinary method and that the defendant had tendered a good and sufficient bond to stay the judgment on appeal. Under these circumstances, the trial court did not err in making an implied finding that there was no causal connection between the defendant's omission to pay and the garnishments just mentioned.

[8] We conclude, therefore, that down to the date of the judgment the interest was properly computed at 6½ per cent. and that interest on the judgment was properly computed at 7 per cent., but that it should have been computed from the date of the judgment down to July 25, 1925, the date the injunction was served, and that the order should have been for an execution in the sum of $1,877.34 instead of $2,010.72.

The order is modified by adding at the end thereof the following words: "And the amount of said execution is hereby fixed in

the sum of $1,877.34." As so modified, the order is affirmed. It is further ordered that the defendant do have and recover his costs on this appeal.

We concur: NOURSE, P. J.; SPENCE, J.

127 Cal.App. 635

SINGLETON et al. v. HARTFORD FIRE INS. CO.

Civ. 4621.

District Court of Appeal, Third District, California.

Nov. 22, 1932.

Rehearing Denied Dec. 22, 1932.

Hearing Denied by Supreme Court Jan. 20, 1933.

1. Insurance ⇐670.

Where there was evidence as to false swearing of insured as to value and incendiarism and verdict was general, it must be presumed that insured's statements regarding value were not willfully fraudulent and that he did not cause fire.

2. Insurance ⇐670.

Where no special issues were submitted regarding value of property destroyed and verdict for insured for full amount of fire policy was general, it must be concluded actual value exceeded amount of insurance.

3. Insurance ⇐607.

Transaction whereby insurer taking assignment of mortgage on premises sustaining fire loss, released mortgage, and agreed not to prosecute foreclosure, in return for payment on account of such mortgage and note by purchaser of premises from insured, *held* satisfaction of mortgage precluding insurer from claiming ownership of payments distinct from discharge of mortgage.

Such transaction constituted a satisfaction of the mortgage and payment of the note, and was not a mere surrender of insurer's right of action to foreclose the mortgage, since insurer had no property to sell or transfer except the note and mortgage assigned to it, and had no right to foreclose upon the property independently of enforcing payment of the note, and since, when it received payment and assigned the note and mortgage to insured's purchaser, discharged and canceled, the right to foreclose ceased to exist, so that insurer had no further right against purchaser.

4. Mortgages ⇐283(2).

Where purchaser makes payment to mortgagee instead of owner, mortgage debt is extinguished and does not constitute basis for further claim against former owner of property (Civ. Code, § 1473).

5. Appeal and error ⇐882(8).

Insurer could not complain of insured's evidence regarding manner insured and insurer's agent fixed value of property, where insurer had previously introduced evidence regarding same transaction.

6. Insurance ⇐553(1).

To forfeit fire policy, false swearing and fraud must be willful and intended to injure insurer or relate to some matter material to its liability.

7. Insurance ⇐669(13).

Instruction that discrepancy in insured's statements regarding property value would not defeat recovery on fire policy, if they could be accounted for as opinion or mistake, *held* not erroneous.

Such instruction was not erroneous by virtue of the fact that it stated if the discrepancy could be accounted for instead of stating that the discrepancy was accounted for satisfactorily by the insured.

8. Fraud ⇐65(1).

Instruction defense of fraud, where relied on, must be supported by preponderance of evidence, and defendant must go beyond showing issue may be reasonably decided either way, *held* not misleading.

Portion of instruction objected to was, "but when the defendant's case goes no further than to establish a state of facts from which an inference of fraud may or may not be reasonably drawn, he has failed to establish his case by a preponderance of the evidence," and was not objectionable as stating that defendant's case had gone no further than such showing, and was not misleading in view of instructions covering preponderance of evidence, and what was necessary for each party to prove.

9. Insurance ⇐553(1).

Where insured knowingly and willfully makes false statement regarding material facts concerning value of property insured or damage thereto, intention to deceive insurer is implied.

10. Appeal and error ⇐1033(5).

Instruction that, where fire policy provided entire policy should be void for insured's fraud or false swearing, such fraud and false swearing forfeited entire policy, though relating only to two items of insurance, *held* favorable to insurer.

Instruction was, in substance, that fire policy provided that the entire policy should be void in case of any fraud or false swearing by insured, and therefore, if jury found that insured violated such provision by acting fraudulently or swearing falsely, the entire policy was forfeited, even though the fraud or false swear-

ing related only to one or two items of insurance, and was favorable to insurer, in that it did not include words indicating that insured knowingly and willfully violated the provisions of the policy.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by George Singleton and another against the Hartford Fire Insurance Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Percy V. Long and Bert W. Levit, both of San Francisco (S. C. Young, of Quincy, of council), for appellant.

Huston, Huston & Huston, of Sacramento, and M. C. Kerr, of Quincy, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was originally commenced by George Singleton and the Indian Valley Bank, a corporation, to recover the sum of $5,000 upon a certain policy of fire insurance issued by the defendant to George Singleton, and containing a mortgage clause in favor of the Indian Valley Bank. The policy of insurance covered two items of property, $4,000 upon an hotel building in Crescent Mills, in Plumas county, and $1,000 on the contents thereof. The Indian Valley Bank had a mortgage on the hotel building for the principal sum of $800. The insurance policy provided for the payment of this sum to the mortgagee in the event of loss. Subsequent to the beginning of this action, the insurance company paid the Indian Valley Bank the amount due on the mortgage in the sum of $905.31, and took an assignment thereof, and thereupon the bank dismissed its action, and the word "plaintiff" used hereinafter will refer only to the plaintiff George Singleton. The trial resulted in a verdict for the plaintiff George Singleton in the sum of $5,000. From this judgment the defendant appeals.

Four grounds of reversal are alleged: (1) That the court erred in directing the jury that, in the event it found for the plaintiff, the verdict should be for the full amount claimed; (2) that the evidence is insufficient to support the verdict; (3) that the court erred in admitting certain testimony; (4) that the court erred in giving certain instructions to the jury and refusing to give certain instructions requested by the defendant.

[1] Upon a former trial of this case, the court directed the jury to bring in a verdict in favor of the plaintiff. Upon appeal to this court, the judgment was reversed on the ground that the court erred in so instructing the jury. Singleton v. Hartford Fire Ins. Co., 105 Cal. App. 320, 287 P. 529. A review of the opinion in that case upon appeal fails to disclose that any of the questions there presented for consideration are determinative of any of the issues presented upon this appeal. It was there held that the testimony introduced in the case was sufficient to carry the cause to the jury on the question as to whether the plaintiff had not voided the policy by reason of false and fraudulent statements relative to the value of the personal property destroyed, and also as to whether the plaintiff had not in fact set fire to the building. As the record is now presented to us, it appears that practically the same testimony was introduced as to the false and fraudulent swearing by the plaintiff as to the value of the personal property destroyed, and also as to whether the hotel was not in fact set on fire by the plaintiff. The verdict of the jury was general, and it must be concluded therefrom that whatever statements the plaintiff may have made as to the value of the property, were not knowingly or willfully fraudulent, and that the hotel was not set on fire by him.

Disregarding the order in which the appellant alleges grounds for reversal, we will consider first the question relating to the value of the personal property.

The schedule as set forth in the proof furnished by the plaintiff to the defendant following the destruction of the property is as follows: 7 wood beds, 23 iron beds, 30 springs, 30 mattresses, 22 dressers, 3 bureaus, 52 chairs, 11 tables, 4 rugs, 4 sofas, 10 iron stools, dishes and cooking utensils, 50 pillows, 36 sheets, 6 blankets, 36 pillowcases, 4 quilts and blankets—of the replacement value of $2,978.50, depreciation, $1,490; sound value and loss, $1,488.50. No question is raised as to the hotel building being of a value in excess of the insurance.

A number of witnesses were called to testify as to the value of the property and as to what personal property was contained in the hotel, and also its contents. The testimony is too voluminous to be set forth in this opinion, or in fact to be even summarized, and therefore only a general statement can be inserted herein.

[2] So far as called to our attention, and so far as our investigation has been able to ascertain, only two witnesses controverting plaintiff's proof testified as to the value of the personal property scheduled as being in the hotel. One testified that the property was of the value of about $250; another witness testified that the value was from $200 to $225. The record does not show that either one of these witnesses had any special knowledge or really any knowledge whatever of the value of the kind of property about which they were testifying. The testimony, however, does show that the schedule furnished by the plaintiff to the defendant did undoubtedly

in several instances exceed in number the actual number of the articles claimed to be in the hotel, and also that the value of the same was considerably in excess of the actual value of the property in question. No special issues were submitted to the jury as to the value of the property, and, as we have said, only a general verdict was rendered, from which it must be concluded again that the actual value was at least in excess of the amount of insurance, and the only question left for us to determine is as to whether the court correctly instructed the jury that, if the statement of loss or proof of loss submitted by the plaintiff to the defendant was not a true statement, it would not void the policy unless it was knowingly and willfully false. This will be determined when we come to consider the instructions.

The record shows that during the pendency of the action, after the defendant had paid to the Indian Valley Bank the sum of $905.31, and had taken an assignment of the note evidencing such indebtedness and the mortgage on the hotel property given to secure the payment thereof, the real estate upon which the hotel had stood was sold by the plaintiff to Mr. and Mrs. James, and thereupon the appellant assigned and transferred the mortgage heretofore mentioned, to the purchasers. Mr. James, upon making the purchase, paid to the appellant the sum of $1,100, which was applied to the payment of the mortgage held by the Hartford Insurance Company. The insurance company made out and delivered to James a satisfaction of mortgage. This transaction was conducted by and through a man by the name of L. L. Clough, who was called as a witness in the case, and testified as follows:

"Q. What, if anything, did you have to do with it? [Sale and purchase of the hotel property.] A. I was requested by Mr. James to make the purchase from Mr. Singleton.

"Q. And did Mr. James make the purchase from Mr. Singleton? A. He did, yes sir.

"Q. And what was the purchase price? A. $1,100.00.

"Q. And it applied to what? A. To the payment of the mortgage held by the bank—I would have to look at my notes and see the name of the Company.

"Q. The Hartford Fire Insurance Company? A. Yes, Hartford Fire Insurance Company.

"Q. And did you pay that money to the Hartford Fire Insurance Company on the mortgage held by it? A. I did, yes sir.

"Q. And did you receive a satisfaction of the mortgage? A. I did.

"Q. Have you that satisfaction here? A. Yes sir."

The release of the mortgage is in the following words and figures:

"Know all men by these presents: That the undersigned, Hartford Fire Insurance Company, a corporation, does hereby certify and declare that a certain mortgage bearing date the 9th day of June, 1926, made and executed by George Singleton to Indian Valley Bank, a corporation, and assigned to the undersigned on the 30th day of January, 1928, by the said Indian Valley Bank (said assignment being recorded in the office of the County Recorder of Plumas County, California, in volume 2 of Assignment of Mortgages, page 119 on the 3rd day of April, 1928), and recorded in the office of the County Recorder of Plumas County, California, in volume 20 of Mortgages, page 406, on the 10th day of June, 1926, is hereby canceled, released and discharged.

"Dated, San Francisco, California, November 19th, 1930.

"Hartford Fire Insurance Company
"By Joy Lichtenstein, Manager."

On November 21, 1930, the following letter was written by counsel for the appellant to L. L. Clough, in relation to the note secured by the mortgage. Omitting the address, the letter is as follows: "Enclosed herewith you will find one of the original agreements, signed, as well as the release of mortgage duly acknowledged. You are undoubtedly aware that the note, which is secured by the mortgage, was introduced in evidence at the trial and is in possession of the court. When the case comes on for trial again we will take steps to have the same released, and will then cancel the same."

[3] The contention of the appellant is that the transaction referred to was not in fact a satisfaction of mortgage and a payment of the note, but was only a transfer and surrender of its right of action to foreclose the mortgage as against Singleton; that it did not receive the $1,100 as repayment of the sum which it had paid to the Indian Valley Bank, by reason of the fact that it had taken an assignment of the note and mortgage from the Indian Valley Bank, and therefore that the insurance company was entitled to hold the $1,100 as its own money, freed from any liability to account to the plaintiff herein for the same, or to have the $1,100 held as a repayment of the purchase price of the note and mortgage from the Indian Valley Bank. This claim is based upon an agreement which appears to have been entered into between Lillie S. James and the insurance company, by Joy Lichtenstein, its manager. This instrument recites: That, whereas said James had purchased the interest of George Singleton in and to the real estate upon which the hotel formerly stood, and had offered to pay to the insurance company the sum of $1,100 and was desirous of having the mortgage released so that the title to the property would be no longer incumbered thereby, it was agreed as follows: "First party agrees to

pay to said second party immediately upon execution of this agreement, the sum of $1,100.00, gold coin of the United States. Second party agreeds to execute and deliver to first party immediately upon receipt of such payment, a complete release and discharge of said mortgage, and further agrees not to further prosecute that part of said action calling for the foreclosure of said mortgage. Second party further agrees to cancel the note secured by said mortgage and to deliver the canceled note to first party. It is understood and agreed that this agreement is by way of compromise of second party's right to continue to prosecute said action for foreclosure for the full amount of the obligation secured by said mortgage."

In support of its contention, appellant cites 6 California Jurisprudence, pages 171, 173, and 175, to the effect that: "Any suspension or forebearance of a legal right constitutes a sufficient consideration for a contract." That "Forbearance to sue is a sufficient consideration to support a contract." Likewise, "The compromise of even a doubtful claim asserted in good faith constitutes a sufficient consideration for a new promise," etc.

Looking through the form of the agreement to the substance, it is clear that the insurance company had no property to sell or transfer, except the note and mortgage which had been assigned to it by the Indian Valley Bank. The mortgage gave a right, of course, to foreclose upon the property in the event that the note was not paid. The indebtedness, the amount of money which the insurance company had paid to the bank, and for which it received the evidences of its right to demand payment from the plaintiff, was all that it possessed. It had no right to foreclose upon the property independently of enforcing payment of the promissory note, and, when the promissory note was canceled and surrendered, the right to foreclose ceased to exist. It is only a confusion of ideas which leads to the claim that there is a property right to institute and maintain foreclosure proceedings independently of the debt upon which a mortgage is based, or to secure the payment for which it is executed. The very moment the indebtedness ceases to exist and the note is canceled, there is an end to all other rights. There might be circumstances under which James might in equity have the note and mortgage revived and held valid as against the plaintiff, had the property not been taken under the obligation to pay off the note and mortgage.

[4] The appellant had a right to be reimbursed the amount which it had paid to the Indian Valley Bank. Whether it received that amount from the plaintiff or Mr. James who purchased the property from the plaintiff does not affect the situation in the least. The moment the insurance company received payment and assigned the note and mortgage, discharged and canceled to James, it had no further claim against the plaintiff in this action. Again, if the respondent is not entitled to the payment made by James, he would have a cause of action against the plaintiff, but the mortgage is already discharged and the note must be treated as actually canceled, by reason of what we have hereinbefore stated that cancellation thereof would be made. Further, it is unquestionable that the plaintiff cannot be required to pay his indebtedness twice. Thus, if payment is made to the person holding the mortgage and note secured thereby, by the purchaser of the property instead of to the owner of the property, the debt is extinguished and does not constitute the basis for any further claim against the former owner of the property. Section 1473 of the Civil Code is broad enough to support every statement herein made. We may, however, cite the cases of Crumlish's Administrators v. Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 120, 45 Am. St. Rep. 872; Danziger v. Hoyt, 120 N. Y. 190, 24 N. E. 294; Reynolds v. London, etc., Co., 128 Cal. 16, 19, 60 P. 467, 79 Am. St. Rep. 17; 26 C. J. 438—where it is held that a mortgagee has no rights beyond the collection of his mortgage debt.

While the circumstances involved and some of the cases cited are not precisely similar to those presented here, the principles of law therein set forth are applicable.

The appellant strongly insists that it is untrue that any money was paid to the appellant on the mortgage, or that a satisfaction of the mortgage was executed by the appellant. The instruments which we have set forth speak for themselves. The language of the writing is: "Is hereby canceled, released and discharged." True, the word "satisfaction" is not used, but the life of the mortgage is ended, and it was agreed that the note would be delivered marked "canceled" as soon as its possession could be obtained from the custody of the court where it had been filed as an exhibit upon the first trial of this action. The apparent good faith of the appellant in contending that it has an ownership in the $1,100 paid to it on account of the note and mortgage, separate and distinct from the payment and discharge of the note and mortgage, and to demand of the plaintiff an additional payment of $905.31, is the only reason for the extended consideration which we have given to this matter.

[5] The third contention set forth as a ground for reversal is that the court erred in admitting the following testimony from the plaintiff relative to a transaction had with L. T. Bacher, the insurance agent through whom the policy referred to herein was executed by the appellant and delivered to the plaintiff and brought out by counsel for the plaintiff:

"We want to finish one thing at a time.

Now, just state to the jury what your transaction was with Mr. Bacher? A. I met Mr. Bacher, and he had asked me before if I did not want some insurance, and I told him I would as soon as I got the place fixed up. Well, he went down and went through every room in the hotel, and had an envelope in his hand, and he wrote down everything; he went through every room in the house and marked down—I don't know what he put down, but afterwards he said, 'How much insurance do you want?' I said, '$5,000; $4,000 on the building and $1,000 on the furniture.' And he went and wrote to San Francisco and got the policy. He said to me, 'You ought to take $1,000 more on that;' and I said, 'The premium is too high.'

"Q. Now, what statement, if any, did Mr. Bacher make to you as to the value he placed on the contents of the hotel? A. About $2,000.

"Q. And that statement was made by him after he had made an examination of the hotel? A. Yes sir."

The foregoing testimony was elicited by counsel for the plaintiff after the appellant had brought out the following testimony from the witness:

"Q. Well, in order to arrive at this value of $2,000 you had to put some value on the wooden beds, didn't you? A. Mr. Bacher did that; I didn't have anything to do with that; Mr. Bacher went through and put that on.

"Q. Then, you made up the proof of loss and Mr. Bacher went through there and he fixed the value for you? A. No, he went through when he got the insurance, in every room in the house.

"Q. When did he write the insurance? A. Well, sir, I don't know that date either.

"Q. Well, the policy was written in April of 1926, wasn't it? A. Yes, I guess so.

"Q. And he went through there in April of 1926, you said? A. Well, I don't know. It was before that.

"Q. Did he take an inventory? A. We went through with a paper and wrote down.

"Q. What value did he place on those beds? A. I don't know what he put on them. I didn't ask him.

"Q. Was he the one that put this value of $10 on the iron beds? A. No, no. I just put that on myself. I don't know whether it is all right or whether it is wrong.

"Q. Mr. Bacher is dead, isn't he? A. Yes sir, he is.

"Q. When did he die, do you know? A. No.

"Q. He died before the first trial, though, didn't he? A. Yes, I guess he did."

In view of this testimony brought into the case by the appellant, it is evident that no prejudice resulted from the testimony brought out thereafter from the same witness by counsel for the appellant. The door for the introduction of such testimony was opened by the appellant, and it is too late now to complain.

It is finally urged that reversal should be ordered by reason of the giving of certain instructions to the jury, and the refusal of certain instructions requested by the appellant. As a preliminary to the consideration of this final contention, we will first call attention to 24 California Jurisprudence, 806, § 79, reading as follows: "Numerous cases establish the rule that it is not error for a court to refuse to give a requested instruction if the subject matter thereof is substantially incorporated in the instructions given," etc.

[6] The first instruction assailed, given at the request of the plaintiff, reads: "You are instructed that by false swearing and fraud that will forfeit a policy is meant wilful fraud or false swearing, and not the result of inadvertence or mistake. It should be knowingly and wilfully false, or intended to defraud the Company; or if not so intended, must relate to some matter material to the inquiry concerning which the Company has a right to know the truth, and the effect of which would have a bearing upon its liability. Therefore, if you should find that the plaintiff did make any false statement, that is not sufficient to void the policy unless you further find that his statements were knowingly and wilfully false and intended to injure the Company, and if not so intended, must relate to some matter material to the inquiry concerning which the Company has a right to know the truth and the effect of which would have a bearing upon its liability."

The principal case touching the question of false swearing is that of Helbing v. Svea Insurance Co., 54 Cal. 156, 35 Am. Rep. 72. It is there held (quoting from the syllabus): "A provision in a policy of insurance, that the application for insurance shall be considered as a warranty, and that if the property insured is overvalued in it, the policy shall be void, applies only where the statement as to value is intentionally false. So, also, where the policy provides that all fraud, or attempt at fraud, by false swearing as to the loss, shall cause a forfeiture of all claim under the policy, a wrongful or intentional false swearing is intended, and not a mere discrepancy, or innocent error. Whether fraud is to be inferred from an excessive statement of the value of the property in the original application, or of the loss in the preliminary proofs, is a question of fact; and in neither case does a legal presumption of fraud arise; nor is the burden cast upon the assured to establish that his statement was not intentionally false."

To the same effect is the case of Miller v. Fireman's Fund Ins. Co., 6 Cal. App. 395, 92

P. 332, where this court, speaking through Mr. Justice Burnett, said (quoting from the syllabus): "Though willfully false statements in the proofs of loss avoid the policy when it so provides, yet an untrue statement, to have that effect, must have been knowingly and intentionally made by the insured with knowledge of its falsity, and with the intention of defrauding the company. Whether a false statement was so made is a question of fact for the jury."

In the annotations following the case of Columbian Ins. Co. v. Modern Laundry, 20 A. L. R. 1164, are to be found an overwhelming list of cases supporting the following statement: "It is well settled that where an insured person, in making proof of loss by fire, overestimates through mistake or inadvertence, the value of the property destroyed, the overvaluation does not amount to fraud sufficient to void the policy." On page 1168 of the same volume of 20 A. L. R., will be found a long list of cases supporting the following as a correct statement of the law: "Where an insured knowingly and wilfully overestimates in his proof of loss, the value of the property destroyed, with the intention of deceiving the insured, such overvaluation will avoid the policy and defeat any right of the insured to recover thereon." And on page 1172 of the same volume of 20 A. L. R., will be found another long list of cases holding: "That where it appears from the evidence that there was an overestimate of value, it is a question of fact for the jury to determine whether the insured acted honestly and in good faith in making such valuation, or whether there was an intention on his part to defraud the insurer."

[7, 8] The court, at the request of the plaintiff, also gave two further instructions, alleged by the appellant to be prejudicially erroneous. The first of these instructions reads: "You are instructed that if you find any discrepancy in the statements of the plaintiff in the respects claimed by the defendant, such discrepancy will not defeat the right of the plaintiff to recover if you find that they can reasonably be accounted for on the score of opinion or judgment honestly given or a mistake honestly made."

The second instruction is as follows: "You are instructed that where a question of fraud is involved, if there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of the jury to draw the inference favorable to fair dealing. Fraud must be proved, though not necessarily by direct evidence, but when the defendant's case goes no further than to establish a state of facts from which the inference of fraud may or may not be reasonably drawn, he has failed to establish his case by a preponderance of the evidence, and it becomes your duty to find in favor of innocence and uprightness."

The contention is made that the instruction on the subject of discrepancy should have been to the effect that the discrepancy was accounted for satisfactorily by the plaintiff, and not that the discrepancy could be accounted for. However, in the case of Miller v. Fireman's Fund Insurance Company, supra, an identical instruction was given approval by this court, and hearing denied by the Supreme Court. No further comment is necessary.

In Hind v. Oriental Products Co., Inc., 195 Cal. 655, 235 P. 438, the substantive portion of the second instruction which we have just quoted was approved as being a correct statement of the law. Appellant's objection, however, goes to the last sentence where it says: "But when the defendant's case goes no further than to establish the state of facts from which an inference of fraud may or may not be reasonably drawn, he has failed to establish his case by a preponderance of the evidence, and it becomes your duty to find in favor of innocence and uprightness." The objection to this portion of the instruction is more technical than substantial. It does not state that the defendant's case in this instance has gone no further. It simply states that, where a defendant relies upon fraud to establish a defense, it must go beyond the showing that the issue may reasonably be decided either way, and must be supported by a preponderance of the evidence. Even in the instant case it was necessary, in order that the defendant prevail in its defense of fraud, to establish such defense by a preponderance of the evidence, and not to leave the issue in such a condition that a reasonable inference might be drawn either for or against the defense of fraud. If equally balanced, the defendant did not prove its case. We do not think that the jury, in view of all the instructions which covered the question of preponderance of the evidence and what it was necessary for each party to prove, was misled by any portion of the last instruction.

The defendant sets out in its brief several requested instructions which were refused, but a reading of the refused instructions discloses that every one of the refused instructions, save those covered by instructions given by the court at the request of the plaintiff, or upon its own motion, omitted an essential element necessary to establish the defense of fraud.

[9, 10] The court gave to the jury two instructions, correctly instructing the jury on the subjects included within the refused instructions requested by the appellant, to wit: "That if plaintiff, George Singleton, knowingly and wilfully made a false statement of or

regarding a material fact in his proof of loss, or in the sworn examination held under the terms of the policy of insurance, or in his testimony, regarding the value of the property insured, or the loss or damage thereto by fire, the intention to deceive the insurer is necessarily implied as the natural consequence of such act." And further: "The policy provides that the entire policy shall be void in case of any fraud or false swearing by the insured, and therefore if you find that the plaintiff, George Singleton, violated this provision of the policy by acting fraudulently or swearing falsely, you are instructed that the entire policy is forfeited thereby, even though the fraud or false swearing related only to one or two items of insurance." The last instruction quoted is more favorable to the appellant than it should have been. It should have included words indicating that the plaintiff knowingly and willfully violated the provisions of the policy. Miller v. Fireman's Fund Ins. Co., supra; Clark v. Phoenix Ins. Co., 36 Cal. 168.

The authorities which we have cited show that the court committed no error in its instructions to the jury.

No contention is made upon this appeal as to the incendiary character of the fire.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

McDANIELS v. DICKEY et al.*

Civ. 8312.

District Court of Appeal, First District, Division 1, California.

Nov. 28, 1932.

Hearing Granted by Supreme Court Jan. 26, 1933.

Eminent domain ⇐153.

One acquiring property subsequent to interlocutory decree, in condemnation proceedings to obtain easement thereon, acquired no right to compensation payable under decree (St. 1903, p. 379, § 10, as amended by St. 1927, p. 1146, § 8).

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Suit by Elizabeth G. McDaniels against G. W. Dickey and others. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Edward H. Estill and Edmond Wheeler Pottle, both of Los Angeles, for appellant.

Alonzo D. Hitchcock, of Van Nuys, for respondents G. W. Dickey, Loraine Dickey, and Charles K. Heard.

KNIGHT, J.

Plaintiff appeals from a judgment of dismissal entered pursuant to an order sustaining a demurrer to the complaint without leave to amend.

The complaint alleges: "That on or about the 20th day of February, 1928, complaint was filed and summons issued in case No. 245510 in the above-entitled court upon proceedings for condemnation, wherein the City of Los Angeles, a municipal corporation, was plaintiff and wherein the defendants herein, G. W. Dickey and Loraine Dickey were, among others, named defendants therein as the owners of Parcel 2 set forth and described in said proceeding; That the interlocutory judgment therein was entered on the 17th day of May, 1929, in Book 730 at Page 80 of Judgments; That by the terms and provisions of said interlocutory judgment it is, inter alia, provided that the total compensation proper to be paid to said defendants therein, G. W. Dickey and Loraine Dickey, as the owners of said parcel of land, is the sum of One Thousand Two Hundred Seventy-six and 73/100 ($1276.73) Dollars; That said compensation has not been paid and the final judgment in said proceedings has not been entered; all of which will more fully appear by reference to the files, * * * in said condemnation proceeding * * * ready to be produced upon the trial of this cause, and to the originals thereof to which reference is hereby made. That on or about the 19th day of June, 1929, by grant deed recorded on the 6th day of August, 1929, * * * said defendants, G. W. Dickey and Loraine Dickey, as vendors, sold and conveyed to plaintiff, as vendee, that certain parcel of real property in the City of Los Angeles, County of Los Angeles, State of California, more particularly in said deed set forth and described, a copy of which is attached hereto and made a part hereof as Exhibit 'A.'" The deed referred to purports to convey to plaintiff, for a consideration of $10, the east 80.28 feet of the west 305.28 feet of the south 175 feet of lot 66, tract 1000, "as per map recorded in Book 19 page 1 et seq. of Maps in the office of the County Recorder of said County; subject to an easement on the Easterly portion thereof under proceedings for condemnation instituted in Superior Court of said County in Case No. 245510. Subject to all taxes for the fiscal year 1929-30; Subject to street bonds for improvement of Burbank Blvd. upon this and other property; Subject to conditions, restrictions, reservations, rights, rights of way and easements of record." Continuing, the complaint alleges that it was

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 25 P.2d 404.

agreed between the Dickeys as vendors and plaintiff as vendee at the time of the purchase of said property "that the sum of money to be paid under said proceedings in condemnation * * * for an easement over the easterly portion thereof, should be paid to the plaintiffs"; that the necessary papers therefor would be executed; but that the Dickeys had refused to do anything in that behalf. Attached to the complaint is a map which plaintiff alleges shows, among other things, the amount of street assessment levied against said "parcel 2," the area of said parcel and an approximation of the amount of the award plaintiff should receive. The prayer of the complaint was that the city be required to pay the amount of the award into court, or retain the same until plaintiff's alleged right to a portion thereof could be determined; that plaintiff's proportion be determined by the court and that the Dickeys be required to execute and deliver to plaintiff an assignment thereof, or upon their failure so to do that the clerk of the court be directed to do so.

The city filed an answer which, among other things, set forth the amount of the award and of the assessment, and asked for an order authorizing it to deposit the balance of the award, after deducting the assessment, with the clerk. The Dickeys demurred to the complaint, the main ground being that the facts alleged did not constitute a cause of action; and as stated the demurrer was sustained without leave to amend.

The legislative act under the authority of which the city proceeded is not mentioned in the complaint, and at the outset of this appeal the parties were not agreed as to which of the several improvement acts the city followed, plaintiff indicating in her opening brief that it was the act of 1911 (Stats. 1911, p. 730), and the Dickeys claiming in their brief that it was the Street Opening Act of 1903 (Stats. 1903, p. 376). However, in her closing brief plaintiff does not dispute the assertion of the Dickeys that said proceedings were taken under the act of 1903; and therefore we shall assume that such was the fact.

As said in Russakov v. McCarthy Co., 206 Cal. 682, 686, 275 P. 808, 810: "That a person, to be entitled to moneys awarded as compensation for the condemnation of property, must establish an interest or estate in the thing condemned, is, as an abstract proposition of law, unquestionably sound. But the right to compensation is a personal one which does not run with the land, and does not pass to a vendee of the land *after the right accrues*, in the absence of an express agreement to that effect. Where the right accrues after a conveyance, a vendee or optionee is entitled to compensation for the damage he has suffered. 10 Cal. Jur. 356, and cases cited." (Italics ours.)

The determinative question presented is, therefore, whether the right to the compensation fixed by said interlocutory decree accrued at the time of the rendition thereof or at any time prior thereto. If it did, then, in the absence of an express agreement, plaintiff was not entitled to any portion thereof because she acquired her portion of the land after the rendition of said decree; and the right to such compensation being a personal one, which did not run with the land, no part thereof passed to plaintiff upon making said purchase. The question is answered by the provisions of section 10 of said act of 1903 (as amended by St. 1927, p. 1146, § 8), for it is there expressly provided that "For the purpose of assessing the compensation and damages, the right thereto shall be deemed to have accrued at the date of the issuance of summons * * *" in the condemnation action. True, as pointed out in Conlin v. Southern Pacific R. R. Co., 40 Cal. App. 733, 182 P. 67, and East San Mateo Land Co. v. Southern Pacific Railroad Co., 30 Cal. App. 223, 157 P. 634, where the land has been taken for public use *without compensation being first made*, and its continued possession is necessary to such use, a different rule prevails. In such cases the right to compensation accrues at the time the land is taken and belongs to the owner at the time of the taking. Lewis on Eminent Domain (3d Ed.) §§ 462–464. But this is not such a case.

It is also true, as plaintiff argues, that under the terms of the act of 1903, after having obtained an interlocutory decree, a municipality may abandon the condemnation proceedings; but even so, the right to so abandon does not affect the right to the compensation if the municipality pays the compensation in accordance with the terms of said decree.

As indicated in Russakov v. McCarthy Co., supra, the right to the compensation may pass to a vendee after the right thereto accrues to the vendor where there is an express agreement to that effect; and as will be noted, the complaint in the present case contains certain allegations with reference to an agreement between the parties. But in plaintiff's closing brief she frankly admits that "the agreement upon which appellant [plaintiff] stands is the agreement to be gathered from the four corners of the deed executed and delivered by respondents to appellant"; and as already shown under the authorities above cited, the conveyance of the property to her carried no right to any portion of the compensation awarded by said decree.

The judgment is affirmed.

I concur: TYLER, P. J.

HOUGH et al. v. WRIGHT.

Civ. 8546.

District Court of Appeal, First District, Division 1, California.

Nov. 26, 1932.

1. Dismissal and nonsuit ⇐19(1).

In action to quiet title, answer denying plaintiffs' ownership and claiming ownership and praying for judgment sufficiently alleged affirmative relief preventing dismissal by plaintiffs (Code Civ. Proc. § 581, subd. 1).

2. Quieting title ⇐51.

Defendant, to obtain affirmative relief in quiet title action, *held* not required to set forth facts showing source of title or evidence to prove ownership, where it appeared that she was record owner in fee.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Rollo Jerome Hough and another against Cora Bernice Wright, in which defendant sought affirmative relief. From the judgment for defendant, plaintiffs appeal.

Affirmed.

Jerome Hough, of Los Angeles, for appellants.

J. E. Rodgers and A. F. Bray, both of Martinez, for respondent.

KNIGHT, J.

Plaintiffs brought this action to set aside a deed upon the grounds of undue influence, fraud, and nondelivery; also to quiet title to an undivided two-thirds interest in the property described in the deed. In her answer defendant denied specifically the allegations of the complaint, including those relating to plaintiffs' claim of ownership in the property, and in this behalf alleged affirmatively that she was the owner in fee of the whole of said real property. The prayer of the answer was that plaintiffs take nothing by their action, that by its decree the court declare defendant to be the owner of said property, and that plaintiffs were without right, title, interest or estate therein, and for general relief.

[1, 2] The action was filed in Contra Costa county wherein the property was situate; and the trial was set for 10 o'clock in the forenoon of October 23, 1930, some ten months after the cause was at issue. At the time set defendant, who was a resident of Eureka, was present in court with counsel and some fourteen witnesses ready to proceed with the trial, five of whom were from Eureka and four from Alameda county; but a few minutes before 10 o'clock plaintiffs filed with the clerk a request for the dismissal of the action, and thereupon filed a new action against the defendant identical in form with the one sought to be dismissed. The clerk entered the dismissal accordingly, and a few minutes later, when the action was called for trial, the matter of said dismissal was brought to the attention of the court and defendant's counsel; whereupon defendant moved to set aside said dismissal upon the ground that by her answer she sought and was entitled to affirmative relief; and that consequently, under the proviso embodied in subdivision 1 of section 581 of the Code of Civil Procedure, plaintiffs were precluded from dismissing the action. The motion was granted, and on stipulation the trial was continued until the following day, at which time the action was tried and submitted on evidence introduced by defendant, and judgment rendered in her favor, granting the affirmative relief prayed, from which judgment plaintiffs have taken this appeal.

The record further shows that plaintiffs and defendant are brothers and sister; and that the property was deeded to defendant on January 15, 1929, by their father, William J. Hough, who had resided with defendant at her home in Eureka for a number of years preceding his death, which occurred January 29, 1929; that the property involved formerly belonged to Jane E. Bennett, a sister to William J. Hough, who predeceased him less than three weeks, leaving him as sole surviving heir; and that the final distribution of her estate was awaiting the termination of the litigation over this deed. It further appears that Rollo Jerome Hough, one of the plaintiffs, is an attorney at law, and that on the day following the filing of the request for dismissal plaintiffs' attorneys withdrew from the case, and that said Rollo Jerome Hough was substituted in their place and stead.

The sole contention made by plaintiffs is that the affirmative allegations of the answer were legally insufficient to warrant the granting of any affirmative relief, and that therefore plaintiffs were entitled, under the authority of subdivision one of said section 581, to dismiss the action. It is well settled, however, that in actions to quiet title affirmative relief may be granted to a defendant where, as here, by his answer, he denies the plaintiff's alleged ownership, and alleges ownership in himself and prays for a judgment establishing and quieting title in him; and that, where such is the state of the answer the case is brought within the proviso of subdivision 1 of said Code section, and thus prevents a dismissal of the action by the plaintiff. Islais, etc., Water Co. v. Allen, 132 Cal. 432, 64 P. 713; Brooks v. White, 22 Cal. App. 719, 136 P. 500; Larkin v. Superior Court, 171 Cal. 719, 154 P. 841, Ann. Cas. 1917D, 670; Dellaringa v. Hooker, 31 Cal. App. 667, 161 P. 276; Bay Land & Terminal Co. v. Superior Court, 119 Cal. App. 756, 6 L. Ed. 527; 22

Cal. Jur. 160. Nor was it necessary, as plaintiffs contend, in order to obtain affirmative relief, for defendant to set forth facts showing the source of her title or evidence to prove her ownership. In view of the admitted fact that she was the record owner in fee of the property, general allegations of ownership were sufficient. 22 Cal. Jur. 149, 150. In this connection it may be stated that defendant's allegations of ownership were substantially in the same form as those employed by plaintiffs in alleging their ownership.

Therefore, since the purported dismissal of the action was a nullity, and the cause was regularly set for trial, the defendant was entitled to proceed with her case and take judgment (9 Cal. Jur. 511); and, inasmuch as plaintiffs at no time, by amendment or otherwise, sought to withdraw, abandon, or eliminate from the complaint any one of the first three causes of action set forth therein, the trial court was called upon to hear and determine all issues of fact raised by the pleadings, and to make findings and render judgment accordingly. After having reviewed the entire record and given due consideration to all of the points urged by plaintiffs, it is our opinion that the appeal is wholly without merit, and, from the circumstances above set forth, it would appear that the same was taken solely for the purpose of delay.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

127 Cal.App. 625

WOODWORTH v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8427.

District Court of Appeal, Second District, Division 2, California.

Nov. 22, 1932.

Hearing Denied by Supreme Court Jan. 20, 1933.

1. Seamen ⇐2.

"Seaman" is one serving vessel in navigation under contract or employed on vessel to assist in main purpose of voyage.

[Ed. Note.—For other definitions of "Seaman," see Words and Phrases.]

2. Admiralty ⇐13.

Employee, operating passenger float, attached to cable, from launch bringing passengers from anchored fishing barge, when injured, was not subject to exclusive admiralty jurisdiction as "one employed under a maritime contract to serve as the sole member of a crew of a vessel transporting passengers from an ocean-going craft" (Const. U. S. art. 3, § 2; Jud. Code, § 24 [28 USCA § 41]; 46 USCA §§ 564, 561–575, 688, 713).

Proceeding for compensation under the Workmen's Compensation Act by Norman Warren Woodworth, a minor, employee, by Vivian Woodworth, his guardian ad litem, opposed by the Gratia Fishing Barge Company and another, employers. To review an order of the Industrial Accident Commission, rejecting the claim for lack of jurisdiction, claimant brings certiorari.

Reversed.

Chester J. Staley and C. C. Caswell, both of Los Angeles, for petitioner.

A. I. Townsend and Everett A. Corten, both of San Francisco, for respondents.

CRAIG, J.

An application filed by the petitioner herein, a minor, by his guardian ad litem, with the Industrial Accident Commission, claiming compensation for injuries alleged to have been sustained while employed upon an improvised craft which loaded and unloaded passengers and fishing supplies to and from a launch which plied between said craft and an anchored pleasure boat, was rejected by the said commission upon the ground that it was without jurisdiction of the cause. The petitioner thereupon filed an application for review of such decision.

It appeared that the respondent corporation and said William F. Storey maintained, at a distance of about 2⅛ miles from the shore of the Pacific Ocean, a fishing barge, which was anchored, and to which the public were invited. Certain charges were made for the privileges of said barge, which included transportation thereto and return. Patrons were carried to the barge from a point about 600 feet from the shore by a small launch. Between the points last mentioned said respondents placed a steel cable, to which, the parties have stipulated, "was engaged a float approximately twenty feet square, constructed of empty drums or tanks bound together upon which timbers were placed and likewise bound together, above and upon which was constructed a small deck with a room and seats for passengers and space for gasoline engine." At the time of said injury, the petitioner was operating such structure in carrying passengers thereon toward shore. The respondent commission held, and it is here insisted, that "one employed under a maritime contract to serve as the sole member of the crew of a vessel and who sustained injury by contact with the machinery then being used to propel such craft, while transporting passengers for hire upon the navigable waters of the United States during a landward journey from an ocean-going craft to the shore, was engaged in activity so closely related to navigation and commerce as to be subject to the exclusive admiralty jurisdiction." In support of its contention are cited

article 3, § 2, of the Constitution of the United States (Const, pt. 2, p. 284, USCA), "The judicial Power shall extend to all Cases * * * of admiralty and maritime Jurisdiction"; and section 24 of the Judicial Code (28 USCA, p. 32, § 41), "The district courts shall have original jurisdiction as follows: * * * Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it. * * *"

[1] The maritime law has been held to have been instituted for the protection of seamen and to afford them the right to recover for maintenance, cure, and wages during disability when injured in service of their ship. Pac. S. S. Co. v. Peterson, 278 U. S. 130, 49 S. Ct. 75, 73 L. Ed. 220; Morris v. U. S. (C. C. A.) 3 F.(2d) 588; The Mars, 149 F. 729, 79 C. C. A. 435. By an act of Congress, any seaman may also, "at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. * * * Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." 38 Stats. 1185, § 20, as amended by 41 Stats. 1007, § 33 (46 USCA § 688). In construction of the chapter embracing the foregoing and other provisions regulating employees and the system of their employment in maritime merchant commerce, "every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this chapter may be applicable. * * *" 38 Stats. 1168, § 10 (46 USCA § 713). But a "seaman" is one who by contractual arrangement serves the vessel in navigation. Martis v. Union Transport Co., 207 App. Div. 381, 202 N. Y. S. 56. "Seamen" are persons employed in a vessel to assist in the main purpose of the voyage. The Z R-3 (D. C.) 18 F.(2d) 122. Said chapter requires that the master of every vessel shall "make an agreement in writing or in print, with every seaman whom he carries to sea as one of the crew" (46 USCA § 564), and strict penalties are exacted for nonobservance thereof, (46 USCA §§ 561–575).

[2] We do not feel authorized to hold that the maritime law nor congressional legislation contemplated for the employment and protection of those engaged in merchant commerce were intended to be so comprehensive as to include one who labored only on shore and upon a pontoon or float attached thereto. The record fails to bring the petitioner within the definition of respondents as "one employed under a maritime contract to serve as the sole member of a crew of a vessel * * * transporting passengers * * * from an ocean-going craft," nor to suggest that any of the conditions of the maritime law or Seamen's Act were fulfilled or required of either party to the employment mentioned. Sultan Railway & Timber Co. v. Dept. of Labor & Ind., 277 U. S. 135, 48 S. Ct. 505, 72 L. Ed. 820.

The order is reversed.

We concur: WORKS, P. J.; STEPHENS, Justice pro tem.

127 Cal.App. 678

TAAFFE v. BLOCH et al.

Civ. 8543.

District Court of Appeal, First District, Division 1, California.

Nov. 25, 1932.

1. Venue ⇐16½.

Real and personal actions, joined in same complaint, must be tried in county of defendant's residence on proper demand (Code Civ. Proc. § 395).

2. Venue ⇐55.

Plaintiff's request to dismiss cause of action for value of services after defendant moved for change of venue did not affect latter's right thereto; being amendment of complaint praying also foreclosure of mechanic's lien (Code Civ. Proc. § 395 and § 581, subd. 1).

3. Venue ⇐55.

Defendant's right to change of venue must be determined by state of complaint when he appeared (Code Civ. Proc. § 395).

4. Venue ⇐55.

Filing of amendment to complaint after defendant filed motion for change of venue does not defeat such motion (Code Civ. Proc. § 395).

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by William Charles Taaffe against Francis V. Bloch, also known as F. B. Bloch, and others. From an order denying named defendant's motion to change the place of trial, he appeals.

Reversed.

A. B. Weller, of San Francisco, for appellant.

Louis Oneal, of San Jose, for respondent.

KNIGHT, J.

[1] This is an appeal by defendant from an order denying his motion for a change of place of trial based upon the ground of nonresidence.

The complaint contained two counts; the first being for the foreclosure of a mechanic's lien theretofore filed against property situate in the county in which the action was brought, and the second for the recovery of the reasonable value of the work and services alleged to have been performed by respondent for appellant at the latter's request. The authorities hold uniformly that, where real and personal actions are joined in the same complaint, the case must be tried in the county of the defendant's residence upon proper demand being made therefor (Sheeley v. Jones, 192 Cal. 256, 219 P. 744; Brown v. Happy Valley Fruit Growers, 206 Cal. 515, 274 P. 977; Warner v. Warner, 100 Cal. 11, 34 P. 523); and in the case of Chew v. Storrie, 108 Cal. App. 313, 291 P. 610, it was expressly held that where, as here, a complaint in one count sets forth a cause of action for the foreclosure of a mechanic's lien, and in a second count pleads a cause of action based on personal liability, the action becomes transitory, and, under the authority of section 395 of the Code of Civil Procedure, the trial must be changed to the place of the defendant's residence upon demand being made therefor.

[2-4] After appellant's moving papers were filed, however, and prior to the hearing of the motion, respondent filed with the clerk of the court a document signed by respondent's attorney reading as follows: "To the Clerk of the above entitled court: You are hereby directed and authorized to dismiss plaintiff's second cause of action as set out in plaintiff's complaint." The appeal was not argued orally, and respondent has not seen fit to file any brief in support of the trial court's ruling. It may be assumed, therefore, as suggested in appellant's brief, that the adverse order from which the appeal was taken was based upon the theory that the filing of the above request for a dismissal of the second cause of action took the case out of the operation of the rule of the cases above cited. We are unable to agree that such was the effect thereof. Subdivision 1 of section 581 of the Code of Civil Procedure, under the authority of which respondent presumed to file said dismissal, provides that a plaintiff may dismiss "an action" by filing a written request therefor with the clerk and paying the costs; and with respect to the scope of said subdivision it has been held that under its provisions a plaintiff may dismiss one or more of several defendants and continue the action against the remaining defendants (Prendergast v. Mitchell-Silliman Co., 65 Cal. App. 456, 224 P. 243); but, as pointed out in California Jurisprudence (vol. 1, p. 306), there is a marked difference in a legal sense between "an action" and "a cause of action," and nowhere in said section is a plaintiff authorized expressly or by implication to amend or revise his complaint, by dismissing or striking therefrom one or more of several causes of action by filing a written request therefor with the clerk. Furthermore, it is well settled that on motion for a change of place of trial to the proper county the right thereto must be determined by the state of the complaint as it stood at the time of the appearance of the party demanding the change (25 Cal. Jur. 907, 908, and cases cited); and that the filing of an amendment to the complaint subsequent to the filing of the motion for change of place of trial does not have the effect of defeating said motion (Buell v. Dodge, 57 Cal. 645).

It follows, therefore, that, since the document filed with the clerk by respondent did not purport to be a request for the dismissal of the action itself, and was never intended to accomplish that purpose, but, on the contrary, was filed for the sole purpose of eliminating the second cause of action set forth in the complaint, it constituted nothing more than an amendment to the complaint, and must be treated as such; and, having been filed subsequent to the filing of appellant's motion, it had no effect under the rule of the cases cited on appellant's right to have the place of trial of the action changed to the county of his residence.

If it was respondent's desire to have the foreclosure proceeding tried in the county in which the action was brought, he could easily have accomplished such result by dismissing the action as permitted by said Code section and filing it anew, based on the one cause of action.

The order is reversed.

We concur: TYLER, P. J.; CASHIN, J.

127 Cal.App. 554

FOGLER et al. v. PURKISER.

Civ. 179.

District Court of Appeal, Fourth District, California.

Nov. 18, 1932.

1. Trial ⇐105(2).

Time for purchaser's performance of written land contract, containing no provision as to time for payment of price, must be determined without regard to evidence of oral agreement, though introduced without objection (Civ. Code, § 1657; Code Civ. Proc. § 1856).

2. Evidence ⇐384.

Parol evidence rule is one of substantive law as well as of evidence.

3. Specific performance ⇐121(10, 11).

Evidence *held* to support findings in action for specific performance of contract to convey realty that plaintiff did not refuse to perform contract and that defendant did not rescind it.

4. Vendor and purchaser ⇐76.

Delivery of deed and payment of price are dependent and concurrent conditions in contract for sale of realty.

5. Vendor and purchaser ⇐102.

Contract for sale of realty remained in effect, where vendor did not rescind it nor take steps to put purchasers in default, but announced that she would no longer be bound by covenants therein.

6. Vendor and purchaser ⇐170.

Purchaser's offer when not in default to perform contract to purchase realty by serving written tender of price on vendor after latter's announcement that she would not consummate transaction put her in default, in absence of objection to offer (Civ. Code, §§ 1491, 1496, 1501).

7. Pleading ⇐81.

Pleadings in action on note *held* not available to plaintiff therein as defense to maker's action for specific performance of contract to convey realty in part consideration of maker not contesting disposition of note after payee's death.

The answer, filed in action on note over year after filing of complaint in action for specific performance, alleged that defendant obtained execution of note by duress and undue influence on payee while occupying fiduciary relationship toward her, and that note was without consideration, and there was no evidence of further proceedings in action thereon after filing of answer, nor any supplemental answer or application for leave to file supplemental pleadings in specific performance suit, which was at issue long before maker's alleged violation of contract.

8. Pleading ⇐81.

Answer relates to facts existing when action was brought, and matters of defense subsequently arising must be set up by supplemental answer.

9. Election of remedies ⇐7(1).

Mere filing of answer in action on note, alleged to have been obtained by plaintiff's exercise of duress and undue influence on payee, since deceased, *held* not bar to maker's action for specific performance of plaintiff's contract to convey realty formerly belonging to payee.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Irving R. Fogler and another against May N. Purkiser, formerly May N. Fogler. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Burton E. Hales, of Redlands, for appellant.

Swing & Wilson, of San Bernardino, for respondents.

AMES, Justice pro tem.

This is an action to compel the specific performance of a contract to convey real estate. The parties to this action are the children and heirs at law of Alice A. Fogler, who died intestate in San Bernardino county on the 26th day of October, 1928. During her lifetime she was the owner of a tract of land consisting of 40 acres, which throughout this opinion will be designated as parcel 1, and certain real property in the city of Redlands, San Bernardino county, improved with a dwelling house thereon, in which she resided at the time of her death, and which is designated as parcel 2. The deceased was also the owner of a promissory note executed by plaintiff Irving R. Fogler in the sum of $1,000, dated the 23d day of August, 1927.

Shortly after the death of Alice A. Fogler, the defendant caused to be recorded in the office of the county recorder of San Bernardino county two deeds of conveyance purporting to have been executed and acknowledged by the deceased during her lifetime, conveying to the defendant all of the real property which belonged to decedent during her lifetime. Thereafter and on the 10th day of November, 1928, plaintiff Irving R. Fogler caused to be filed for record in the office of the county recorder of San Bernardino county an affidavit in which he alleged that Alice A. Fogler at the time of

her death was the owner of both parcel 1 and parcel 2 herein referred to, that the defendant claims to be the owner thereof, and that the deeds under which defendant claims title to said real property are null and void. On the same day on which the affidavit of plaintiff Fogler was filed for record, he caused to be filed in the office of the clerk of the superior court of San Bernardino county a petition for letters of administration in the matter of the estate of Alice A. Fogler, deceased, in which he alleged that the estate of Alice A. Fogler consisted of both parcel 1 and parcel 2, and prayed that letters of administration be issued to himself. This petition was set for hearing in the superior court on the 26th day of November, 1928. After the filing of the petition for letters of administration, negotiations were entered into between the parties to this action for the purpose of effecting a settlement of the controversy which had arisen. These negotiations culminated in a written agreement executed by all of the parties to this action on the 23d day of November, 1928. In that agreement defendant agreed "for and in consideration of the covenants and agreements hereinafter contained" on the part of the plaintiffs, to deed to the plaintiffs each 10 acres of the south 20 acres of the 40-acre tract of land described as parcel 1, and the plaintiffs, in consideration of the covenants and agreements on the part of the defendant, agreed "not to contest the disposition of her property," heretofore made by Mrs. Alice A. Fogler in any manner whatsoever, whether the said property was disposed of by Mrs. Alice A. Fogler "by deed, gift, assignment, or otherwise." The agreement then contained the following covenant, out of which the present controversy arose: "And said Irving R. Fogler hereby agrees to pay said May N. Purkiser the sum of ten thousand dollars for the North 20 acres of the 40 acre tract of land heretofore owned by said Mrs. Alice A. Fogler near the City of San Bernardino Cal. and said May N. Purkiser hereby agrees to accept the sum of ten thousand dollars for said 20 acres, and to deliver to said Irving R. Fogler a good and sufficient deed of grant to said 20 acres of land." For the specific enforcement of this contract, plaintiffs brought this action.

The complaint alleged the performance of the contract on the part of plaintiffs, and further that they had refrained from further efforts to obtain testimony to establish the fact that parcels 1 and 2 and other property constituted a portion of the estate of Alice A. Fogler, and had refrained from further attempts to establish that the conveyances recorded by the defendant were insufficient to convey title to parcels 1 and 2 to her, and further alleged that on the 18th day of March, 1929, they tendered to the defendant the sum of $10,000 and demanded that she perform the covenants in her agreement by executing to the plaintiffs the conveyances therein provided for. The failure of defendant to perform the covenants in the agreement is then alleged in appropriate language. In her answer, defendant denied all of the foregoing allegations of the complaint, and further alleged that on or about the 1st day of March, 1929, because of the refusal of plaintiffs to comply with the terms of the agreement, she repudiated the same and notified plaintiff Irving R. Fogler that she would no longer be bound by its terms.

After trial upon the merits, the court found generally in finding No. 1 that all of the allegations in each respective paragraph of the complaint were true. Finding No. 2 is as follows: "The Court hereby finds that it is not true that the defendant [sic], Irving R. Fogler, has refused repeatedly or at all to carry out the terms of said agreement, or that he has told the defendant on many occasions, or upon any occasion, that he would not and could not pay her the sum of $10,000.00 as provided in said agreement, nor that he would pay her the sum of $2,000.00 and give her a mortgage back for the sum of $8,000.00 in payment for said land; nor is it true that because of the refusal of the plaintiffs or either of them, to comply with the terms of said agreement, the defendant on or about the first of March, 1929, or at any other time, rescinded said agreement, and notified the plaintiff, Irving R. Fogler, that she would no longer be bound by its terms, that she would no longer regard said agreement as binding upon herself, and that the same was at an end so far as she was concerned, and that he could proceed with the action which he had commenced in the Superior Court of said County for the probate of the estate of Alice A. Fogler."

Finding No. 3 is a specific finding that defendant has never rescinded said agreement and that the same is in full force and effect. Pursuant to the findings, judgment of the court was duly entered, in which the specific performance of the agreement of November 23, 1928, was ordered and decreed, and from that judgment defendant appeals.

[1] It is first contended by appellant that findings 2 and 3 are not supported by the evidence, in that the evidence shows, without substantial conflict, that defendant, on or about March 1, 1929, rescinded the agreement, and that respondent Irving R. Fogler had not, prior to that time, paid the purchase price of $10,000, and that he was then in default.

It will be observed that the agreement of November 23, 1928, contains no provision as to the time when the purchase price shall be paid. However, appellant and her coun-

sel testified that there was an oral agreement at the time of the execution of the contract that the purchase price would be paid by Irving R. Fogler in cash at the office of the attorney for appellant the first of the following week, and that neither the purchase price nor any part thereof was paid at that time, nor did Irving R. Fogler appear at the appointed place at that time. This evidence was admitted without objection on the part of respondents, and it is now contended by appellant that the failure to pay the purchase price at the office of her attorney at the time specified in the oral agreement constituted a violation of the contract on the part of respondents and justified its rescission by her. We think, however, that the time of performance must be determined regardless of the evidence of the oral agreement, although the same was introduced without objection. Section 1657 of the Civil Code is as follows: "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantly—as, for example, if it consists in the payment of money only—it must be performed immediately upon the thing to be done being exactly ascertained."

In construing this section, it has been held that, if a contract specifies no time for its performance, the law implies that it shall be performed within a reasonable time, and will not permit this implication to be rebutted by extrinsic testimony going to fix a definite term because this varies the terms of the written contract and would violate the provisions of section 1856 of the Code of Civil Procedure, which provides as follows:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

"1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

"2 Where the validity of the agreement is the fact in dispute."

In the case of Standard Box Co. v. Mutual Biscuit Co., 10 Cal. App. 746, 103 P. 938, 939, the court says: "Nor do we think it was competent to show by parol testimony that at the time the option was given plaintiff agreed that defendant should have one year within which to accept it. It is a well-settled principle that that which is implied by law becomes as much a part of the contract as that which is therein written, and, if the contract is clear and complete when aided by that which is imported into it by legal implication, it cannot be contradicted by parol in respect of that which is implied any more than in respect of that which is written. * * * 'There is another principle to be observed, namely, that whatever the law implies from a contract in writing is as much a part of the contract as that which is therein expressed; and to the extent that the contract, with that which the law implies, is clear, definite, and complete, it cannot be added to, varied, or contradicted by extrinsic evidence.' * * *"

The same rule is announced in the following cases: Greenberg v. California B. R. Co., 107 Cal. 667, 40 P. 1053; Peterson v. Chaix, 5 Cal. App. 525, 90 P. 948; California Drilling & Machinery Co. v. Crowder, 58 Cal. App. 529, 209 P. 68; LaFrance v. Kashishian, 204 Cal. 643, 269 P. 655.

[2] Nor have respondents waived their right to urge the point on appeal, that this evidence should be disregarded. It has been held that the parol evidence rule is not only a rule of evidence, but one of substantive law. Harding v. Robinson, 175 Cal. 534, 166 P. 808; Rottman v. Hevener, 54 Cal. App. 474, 202 P. 329.

[3] If, then, respondents had a reasonable time within which to perform the covenants in the contract and they were not in default at the time of the purported rescission, a rescission on the part of appellant would not be justified. We think that there is sufficient evidence in the record to support the finding that the contract was not rescinded. Appellant testified that Irving R. Fogler never offered to pay her the sum of $10,000 cash, but that in December, 1928, he offered to pay the sum of $2,000 in cash and to secure the balance of $8,000 by a mortgage upon the premises to be conveyed. This offer, she testified, she rejected and stated that she wanted the cash. At another interview in January, 1929, he repeated the same offer. She again declined to accept it, and stated that she wanted $10,000, and that she then told him that she would no longer be bound by the contract.

The testimony of Irving R. Fogler, which tends to support findings 2 and 3, may be summarized as follows: That he made arrangements at a bank to borrow the money with which to finance this transaction and had a certificate of title "brought down to date." He further says: "I saw my sister several times and wanted her to carry out the agreement;" that his attorney had dismissed the petition for letters of administration and in January, 1929, prepared a quitclaim deed bearing date January 12, 1929, which was executed and acknowledged by respondents herein. Incorporated in the quitclaim deed were certain recitals that the parties thereto were next of kin and heirs at law of Alice A. Fogler, that the claims of all of her creditors and the expenses of her last illness had

been paid, together with a waiver of the right to contest the validity of the deeds theretofore recorded by appellant. Attached to the quitclaim deed was an affidavit to be signed by appellant to the effect that the recitals in the quitclaim deed were true. Respondent Irving R. Fogler further testified that he made several trips to Redlands to ask appellant to sign the affidavit attached to the quitclaim deed and consummate the transaction, but that she stated she would not go through with it, that she said the property was all hers and she thought she had a right to it; that about March 1, 1929, appellant's attorney told him that appellant would not go through with the agreement; that on or about that date appellant's attorney told the witness that appellant "would go through with the agreement if we would draw up another one for $600 an acre"; that during the latter part of January or the first of February, 1929, appellant informed him that she would not carry out the contract.

Fred A. Wilson, attorney for respondents, testified that on January 23, 1929, he inclosed the quitclaim deed executed and acknowledged by respondents to the attorney for the appellant at Redlands, with the request that the same be executed by her; that at a subsequent time Mr. Hales, the attorney for appellant, informed him that he "thought the defendant was going to back out of the deal." On February 6, 1929, he again wrote to Mr. Hales asking him to procure the execution of the quitclaim deed, to which Mr. Hales did not reply, nor has the affidavit attached to the quitclaim deed ever been executed by appellant. We think this evidence is sufficient to support the findings, and in fact tends to prove an abandonment of the contract on the part of appellant.

[4] It is the rule in California that, in a contract for the sale of real estate, the delivery of the deed and the payment of the purchase price are dependent and concurrent conditions. Cates v. McNeil, 169 Cal. 697, 147 P. 944; Whittier v. Gormley, 3 Cal. App. 489, 86 P. 726; Lemle v. Barry, 181 Cal. 6, 183 P. 148; 25 Cal. Jur. 672.

[5] We are not called upon to determine whether or not the circumstances were such that appellant had a right to rescind the contract, if such right existed, because the court found that she did not exercise it. She took no steps to put respondents in default, but announced that she would no longer be bound by the covenants in her contract. The contract then is still in full force and effect. Lemle v. Barry, supra.

[6] On the 18th day of March, 1929, and after appellant had announced that she would not consummate the transaction, respondents served upon the appellant a written tender of the sum of $10,000 "as the purchase price and in payment of the north half of that certain real property" referred to as parcel 1, which is further described in the notice, together with a demand for a conveyance pursuant to the provisions of the agreement of November 23, 1929, but that appellant neither complied with any of the terms of her agreement, nor did she offer any objection, either to the form of the tender or the contents thereof.

This offer to perform having been made at a time when respondents were not in default and no objection having been made to it, places the appellant in the position of the party in default rather than the respondents. Civ. Code, §§ 1491, 1496, 1501; Cates v. McNeil, supra; Kofoed v. Gordon, 122 Cal. 314, 54 P. 1115.

[7, 8] Another contention advanced by appellant is that respondent Irving R. Fogler has failed to comply with the terms of the agreement of November 23, 1928, in that he is contesting the disposition of the promissory note executed by him to his deceased mother on August 23, 1927, and to support this contention she offered in evidence at the trial the complaint and answer in an action which was then pending in the superior court of San Bernardino county, in which this defendant and Bank of America of California, Inc., were plaintiffs and the plaintiffs herein were defendants. That action was brought for the purpose of recovering a judgment upon a promissory note executed by Irving R. Fogler and Myrtle O. Fogler, in which defendants therein (plaintiffs here) filed an answer in which they alleged that the execution of said promissory note was obtained by May N. Purkiser, the defendant herein, by means of duress and undue influence exercised by her upon the deceased while occupying a fiduciary relationship towards her, and further that said note was executed without any consideration. The offer of these pleadings in the case of Purkiser v. Fogler was objected to by respondents as incompetent, irrelevant, and immaterial. The court thereupon reserved its ruling, and no ruling upon the offer is disclosed by the record here. The answer was filed in the superior court of San Bernardino county on the 25th day of April, 1930, over one year after the complaint in the instant action had been filed, and there is no evidence in the record that any further proceedings had been had in that action subsequent to the filing of the answer. Assuming that the complaint and answer in the action brought by the appellant and the Bank of America in the superior court are properly in evidence here, we do not believe that they are available to the appellant as a defense to this action. It is manifest that the alleged violation of the contract by Irving R. Fogler occurred at a time long after this action was at issue, and no supplemental answer was filed nor, so far as is shown by the record here, was any application made for

leave to file such supplemental pleadings. An answer in a civil action relates to facts existing at the time the action was brought, and matters of defense subsequently arising can be taken advantage of only by setting them up by supplemental answer. 21 Cal. Jur. 173; McMinn v. O'Connor, 27 Cal. 239; Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256; California Farm & Fruit Co., Ltd., v. Schiappa-Pietra, 151 Cal. 732, 91 P. 593; Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080.

[9] But assuming that the allegations in the answer of Irving R. Fogler were properly before the court, we are still of the opinion that they do not reveal facts upon which the court could find a violation of his contract. Bearing in mind that it was the appellant, and not the respondents, who was in default under the terms of the contract of November 23, 1928, it was she who instituted the action to recover judgment upon the promissory note. Irving R. Fogler had merely pleaded the facts set forth in his answer as a defense in said action. We may assume that no trial had been had thereon and no judgment entered therein. Prior to the entry of a judgment in either case, Irving R. Fogler was not put to an election of remedies. In the case of Roullard v. Rosenberg Bros. & Co., 193 Cal. 360, 224 P. 449, 450, the court said: "It cannot be said that plaintiffs made an election of remedies by the mere commencement of the action in the case at bar, because at that time they had no choice of remedies. No default had then been made in the contract of purchase, and the only remedy then available to plaintiffs was the action of conversion, which they are here prosecuting. Neither do we think they can be said to have made an election by the mere commencement of the action in the suit to quiet title. When that had been done, the situation was that plaintiffs had then commenced two actions, one an action for damages for conversion, being the case at bar, the other a suit to quiet title. Neither of said actions had then proceeded beyond the point of filing complaint and issuance of summons, and it could not be said that plaintiffs had 'clearly elected to proceed' upon either of them as distinguished from the other. The conclusion to be deduced from plaintiffs' conduct up to that point would be that they had not elected to pursue either remedy, but had elected rather to pursue both. If plaintiffs had then proceeded to pursue the quiet title action to trial and judgment, leaving the conversion action in statu quo, it might then have been argued with some force that they had thereby elected to pursue that action to the exclusion of this. But they did not do that. Instead thereof, they pressed the conversion action to trial and judgment, leaving the quiet title suit to remain in abeyance, so that if it can be said that plaintiffs have elected to pursue either of these remedies to the exclusion of the other, it would have to be concluded that they have chosen to pursue the remedy of the case at bar."

Had the action in the superior court proceeded to final judgment and the record in that case was properly before us under adequate pleadings, appellant might have been bound by his election, but, since no such judgment has been entered, the mere filing of the answer with the allegations therein contained is not a bar to the relief prayed for in plaintiffs' complaint.

We find no other points in the record which merit our attention.

The judgment appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

127 Cal.App. 708

Ex parte BARNES.

Cr. 2295.

District Court of Appeal, Second District, Division 2, California.

Nov. 28, 1932.

Habeas corpus ⇐69.

Justice of peace could amend his docket, even after issuance of writ of habeas corpus, to show that petitioner was actually tried.

Proceedings by Charles A. Barnes for writ of habeas corpus to be directed to the Sheriff of Los Angeles County to secure the release of petitioner from custody under a commitment by a Justice of the Peace.

Writ discharged, and petitioner remanded to the Sheriff's custody.

C. B. Conlin and Charles S. McKelvey, both of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty. and Tracy Chatfield Becker and Frank W. Stafford, Dep. Dist. Attys., all of Los Angeles, for respondent.

WORKS, P. J.

Petitioner is in custody under an alleged conviction on a criminal charge before a justice of the peace, petitioner's contention being that the docket of the justice fails to show that petitioner had a trial before the judgment of conviction was rendered.

At the oral argument respondent was permitted to file an amended return to the writ, by which it was shown that since the issuance

of the writ the justice had corrected the docket to show that a trial actually occurred. Petitioner contends that a justice of the peace may not amend his docket at such a stage. This contention cannot be upheld. See In re Glavich, 74 Cal. App. 144, 239 P. 707.

The writ is discharged, and the petitioner is remanded to custody.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

127 Cal.App. 747

CAMPBELL v. RAINEY, Superintendent of Banks.

Civ. 961.

District Court of Appeal, Fourth District, California.

Nov. 29, 1932.

1. Payment ⇐84(3).

Money paid because of assessment levied on bank stockholder under statute subsequently declared unconstitutional involved "mistake of law," not "mistake of law and fact" (St. 1917, p. 581, as amended by St. 1925, p. 905).

[Ed. Note.—For other definitions of "Mistake of Fact" and "Mistake of Law," see Words and Phrases.]

2. Payment ⇐84(3).

Mutual mistake of law *held* insufficient for recovery of money paid because of assessment levied on bank stockholder under statute subsequently invalidated (St. 1917, p. 581, as amended by St. 1925, p. 905).

3. Payment ⇐87(2).

Where bank stockholder was informed that collection of assessment would be enforced, but no property seizure or attachment was threatened, payment involved no "compulsion" (St. 1917, p. 581, § 3, as amended by St. 1925, p. 906, § 2).

[Ed. Note.—For other definitions of "Compulsion," see Words and Phrases.]

4. Payment ⇐87(3).

When resort to judicial proceedings is required to enforce payment of tax or assessment, payment involves no "compulsion."

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by B. E. Campbell against Edward Rainey (as successor to Will C. Wood), as State Superintendent of Banks, and trustee in charge of the liquidation of the Farmers' & Merchants' Bank of Imperial, a banking corporation, in liquidation. Judgment for plaintiff, and defendant appeals.

Reversed.

Elbert W. Davis and J. H. Hoffman, both of San Francisco, Whitelaw & Whitelaw, of El Centro, and Sullivan, Roche, Johnson & Barry, of San Francisco, for appellant.

C. L. Brown, of El Centro, for respondent.

JENNINGS, J.

This action was instituted by plaintiff, a stockholder in the Farmers' & Merchants' Bank of Imperial, to recover from defendant superintendent of banks of the state of California a certain sum of money paid by said plaintiff on account of an assessment imposed by said defendant upon the stockholders of the bank after the bank had become insolvent and defendant's predecessor in office had taken possession of the property and business of the bank and was proceeding to liquidate its affairs. Defendant's predecessor took possession of the bank's property and business on October 10, 1927. On this date plaintiff was the owner of 60 shares of stock of the bank. Thereafter, and during the process of liquidation, defendant's predecessor levied an assessment upon the stockholders of the bank in accordance with the provisions of chapter 496 of the Statutes of 1917, p. 581, as amended by chapter 420 of the Statutes of 1925, p. 905. The assessment levied upon plaintiff amounted to $6,000. Of this amount plaintiff paid the sum of $2,515.87. On April 18, 1929, the Supreme Court of California held that the statute, by virtue of whose provisions the assessment was levied upon plaintiff, was unconstitutional. Wood v. Hamaguchi, 207 Cal. 79, 277 P. 113, 63 A. L. R. 861. Thereafter no further payment was made by plaintiff on account of said assessment, and on April 25, 1930, he instituted the present action to recover the sum of $2,515.87 paid by him as aforesaid. From a judgment permitting recovery of the said sum, defendant appeals.

Appellant sets forth certain specifications of error which it is contended were committed by the trial court, and which, it is claimed, entitle him to a reversal of the judgment.

[1] The first particular in which it is contended that the court erred is in finding that there was any mistake of fact which contributed to the making of payments by respondent on account of the aforesaid assessment levied against him. The court's finding in this regard is in the following language:

"That the said plaintiff and the said defendant, at the time of the payment and the receipt of said money each believed and assumed that defendant had authority to so receive said money and that the plaintiff was required to pay said money, and they each based their belief that the said money should be paid and received as aforesaid upon and

under the provisions of those portions of chapter 496 of the Statutes of 1917, page 581, as amended by chapter 420, of Statutes of 1925, page 905, authorizing the making and levying of an assessment of the stock of the stockholders of the banking corporation then in the hands of the superintendent of banks of the State of California in liquidation.

"That both plaintiff and defendant were mistaken both as to the law and fact when they assumed and believed that said assessment was valid and that said money should be paid thereunder and the said plaintiff and defendant were also mistaken as to both fact and law as to the validity of the said assessment, and as to the duty of plaintiff to pay the same and the right of the defendant to receive said money. That plaintiff did not discover such mistake of fact and law, or that he was not required to pay said money, until on or about the 18th day of April, 1929."

The very language of this finding shows that, although the court therein found that both parties proceeded under a mutual mistake of both law and fact, the mistake defined in said finding was a mistake purely and entirely of law. It is apparent that the mistake under which the parties labored consisted in the assumption that the statute, under which the proceedings for the levy and collection of the assessment were taken, was a valid statute. In this it developed they were mistaken, as the statute was subsequently held to be unconstitutional, and therefore invalid. The record fails to disclose the existence of any mistake other than the mistake described in the above-quoted finding. It follows, therefore, that the court erred in finding that the mistake was one of both law and fact.

[2] In this connection, respondent contends that a mutual mistake of law establishes a sufficient basis for recovery. This contention is sufficiently answered by the decisions in Cooley v. County of Calaveras, 121 Cal. 482, 53 P. 1075, 1077, and Wingerter v. San Francisco, 134 Cal. 547, 66 P. 730, 86 Am. St. Rep. 294. Decidedly apropos to the contention thus advanced is the following language from the former case: "The understanding of the law prevailing at the time of the settlement of a contract, although erroneous, will govern, and the subsequent settlement of a question of law by judicial decision does not create such a mistake of law as courts will rectify." This language was quoted with approval in the Wingerter Case.

The second specification of error relied upon by appellant is that the court erred in finding that there was any compulsion under which the payment was made. The finding to this effect is said to be entirely lacking in evidentiary support and contrary to the uncontroverted evidence presented at the trial of the action. The finding which is said to be vulnerable to the attack thus made is in the following language: "That at the time of the said payment plaintiff herein fully believed that unless he so paid said assessment that defendant would bring an action against him to recover the amount of said assessment and would seize and attach the property of plaintiff and tie up and interfere with his business thereby, and cause plaintiff great damage and loss because of such action, and that plaintiff so paid said money because of such business exigency and under an apprehension on his part of being stopped in his business and suffer great damages if the same was not paid, and said money was so paid under compulsion."

The evidence with respect to the feature of compulsion consists of the testimony of respondent and that of Frank V. Boardwell, assistant superintendent of banks of the state of California during the time respondent's payments were made. The latter witness testified that at no time prior to the making of an agreement by respondent to pay the assessment in installments did he threaten to take respondent's property or to attach it. Respondent testified that, before he paid any money on account of the assessment, a demand for payment was made upon him; that he had a conversation with Boardwell prior to making any payment; that Boardwell stated to him that they would compel him to pay the assessment in full, but that nothing was said to him about taking his property; that he consulted an attorney, and became convinced that the state banking department would attach his property and would sell it and force collection of the assessment from the proceeds of the sale, thus increasing the amount he would be compelled to pay by reason of the additional expense that would be incurred in prosecuting the action and subjecting his property to sale. It is undisputed that an action for the recovery of assessments had been instituted against a number of stockholders of the insolvent bank prior to the making of any payment by respondent, and that respondent was a defendant in said action, but had not been served with process, and further that no attachment was levied upon any property of respondent until after he had failed to keep up the installment payments he had agreed to make.

[3, 4] The problem which is presented is whether, from the above-mentioned evidence, the court was warranted in finding that respondent's payments on account of the assessment were made under compulsion.

In this connection respondent places much reliance upon the decision in Young v. Hoagland, 212 Cal. 426, 298 P. 996, 75 A. L. R. 654. In this case the board of directors of a corporation had levied an assessment on stock of the corporation. Thereafter, at a stockholders' meeting the board was removed, and a new board was elected. The new board rescinded the assessment theretofore levied,

but the old board maintained that the stockholders' meeting was not legally called, and refused to surrender their offices. The old board refused to recognize the order of the new board rescinding the assessment, and proceeded to take steps necessary to its enforcement, and threatened to sell all stock of the corporation upon which the assessment was not paid. Plaintiff, not knowing whether the old board had been legally removed and the new board legally elected, and not desiring to run the risk of having his stock sold, paid the assessment, and sued to recover such payment. The trial court found that the payment was made under compulsion, and rendered judgment in plaintiff's favor. The judgment was affirmed on appeal, the Supreme Court holding that the question of whether plaintiff, in making the payment, acted as a reasonably prudent person under the circumstances disclosed by the evidence, was a question of fact for the trial court, and that the evidence justified the trial court's conclusion that the payment was made under compulsion. It is not difficult to differentiate the situation presented in the cited case from that disclosed by the record herein. In the case of Young v. Hoagland, so far as appears, it was not necessary for the old board of directors to bring any action in order to enforce collection of the assessment which they had levied. Having levied it, they proposed to enforce its collection by an immediate sale of the stock of those shareholders who did not voluntarily make payment. A stockholder could, it is true, bring an action to enjoin the threatened sale, but this would impose upon him some vexation and expense. Whether a reasonably prudent person, confronted by these circumstances, would institute such an action or refuse payment or pay the levied assessment is obviously a pure question of fact to be determined by the trier of facts. If the court or jury found that payment under the circumstances was what might be expected of the person of ordinary prudence, the evidence was ample to justify the finding. But the respondent herein was faced by no such problem as confronted the stockholder in the case of Young v. Hoagland, supra. He had been advised that collection of the assessment would be enforced, but no threat of seizure of his property or of its attachment had been made. The possibility of an attachment and sale of his property appears to have occurred to him without any suggestion to that effect having been made to him by appellant or his predecessor or assistant. In the final analysis, respondent seeks to apply the subjective rather than the objective test to his action and to say that, because he thought that collection of the assessment could be enforced, and in its enforcement his property might be seized and sold, therefore he acted under compulsion. But the compulsion thus claimed was a compulsion generated entirely without any assistance from appellant. The testimony of respondent thoroughly negatives the exercise of any compulsion upon respondent. The statute under which the assessment was made contained no self-executing provision for enforcing collection of unpaid assessments. It simply provided in section 3 (as amended by St. 1925, p. 906, § 2) that, if any stockholder shall fail to pay an assessment levied against him in full upon the date specified in the order of the superintendent of banks, a right of action shall immediately accrue to recover the amount of the assessment or any balance remaining unpaid. It is thus apparent that a resort to judicial proceedings was required for the enforcement of collection of any unpaid assessment. The rule is well established that, when resort to judicial proceedings is required to enforce collection of a tax or assessment, the payment of such tax or assessment is not deemed made under compulsion, and an action for its recovery will not lie. Trower v. City & County of San Francisco, 152 Cal. 479, 92 P. 1025, 15 L. R. A. (N. S.) 183, Lewis v. San Francisco, 2 Cal. App. 112, 82 P. 1106.

Since we are of the opinion that the mistake which induced the partial payment by respondent of the assessment levied against him was, under the circumstances shown by the record, a mistake purely of law, and that the payment was not made under compulsion, consideration of the two other points made by appellant, viz. that the action was barred by the statute of limitations and that the court erred in making no findings relative to appellant's cross-complaint seeking recovery of the balance of the assessment which respondent had agreed to pay, is rendered unnecessary.

The judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

127 Cal.App. 758

TOSHI TAKETA, Plaintiff and Respondent, v. POLICY HOLDERS' LIFE INSURANCE ASSOCIATION (a Corporation), Defendant and Appellant.

Civ. 8792.

District Court of Appeal, First District, Division 1, California.

Nov. 30, 1932.

Appeal from Superior Court, Santa Clara County; D. M. Burnett, Judge.

Hugh Martin Young, Charles D. Warner, and Thomas W. Hughes, all of Los Angeles, for appellant.

Edward M. Fellows, of San Jose, for respondent.

PER CURIAM.

Under the authority of section 3, rule V, of the Supreme Court and District Courts of Appeal, respondent moves to dismiss the appeal or affirm the judgment upon the ground that the appeal was taken for delay only and that the questions on which the decision of the case depends are so insubstantial as not to need further argument. After examining the transcript on appeal in connection with the points made in appellant's brief, it is our opinion that the appeal presents a debatable question of law, and therefore the motion is denied.

PACIFIC PALISADES ASS'N v. MENNINGER *

Civ. 8643, 8644.

District Court of Appeal, First District, Division 2, California.

Nov. 28, 1932.

Rehearing Denied Dec. 28, 1932.

Hearing Denied by Supreme Court Jan. 27, 1933.

1. Appeal and error ⇐77(1).

Interlocutory judgment that, unless defendant paid taxes within 90 days after notice, defendant's interest in property should be foreclosed, *held* nonappealable.

2. Appeal and error ⇐595.

Where defendant appealed from interlocutory and final judgments, but only ordered transcript on appeal from interlocutory judgment, motion to dismiss appeal from final judgment was denied.

Motion to dismiss appeal from final judgment because of absence of transcript of evidence was denied, since parties in both appeals were the same, and transcript on first appeal enabled District Court of Appeal to decide merits of second appeal.

3. Set-off and counterclaim ⇐34(1).

In action to foreclose defendant's rights under contract to purchase renewable 99-year leases of six lots, allegations seeking establishment of trust based upon anterior contract as to 1,100 acres within which six lots were located, and also as to 1,050 additional acres owned by plaintiff, *held* not proper as cross-complaint (Code Civ. Proc. § 442).

4. Landlord and tenant ⇐79(1).

Written contract to purchase renewable 99-year leases of lots must be deemed to embody parties' final determination in absence of fraud or mistake (Code Civ. Proc. § 1856).

5. Landlord and tenant ⇐79(1).

Certificate which entitled purchaser to leasehold interest superseded vendor's representations and must be considered as containing all terms of agreement (Civ. Code, § 1625; Code Civ. Proc. § 1856).

6. Novation ⇐1.

Surrender of certificate which entitled purchaser to leasehold interest in partial payment of purchase prices of six leases specified in newly executed contracts, constituted "novation" (Civ. Code, §§ 1530, 1531).

[Ed. Note.—For other definitions of "Novation," see Words and Phrases.]

7. Landlord and tenant ⇐79(1).

Evidence sustained finding that six contracts to purchase renewable 99-year leases of six lots contained entire terms of parties' agreement, and that they did not enter into prior basic contract (Code Civ. Proc. § 1856).

8. Landlord and tenant ⇐149.

In absence of agreement that lessee shall pay taxes, their payment rests upon lessor.

9. Appeal and error ⇐1010(1).

Appellate court cannot disturb trial court's finding, supported by sufficient evidence, that leases tendered lessee and obligating lessee to pay taxes were in agreed form.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by the Pacific Palisades Association, a corporation, against Bertha Deglow Menninger, wherein defendant filed a cross-complaint. From an adverse interlocutory judgment and an adverse final judgment, defendant appeals, and plaintiff moves to dismiss the appeal.

Appeal from interlocutory judgment dismissed. Final judgment affirmed.

Daniel A. Knapp, of Los Angeles, for appellant.

Tanner, Odell & Taft, of Los Angeles, for respondent.

GRAY, Justice pro tem.

[1, 2] Respondent brought this action to foreclose appellant's rights, under a contract, to purchase renewable ninety-nine year leases of six lots in "Pacific Palisades," near Santa Monica, in the city of Los Angeles. After trial, an interlocutory judgment was granted which provided that, unless appellant paid certain taxes on the lots, within ninety days after notice, her interest in the property should be foreclosed and that, thereupon, respondent's title thereto should be quieted. Upon expiration of the specified time and proof of nonpayment of such taxes, a final judgment, foreclosing her rights and quieting

*For subsequent opinion see 26 P.2d 303.

respondent's title, was entered. Appellant appealed from both judgments but only ordered a transcript of the evidence on the appeal from the first judgment. Respondent's motion to dismiss the appeal from the first judgment because it is an interlocutory judgment and, therefore, nonappealable, is well taken and must be granted. Krotzer v. Clark, 178 Cal. 736, 174 P. 657. Its second motion to dismiss the appeal from the final judgment, because of the absence of a transcript of evidence, is denied, since the parties in both appeals are the same and the transcript on the first appeal enables us to decide the merits of the second appeal. Bryant v. Kelly, 203 Cal. 721, 265 P. 817.

The complaint, in six counts, each differing from the others, only as to the lot described, alleges that respondent agreed to sell and appellant agreed to buy, upon the terms of an attached agreement, renewable ninety-nine year leases on six lots, in substantially the attached form, contained in respondent's "Founders Hand Book"; that appellant paid, when due, principal and interest but not taxes, as provided in said agreement; and that respondent tendered leases, in the form specified, but that appellant refused their delivery or to pay the taxes. Since the answer and cross-complaint are too lengthy and involved to permit a full statement of their contents, but a brief résumé thereof, sufficient however for full consideration of the points presented, will be given. The answer avers that the full terms of the sale, of which said agreement contained only a part, are found in a "prior basic contract"; that said agreement did not obligate appellant to pay taxes; and that the lease tendered differed from the attached lease, to which she was entitled. The other allegations of the complaint are admitted. The answer affirmatively alleges that respondent holds title to 1,100 acres of land, known as "Pacific Palisades," of which said six lots are a part, in trust for the benefit of appellant and other "founders" upon terms which provided that a local church, under the authority of a religious corporation, should secure and assign to respondent an option to buy the land, cause the incorporation of respondent and should collect from 275 "founders" $1,000 each as the initial payment on the land, and that respondent should improve and operate the land as an educational, cultural, recreational, and religious center and lease lots therein to the "founders" for residences; and that the consideration of said agreement had failed because of certain specified violations of said trust.

[3] Her cross-complaint alleges that respondent, under an agreement with the local church and the religious corporation, holds title to the 1,100 acres in trust, as specified in the answer; that respondent has failed to carry out the proposed development and, in violation of the trust, has mortgaged the lands, purchased 1,050 additional acres, deeded away portions thereof, dissipated trust assets, and violated its corporate charter; that the religious corporation has ignored its agreement with the founders to supervise respondent's execution of the trust; and that the trust is now impossible of fulfillment. The prayer seeks a decree that respondent holds title to all property received by it in trust for the "founders"; that the trust has been abandoned; that the lessees are entitled to deeds in fee simple; that receivers be appointed to liquidate the trust and request the Attorney General to dissolve the respondent; and that a referee be appointed to make a full accounting of the trust to the receivers. Appellant assigns as error the order, upon respondent's motion, striking out the cross-complaint on the ground that the matters pleaded did not constitute a cross-complaint within the meaning of section 442 of the Code of Civil Procedure. This section provides that: "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter * * * upon which the action is brought, or affecting the property to which the action relates, he may * * * file * * * a cross-complaint." The establishment of a trust, based upon an anterior contract, and its dissolution did not relate to or depend upon the contract of sale, pleaded in the complaint. Cavasso v. Downey, 40 Cal. App. 521, 180 P. 950; Interstate Lumber Co. v. Loop Bldg. Co., 97 Cal. App. 64, 275 P. 262. The cross-complaint seeks the establishment of a trust as to the 1,100 acres, within which are located the six lots, to which the action relates and also as to 1,050 additional acres. "It cannot be that in a legal sense, speaking in the terms of the section, a cross-complaint affects the property to which an action relates when it seeks affirmative relief concerning a single and indivisible parcel of land which includes within its boundaries a lesser tract, which lesser tract is the subject of the action as shown by the allegations of the complaint." Mahan v. Millar, 56 Cal. App. 280, 288, 205 P. 67, 71. Since the matter pleaded was not such as to constitute a cross-complaint, the so-called cross-complaint was properly stricken out. East Riverside, etc., Dist. v. Holcomb, 126 Cal. 315, 58 P. 817.

[4-7] Appellant next contends that the evidence is opposed to the finding that the six contracts of purchase, attached to the complaint contained the entire terms of the parties' agreement and that they did not enter into a "prior basic contract." The answer, while alleging the execution of such a "prior basic contract" does not give its terms. In support of her claim as to such "prior basic contract," appellant introduced in evidence three prospecti of respondent, a newspaper article, a "founders certificate" and a "founders handbook," which she claims constituted an offer to her to purchase a lease in a tract of land to

be developed as therein described, which offer ripened into a contract, when accepted by her execution of the six contracts. As the legal basis for her argument, appellant cites Boyd v. Brinckin, 55 Cal. 427, and Crosby v. Clark, 132 Cal. 1, 63 P. 1022, holding that an offer made in the circular of a railroad company, to sell its lands to actual settlers, is accepted by taking possession in good faith, in pursuance of the circular, as an actual settler, and the offer and acceptance constitute a contract. This rule is not applicable, because appellant never obtained possession of the lots, the respondent never offered possession, prior to the execution of a lease, and the parties executed a written contract, which in the absence of fraud or mistake, must be deemed to embody their final determination. Abbott v. 76 Land & Water Co., 101 Cal. 567, 36 P. 1. The prospecti and newspaper article contained no offer but merely representations as to the beauties of the land, the character of the development proposed, and the advantage of investing therein. Subsequently appellant purchased a "founders certificate" which entitled her to a leasehold interest in a lot in the tracts, to be thereafter selected in the manner therein provided. She does not ask that her contracts, as evidenced by this certificate, be reformed or rescinded for fraud or mistake. This certificate, therefore, superseded the representations (Civ. Code, § 1625), and must be considered as containing all the terms of the agreement. Code Civ. Proc. § 1856; 6 Cal. Jur. 261. Hereafter she executed the six contracts set forth in the complaint, surrendering the "founders certificate" in partial payment of the purchase prices of the six leases, as specified in the new contracts. The surrender of the certificate and the execution of the new contracts constituted a novation. Civ. Code, §§ 1530, 1531. The contract, evidenced by the certificate, was thereby extinguished and the rights of the parties are to be governed by the new contracts. 20 Cal. Jur. 253. These new contracts are also silent as to the prior representations and yet appellant seeks neither their reformation nor rescission but, by standing on their terms, has evidenced her belief that they truly express the real contract. The finding is therefore correct.

[8, 9] Under the sale contracts appellant was admittedly entitled to leases "in substantially the form contained in the Founders Hand Book" of respondent. In assumed compliance with this provision, respondent tendered leases which contained a covenant obligating appellant to pay the taxes on the land leased. Appellant rejected these leases upon the ground that the form of lease set forth in the hand book was silent as to the payment of taxes. In absence of an agreement that the lessee shall pay taxes, their payment rests upon the landlord. 73 A. L. R. 824, note. The court found that the leases tendered were in the agreed form. Appellant attacks this as contrary to the evidence. Each party introduced into evidence a copy of a hand book, which was respectively claimed to be authentic. Appellant's copy, as to the form of lease therein contained, differed from that of respondent in the entire omission of the covenant obligating the lessee to pay taxes. In support of the authenticity of her copy, appellant proved that the "founders certificate," dated August 31, 1921, stated that, as soon as the land had been platted and appraised, respondent would notify her of a day upon which she could select her lot; that in a letter, dated January 7, 1922, respondent promised to mail the hand book so as to reach her four days later and fixed January 14 as the day of selection; and that on January 11 she received, through the mail, her copy. This evidence is corroborated by another "founder's" testimony that he had received through the mail at about the same time, the same hand book. There is no evidence that respondent mailed these copies. Its president denied ever having seen them or that the corporation ever authorized them but admitted that copies were mailed at about this time to the "founders." Respondent argues that the intrinsic evidence of appellant's copy shows it was defective and gave sufficient notice to appellant so as to require her investigation of the omission. Appellant likewise argues that respondent's copy intrinsically shows that it could not have been printed and mailed when respondent claims. This evidence raised a conflict as to which copy was true and correct. Since the weight to be given to the conflicting evidence was confided in the trial court and there is sufficient evidence to support the finding, we cannot disturb it.

The appeal from the interlocutory judgment is dismissed. The final judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

127 Cal.App. 703

PEOPLE v. PALUMBO et al.

Cr. 2248.

District Court of Appeal, Second District, Division 1, California.

Nov. 28, 1932.

1. Indictment and information ⇐147.

Objection that robbery and grand larceny were not of same class of crimes, and therefore could not be charged in same information, could not be considered where not raised by demurrer (Pen. Code, §§ 954, 1012, 1004, subd. 3).

2. Criminal law ⇐369(1, 5).

In prosecution for robbery and grand larceny, evidence that defendants were arrested in drug store under circumstances indicating burglary *held* admissible to prove revolver found on floor was that used in robbery, notwithstanding it tended to prove offense not charged.

Such evidence was admissible to prove that the revolver found on the floor of the drug store was that used in the commission of the robbery, and to prove defendants attempted to get rid of it by leaving it in the drug store when they found they had been caught in the place, and the fact that it also indicated the commission of burglary which was not charged in the information was merely an incident in the proof of the facts concerning the finding of the revolver.

3. Criminal law ⇐661.

In prosecution for robbery and grand larceny, evidence to prove certain revolver was defendant's *held* not objectionable because defendant thereafter admitted revolver was his.

The reception of such evidence was proper, where, at the time of its reception, defendant had not testified or in any way admitted to the court his possession of the gun.

4. Robbery ⇐11.

Conviction of two defendants of first degree robbery *held* authorized, even if evidence had shown only one gun was used.

5. Larceny ⇐23.

Where defendants abandoned stolen automobile several miles from where owner left it, conviction of grand theft *held* authorized, notwithstanding statute providing taking automobiles without owner's permission for temporary use is only misdemeanor (Pen. Code, §§ 484, 499b).

Such conviction was authorized by Pen. Code, § 484, notwithstanding Pen. Code, § 499b, provided that taking automobile without permission of owner for purpose of temporarily using or operating it is only a misdemeanor.

6. Criminal law ⇐824(5).

Failure to advise jury to disregard stricken out evidence of trifling importance *held* not prejudicial error, absent request therefor.

7. Criminal law ⇐1129(3).

Assignment that court erred in instructions because they emphasized state's side *held* insufficient.

8. Criminal law ⇐1129(3).

Assignment that court erred in giving specified instructions, without specifying in what respect there was error, presented nothing for review.

9. Larceny ⇐65.
Robbery ⇐24(1).

Evidence sustained conviction of grand larceny and robbery.

Appeals from Superior Court, Los Angeles County; William C. Doran, Judge.

Nicklas Palumbo and another were convicted of robbery and grand larceny, and they appeal separately.

Affirmed.

Aubrey M. Finley, of Pasadena, for appellant Klein.

C. L. Welch, Edgar T. Fee, and Joseph M. Cunningham, all of Los Angeles, for appellant Palumbo.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

CONREY, P. J.

By the first count of the information appellants were charged with the crime of robbery, committed on the 3d day of February, 1932. By the second count they were charged with grand larceny committed on said 3d day of February by stealing an automobile. They were tried together, and were convicted on both counts. They present separate appeals from the judgments and from the orders denying their motions for a new trial.

[1] It is contended by appellants that the two offenses were improperly joined in the same information; the alleged crimes being not connected together in their commission and not being of the same class of crimes. For this reason it is argued that they did not come within the provisions of section 954 of the Penal Code, which defines the cases in which two or more different offenses may be included in one information. Even if the point might have been meritorious if properly reserved in the record, it cannot be considered on the record now before us. A defendant may demur to an indictment or information, when it appears upon the face thereof: "That more than one offense is charged, except as

provided in section nine hundred and fifty-four." Pen. Code, § 1004, subd. 3. And such an objection can only be taken by demurrer. Pen. Code, § 1012. If the charged offenses of robbery and grand larceny were not of the same class of crimes, that fact appeared on the face of the information; and, if the information failed to show that the two offenses were connected together in their commission, that also appeared on the face of the pleading, and the objection could have been raised by demurrer. People v. Degnen, 70 Cal. App. 567, 573, 234 P. 129.

[2, 3] Appellants claim that the court erred in overruling defendants' objections to testimony relating to the commission of an offense other than those charged in the information. This was evidence to the effect that on the evening of February 3d, shortly after the time of the robbery, defendants were arrested in a drug store, the circumstances of the arrest being such as to indicate that the defendants had committed burglary in entering the store. The record indicates that this evidence was introduced as part of an effort to prove that a revolver found on the floor of the drug store at the time of the arrest was the same revolver that had been used in the commission of the robbery, and to prove that defendants had attempted to get rid of the revolver by leaving it in the drug store when they found that they were caught in that place. For this purpose the evidence was admissible. The fact that it also indicated the commission of burglary by the defendants was merely an incident in the proof of the facts concerning the finding of the revolver. There was no error in the reception of this evidence. Appellants further contend, however, that this evidence concerning the revolver was not admissible because defendant Palumbo's admission of the fact that this was his revolver removed from the issues the question of possession of the gun. But, at the time of the reception of this evidence, Palumbo had not testified, and had not in any way admitted to the court his ownership or possession of the gun. There was evidence that he had made such an admission out of court, but that evidence remained open to denial and dispute. For this reason we think that the authority relied upon by appellants (People v. Washburn, 104 Cal. App. 662, 668, 286 P. 711) is not conclusive upon the question here.

[4] The next point is that the verdict of guilty of first degree robbery is contrary to law, in this, that the evidence showed the use of only one gun in the commission of the robbery, and that, there being but one gun, several verdicts of guilty against the two defendants are contrary to law. Even omitting the direct testimony of one witness that there were two guns—one in the hand of each defendant—we think that the point is without merit.

[5] It is contended that the verdict guilty of grand theft is contrary to law, in this, that the evidence showed nothing more than the taking of an automobile without permission of the owner, for the purpose of temporarily using or operating the same; an offense which, under the provisions of section 499b, Penal Code, is only a misdemeanor. But the jury may well have believed upon the evidence in this case that the offense was grand larceny committed by the felonious stealing and driving away of the personal property of another, as covered by the definition of theft in section 484 of the Penal Code. The owner had left his car on a lot several miles away from the place where it was abandoned by the defendants after they had used it for their own purposes. It never was returned to the owner until after its discovery by the police.

[6] It is suggested that the court committed prejudicial error in its failure to admonish the jury that it must not consider certain evidence which had been stricken out by order of the court. It is true that, in the two instances cited by appellant Palumbo in his brief, the court granted motions to strike certain testimony, and did not advise the jury that it must disregard such testimony. A sufficient answer to this contention of appellants is that the items are of trifling importance, and that no request was made to the court to instruct the jury to disregard the testimony. There is no reason to doubt that the jury did disregard it.

[7] Appellant Palumbo contends that the court erred in the giving of its instructions to the jury, "because they emphasized the state's side of the case." But he does not point out any error in the instructions, or in any of them.

[8] Counsel for appellant Palumbo suggests error in the refusal of requested instructions, but does not attempt to point out in what respect, if any, the court erred in such refusal. He says, "we believe the court erred in not giving the following instructions which were requested"; this is followed by quotation of a series of five requested instructions, unaccompanied by any argument in support of his contention. Under these circumstances, no question is presented for our consideration. It may be that, as the Attorney General claims, in so far as these requested instructions were appropriate to the case, they were covered by other instructions given to the jury.

[9] We are satisfied that the court did not err in refusing to grant a new trial to appellants, or to either one of them, on either the charge of robbery or on the charge of grand theft. The evidence indicates, and in fact strongly tends to prove, that the defendants went out on the streets at night for the purpose of committing robbery, and that the

automobile was stolen by them for use in that enterprise.

The judgments and the orders denying motions for new trial are, and each of them is, affirmed.

We concur: HOUSER, J.; YORK, J.

127 Cal.App. 695

HOWLAND et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

Civ. 8507.

District Court of Appeal, Second District, Division 2, California.

Nov. 26, 1932.

Hearing Denied by Supreme Court Jan. 23, 1933.

1. Judgment ⇐304.

Denial of interest from date of order for possession in condemnation proceeding *held* "judicial error," if any, and not subject to correction as "clerical error," where matter of defendants' right to such interest was debatable (Code Civ. Proc. §§ 1249, 1254; Const. art. 1, § 14, as amended in 1918).

Order for possession was made on February 3, 1926, but the case was not decided until December 12, 1931, when defendants were awarded judgment for value of property at time of trial and interest from December 3, 1931.

[Ed. Note.—For other definitions of "Clerical Error" and "Judicial Errors," see Words and Phrases.]

2. Judgment ⇐304.

Judicial error cannot be corrected by trial court except through new trial or upon timely motion, where erroneous conclusions of law not consistent with findings have been drawn, or where judgment is inconsistent with special verdict.

3. Mandamus ⇐4(1).

Mandamus will not lie to correct judgment on application by parties who allowed time for appeal to lapse.

Application by George D. Howland and Annie E. Howland for a writ of mandate to be directed to the Superior Court of Los Angeles County and William D. Dehy and Percy Hight, Judges of such court, to compel correction of a judgment.

Peremptory writ denied.

Leslie R. Hewitt, of Los Angeles, for petitioners.

Nowland M. Reid, City Atty., and Beach Vasey, Deputy City Atty., both of Long Beach, for respondents.

IRA F. THOMPSON, J.

The city of Long Beach instituted an action in eminent domain against the petitioners here February 3, 1926, and on that date the respondent court made its order fixing the amount of money to be deposited by the plaintiff as a condition of being admitted to immediate possession of the premises involved and also made its order letting plaintiff into possession upon making the required deposit. In due course petitioners filed their answer, but the action was not tried until November, 1931. Several motions were made by the defendants in the trial court between February, 1926, and November, 1931, for a return of the possession to them, but they were all denied. The interlocutory judgment was entered December 12, 1931, in which the defendants were awarded $4,800 (that being the value of the property as of the time of the trial), together with their costs and interest from December 3, 1931, to the date when the amount of the judgment should be paid into court for the benefit of the defendants. Plaintiff moved for a new trial, which was denied, and on March 5, 1932, the moneys were deposited in court. On March 10, 1932, the defendants executed and delivered to the clerk their satisfaction of judgment and received $4,987.30. However, on April 4, 1932, the defendants gave notice of a motion to modify, correct, and amend the judgment to allow therein the defendants interest from February 3, 1926, the date the order was made letting plaintiff into possession, until December 3, 1931, the day when judgment was ordered for defendants. This motion was denied May 7, 1932. By the present proceeding it is sought to have us issue to the respondent court the peremptory writ of mandate commanding it to correct the judgment in accordance with the purport of the motion just mentioned.

[1, 2] It is asserted by the petitioners that it was the plain duty of the trial court to award them interest from the time the order for possession was made, and further it is claimed that the failure of the court in this particular was a mere inadvertence or oversight which may be corrected as a clerical error. This view cannot be sustained, as a brief statement of the proposition of law will demonstrate.

Section 1249 of the Code of Civil Procedure in its pertinent portions reads: "If an order be made letting the plaintiff into possession, as provided in section 1254, the compensation and damages awarded shall draw lawful interest from the date of such order." Section 1254 of the Code of Civil Procedure as it exists now and at the time the instant case was tried provides for an order letting the plaintiff into possession "at any time after trial and judgment entered or pending an appeal." The references to section 1254 in

section 1249 is to the former as it existed prior to the session of the Legislature in 1877. As it then stood, it provided that the court might make an order letting the plaintiff into possession "at any time after service of summons." At the time section 1254 so read, section 1249 provided that "for the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation. * * *" It was not until 1911 (St. 1911, p. 842) that the clause was added: "Provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action * * * the * * * damages shall be deemed to have accrued at the date of the trial." With respect to the sections as they stood prior to addition of the proviso just quoted, our Supreme Court said: "* * * Since the measure of damage was the value of the property at the date of the issuance of summons, no recovery could be had for the use and occupation of the property prior to the rendition of judgment condemning the same. Hence it was eminently just and proper that the owner of land so taken, prior to the establishment of the right of the condemnor, should, as one element of the damage suffered, receive interest upon the compensation awarded for the deprivation of the use and occupation of the land pending a judgment condemning it, without which plaintiff could have no rights therein." Vallejo, etc., R. Co. v. Reed Orchard Co., 177 Cal. 249, 170 P. 426, 427. However, section 1254 as it stood prior to 1877 was declared violative of the Constitution which "as a condition of the taking, prescribed that just compensation must be simultaneously made with the taking of possession." San Mateo Waterworks v. Sharpstein, 50 Cal. 284; Sanborn v. Belden, 51 Cal. 266, and Vilhac v. Stockton, etc., R. R. Co., 53 Cal. 208. The case from which we have just quoted (Vallejo, etc., R. R. Co. v. Reed Orchard Co., supra), also says that the plan upon "being held in contravention of the Constitution, was repealed, and a new and entirely different scheme substituted therefor." At the present time and since 1918 there has been a part of section 14 of article 1 of the Constitution which authorizes the court to permit the plaintiff to take possession at any time after the commencement of the action upon "giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate" to protect the owner. We have set down sufficient to demonstrate that the question whether the defendant in a condemnation action is entitled to interest as here claimed is not free from doubt. An error in arriving at a conclusion cannot possibly be a clerical error, but must be a judicial error. It is hardly necessary to cite authorities to the effect that a judicial error cannot be corrected by the court except through the medium of a new trial or upon motion within a limited time where erroneous conclusions of law not consistent with the findings have been drawn or where the judgment is not consistent with the special verdict. However, we do make reference to the case of McKannay v. McKannay, 68 Cal. App. 709, 230 P. 218, and the authorities there cited.

If it clearly appeared that the respondent court had intended and attempted to award the petitioners the interest claimed then it might be argued that an omission of some character was an inadvertence that might be corrected. But such is not this case. In fact, although the defendants tendered a proposed finding to the effect that plaintiff took possession of the property on February 3, 1926, under an order of court made the same day, which proposed finding was to be in lieu of a finding that there were no improvements on the property, the judge declined to make such change, thereby indicating a contrary intent on his part.

[3] There is a further fatal defect in the position of petitioners. The time for an appeal from the judgment was allowed to lapse without an attempt on their part to avail themselves of that remedy. It is difficult to perceive how after this length of time it may be argued consistently that such a remedy was not speedy and adequate.

Peremptory writ denied.

I concur: WORKS, P. J.

128 Cal.App. 22

BLUMER v. MADDEN.

Civ. 4597.

District Court of Appeal, Third District, California.

Dec. 1, 1932.

1. Novation ⇨1.

Agreement for compromise of judgment, made conditional on regular payment of monthly installments, with provision specifically withholding release of judgment, *held* not to constitute "novation" extinguishing judgment, where debtor failed to make required payments (Civ. Code, §§ 1521, 1522, 1524, 1531).

[Ed. Note.—For other definitions of "Novation," see Words and Phrases.]

2. Novation ⇐1.
Novation depends on intention of parties and must be supported by adequate consideration.

3. Novation ⇐1.
To constitute "novation," extinguishment of old obligation must be contemporaneous with and result of consummation of new agreement (Civ. Code, § 1531).

4. Execution ⇐75.
Where judgment debtor had defaulted under agreement for compromise of judgment, order directing issuance of execution, after five years, *held* not abuse of discretion (Code Civ. Proc. § 685).

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by A. M. Blumer against E. W. Madden, in which plaintiff recovered judgment. From an order denying defendant's motion to recall and quash a writ of execution, defendant appeals.

Affirmed.

Hinsdale, Otis & Johnson, of Sacramento, for appellant.

Chauncey H. Dunn, of Sacramento, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from an order denying defendant's motion to recall and quash a writ of execution.

December 3, 1925, plaintiff recovered judgment against the defendant for the sum of $465.06, together with interest and costs. In November, 1926, the defendant offered in writing to pay plaintiff the sum of $375 in installments of $50 a month in full satisfaction of the judgment. In reply to this offer the plaintiff wrote the defendant a letter in which he agreed to accept in full payment of the judgment the sum of $483.34, provided that sum should be paid in regular monthly installments of $50, beginning with November 15, 1926. This conditional compromise of the judgment was expressed in the following language: "*If the instalments would be carried on monthly*, we would be willing to accept this proposition which would mean $375 plus $108.34, or $483.34 in complete settlement without any further interest. We would not care to release the judgment until the terms of the agreement have been completed."

To the terms of this proposed compromise the defendant agreed. Several monthly payments were subsequently made pursuant to this agreement, aggregating the total sum of $363.48. No payment was made after November 20, 1927. No extension of time was granted.

September 16, 1931, upon proceedings duly had, an execution was directed by the court to be issued under the provisions of section 685 of the Code of Civil Procedure, for the satisfaction of the unpaid portion of the original judgment. The defendant moved to recall and quash this execution on the grounds that the agreement to compromise the judgment constituted a novation, and that the judgment was barred by the provisions of the statute of limitations. This motion was denied. From the order denying the motion to recall and quash the execution, the defendant has appealed.

[1-3] The agreement to compromise the judgment was conditional upon the regular payments of $50 a month until the sum of $483.34 was fully satisfied. The release of the judgment was specifically reserved. This conditional agreement did not constitute a novation of the obligation, and the judgment was not thereby extinguished. A novation is created only when a new obligation is substituted for the original one with the intention of the parties to thereby extinguish the old debt. Section 1531 of the Civil Code provides in part:

"Novation is made:

"1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation."

The plaintiff refused to satisfy the judgment until the agreed sum of $483.34 was fully paid. The defendant defaulted in the payment of his installments. He paid no more than the sum of $363.48. He made no further payments after November 20, 1927. He therefore forfeited his right to satisfy the judgment by the payment of only the sum of $483.34. The original judgment, therefore, remains in full force subject to a credit of such sums as have been paid thereon.

A novation is contractual in its nature and is governed by the same rules of law which apply to any other contract. It depends upon the intention of the parties and must be supported by an adequate consideration. 20 Cal. Jur. 247, § 3; 46 C. J. 588, §§ 28, 29. It is essential that the extinguishment of the old obligation is contemporaneous with and the result of the consummation of the new agreement. If the new agreement is to become operative only at a future time, or is dependent upon a condition which is not performed, there is no extinguishment of the original debt and the novation fails. 46 C. J. 594, § 35. Ordinarily where one is legally bound and can be compelled to pay a definite ascertained sum of money such as is represented by a valid judgment, a mere promise to pay less than the entire sum in satisfaction thereof, is without consideration and void. 6 Cal.

Jur. 179, § 122; Scheeline v. Moshier, 172 Cal. 565, 158 P. 222; Gordon v. Green, 51 Cal. App. 765, 197 P. 955; Siddall v. Clark, 89 Cal. 321, 26 P. 829, 830. In the case last cited it is said: "It has been held in this state that a payment of a part of the amount due upon a money judgment, under an agreement that it shall operate as satisfaction in full, will not discharge the judgment, and that an agreement to discharge a judgment for a sum less than the amount for which it was rendered is void (Deland v. Hiett, 27 Cal. 611 [87 Am. Dec. 102])."

In the case of Gordon v. Green, 51 Cal. App. 765, 197 P. 955, 956, it is said: "Neither the promise to do, nor the actual doing of that which the promisor is by law or subsisting contract bound to do, is a sufficient consideration to support a promise made to the person upon whom the legal liability rests."

In the case of Scheeline v. Moshier, 172 Cal. 565, 158 P. 222, where a written stipulation was filed between the parties to an action on a promissory note agreeing to accept less than the amount of the note to be paid in specified installments, in full satisfaction thereof, and the maker of the note defaulted in certain payments, it was held the note was not extinguished and that a judgment for the unpaid portion of the entire original amount of the note was valid. This seems to be the precise situation in the present case.

Section 1524 of the Civil Code provides that: "Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation."

It is true that the foregoing section does dispense with a new consideration for an agreement to accept less than an amount to which a creditor is entitled, provided the agreement therefor is in writing and expressly declares that the payment is in satisfaction of the original obligation. It may be conceded that if the appellant in this action had paid the sum of $483.34 according to the terms of the written agreement it would have resulted in extinguishing the obligation represented by the judgment. Certainly the payment of installments aggregating a sum less than the amount agreed upon may not be deemed to have extinguished the judgment in view of the specific statement in the written contract that the judgment would not be released until the payments had been fully made. Nor can it be said the payment of installments less than the total amount for which the judgment was to be compromised, were accepted "in satisfaction" of the entire obligation. Section 1524 has no application to the circumstances of the present case.

Conceding that the agreement in this case amounts to an accord under the provisions of section 1521 of the Civil Code, it did not have the effect of extinguishing the judgment until it was fully executed by payment of all of the installments as provided by the terms of the contract. Section 1522 of the Civil Code provides: "Though the parties to an accord are bound to execute it, yet it does not extinguish the obligation until it is fully executed."

[4] The court in the exercise of sound discretion was authorized to direct the issuing of an execution for the satisfaction of the judgment pursuant to section 685 of the Code of Civil Procedure, after the lapse of five years from the date of its entry. Weldon v. Rogers, 159 Cal. 700, 115 P. 464; Wheeler v. Eldred, 121 Cal. 28, 53 P. 431, 66 Am. St. Rep. 20. There appears to have been no abuse of discretion in directing the issuing of this execution for the unpaid portion of the judgment. The judgment creditor had defaulted in the terms of his agreement for a compromise thereof. The motion to recall and quash the writ of execution was therefore properly denied.

The order denying the motion to recall and quash the writ of execution is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

127 Cal.App. 733

MADERA SUGAR PINE CO. v. WEAKLEY et al.

Civ. 4616.

District Court of Appeal, Third District, California.

Nov. 29, 1932.

Rehearing Denied Dec. 29, 1932.

Hearing Denied by Supreme Court Jan. 27, 1933.

1. Appeal and error ⇐931(1).

Appellate court must accept as true all evidence tending to establish correctness of trial court's finding considering all inferences leading to court's conclusion.

2. Frauds, statute of ⇐158(4).

Evidence sustained finding that fruit shipper, and grower, ordered and agreed to pay for box shook used to ship grower's grapes.

Evidence was to effect that the shipper handled and sold the grower's grapes; that shipper and grower both decided upon box shook to be used, shipper agreeing to have shook charged to his account; that such account was carried in the shipper's name; and that he made a part payment thereon to the seller.

3. Frauds, statute of ⇐23(1).

Where defendant was liable as original promisor for merchandise delivered to another, and debt was defendant's obligation, Statute of Frauds does not apply (Civ. Code, § 1624).

4. Frauds, statute of ⇐159.

Whether promise is original or collateral is question of fact.

5. Frauds, statute of ⇐158(4).

Seller's joining of fruit grower as party defendant, with fruit shipper in suit for merchandise, *held* not to show seller looked to grower as original promisor.

6. Appeal and error ⇐877(6).

Plaintiff's acceptance of specified sum from defendant for attachment release, if erroneous, could not be complained of by codefendant, credited with such amount upon balance sued for.

Appeal from Superior Court, Madera County; E. N. Rector, Judge.

Action by the Madera Sugar Pine Company against J. E. Weakley, M. D. Ricci, an individual doing business as the M. D. Ricci Fruit Company, and M. D. Ricci. From a judgment for plaintiff, defendant M. D. Ricci appeals.

Affirmed.

Lindsay & Gearhart, of Fresno, for appellant.

Conley, Conley & Conley, of Fresno, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This action was brought upon the common counts to recover the value of box shook and materials sold and delivered by Madera Sugar Pine Company to J. E. Weakley and M. D. Ricci, an individual doing business under the name of Ricci Fruit Company.

The defendant J. E. Weakley failed to appear and his default was entered, but M. D. Ricci answered, and upon the issue so raised the court, sitting without a jury, found that defendant Ricci had a financial interest in the transaction hereinafter detailed, and was liable thereon with Weakley, and judgment was entered accordingly. Ricci appeals from the judgment so entered, contending that the evidence does not support the findings and that appellant was not liable for the unpaid balance.

The plaintiff, Madera Sugar Pine Company, was a corporation engaged in the manufacturing and sale of lumber and box shook, and M. D. Ricci had been for many years engaged in the shipping of fruit and grapes under the name of Ricci Fruit Company, with his principal place of business in the city of Madera. J. E. Weakley was a grower and packer of grapes produced from his own vineyard and shipped on consignment to eastern markets through the Ricci Fruit Company.

It appears from the transcript that Weakley was preparing to harvest his grapes and was in need of containers in which to pack his crop, and upon the suggestion of Ricci, a Mr. Froom, a sales representative of the Madera Sugar Pine Company, called upon defendant Weakley at his ranch and at the house of Ricci, and finally consummated the sale of box shook needed for the shipment of his grapes to market, and upon which was stenciled the name of J. E. Weakley as the grower and shipper, and his brand or label affixed.

It also appears that M. D. Ricci had been for several years a customer of the box company and was during the time of the delivery of shook to fill the order for the Weakley grapes, buying supplies for his individual account. All of the materials here in question were delivered to the Weakley ranch and were entered upon the order sheets "Ricci Fruit Co—J. E. Weakley Brand," and on the ledger sheets were so charged to Ricci Fruit Company. In the statements sent to Ricci the items were segregated at the request of Ricci and entitled "shook delivered to Ricci Fruit Company for J. E. Weakley."

Nothing was paid by Ricci on the Weakley account except the sum of $300 on account of the September statement, which payment was, according to the testimony of Ricci and his daughter, who acted as his bookkeeper, paid by mistake; but respondent claims that no claim of mistake was made to them until some time after the payment and that no claim for adjustment by way of credit on later bills was ever made by Ricci of them.

[1] The foregoing represents substantially the undisputed facts in the case. As pointed out by Mr. Justice Sloss in the case of Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157, 1158, where the sufficiency of the evidence to support the judgment is challenged, "an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is, under the rule which has always prevailed in this court, to be resolved in favor of the finding." All that is required here is to point out the testimony, which, if given credence by the trial court, would logically lead to the conclusion that the obligation was that of Ricci.

[2] Under this well-known and long-recognized rule, an examination of the record finds ample evidence to support the finding.

Mr. Froom testified, in referring to the meeting between Weakley, Ricci, and himself, at the home of Ricci:

"Q. What happened at that meeting? A. Well, we discussed the grapes and the shook, and the price of the shook, and so on, and what kind of boxes he was going to use.

"Q. Well, who selected the boxes? A. * * * Both decided what boxes, and what transactions happened between the two of them afterwards, I do not know, but at that conversation, Mr. Ricci asked me to furnish him with some sample boxes, at his house, and if I am not mistaken, took four different kind of boxes over there, there is a good many different kind of lugs, for shipping grapes, but my recollection is I furnished four different samples, and they decided what to use.

"Q. When was it Ricci told you to charge this shook to him? A. It was during one of these meetings at his house, I cannot say which meeting it was, but it was at his house, where he first mentioned to charge the shook to the Ricci Fruit Company."

In another portion of his testimony he said: "A. I brought some samples of the boxes over to Mr. Ricci's house, and Mr. Weakley was present at that time, and we got to talking about it, so Ricci made the remark about, he was going to handle his grapes, that is ship them for him, or help him to sell them, that he understood the business better than Weakley did, and that he did not consider Weakley a good grape shipper, or seller, as good as he was, and he wanted to know about the shook prices, and so on, and I gave him the prices on the different kinds of box shook, and then Ricci says, 'Well,' he says, 'I am going to have the shooks all charged to me, I am going to handle his grapes, load them, and charge it through to my account,' because, he says, 'I realize, I do not believe that Mr. Weakley's credit would be good with the Sugar Pine Company,' and I told him, absolutely, I did not think it would, and so, he says, 'that is all right.'"

On another occasion the witness related a conversation with Mr. Ricci about stopping the furnishing of shook to Weakley: "A. * * * Mr. Ricci came out there in the morning, and he said, 'The market has gone to pieces,' and he says, 'I am getting afraid,' he says, 'do not let Weakley have any more shook on my account,' and I told him 'all right, we would stop it right now.'" And he continuing:

"* * * So in an hour or so, probably an hour or so, or maybe more, here comes Mr. Ricci again, and he says, 'All right, Mr. Lee and Mr. Froom, he always called me 'Pete,' and called him 'George,' he says, 'All right, let Mr. Weakley have the boxes, and charge my account, as before,' and that was as near as I can remember the conversation.

"Q. And did you furnish the shook to Weakley, after that conversation, the same as you had before? A. Yes, sir, and charged it the same as we did before."

This testimony was corroborated by George Lee, an employee of the company, who told of the meeting with Mr. Ricci, wherein he directed that the shook be charged to him, and, also, related the instance of when he directed that no further deliveries be made to Mr. Weakley, and later countermanded the order.

There was other testimony by Mr. Froom and Mr. Lee during the trial which, if given credence by the trial court, placed the obligation of payment upon Mr. Ricci; but we believe the foregoing excerpts are sufficient to sustain the finding complained of.

[3, 4] Appellant, in urging his legal objections to the judgment, discusses at length the applicability of the Statute of Frauds (Civ. Code, § 1624); but in view of the finding by the trial court that Ricci was liable as an original promisor, and that the debt from its inception was an obligation of Ricci, the question of the Statute of Frauds does not apply. Whether or not a promise is original or collateral is a question of fact. Harris v. Frank, 81 Cal. 289, 22 P. 856. Respondent cites the case of Merz v. Poole, 82 Cal. App. 15, 254 P. 914, where a defendant had agreed to pay for tires furnished to a third party. The testimony was that the defendant stated to the dealer: "Go ahead; put the tires on, Charlie; and I will pay for them all right; put them on." In that case, the court held that defendant's promise was an original obligation on his part to pay for the tires and made him the principal debtor. In Jan Wai v. Smith-Riddell Co., 55 Cal. App. 59–65, 202 P. 952, 955, the court said: "The oral agreement to pay for the meat delivered to Tominaga is not within the statute of frauds. The complaint and the evidence show an original promise on the part of the defendant. 'If goods are delivered by the seller to one person on the promise of another to pay for them and solely on the promisor's credit the promise is original and not within the statute.'" 25 R. C. L. 448.

[5, 6] Appellant also contends that the joining of Weakley as a party defendant is some evidence that respondent did not look to appellant as being the original promisor, but we cannot attach that construction to the act, nor is the fact that respondent accepted $500 from Weakley for the release from attachment of certain real property, anything of which appellant may complain. He has, at least, received a credit for that amount upon the balance due. And even if erroneous, and as to that we express no opinion, it is still an advantage to appellant of which he cannot complain. Kennedy-Shaw Lumber Company v. Priet, 113 Cal. 291, 45 P. 336.

We find no merit in appellant's contention that the judgment finds no support in the evidence, and the same is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

127 Cal.App. 692

MOORE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 8225.

District Court of Appeal, Second District, Division 2, California.

Nov. 26, 1932.

Hearing Denied by Supreme Court Jan. 23, 1933.

Corporations ⊂=553(1).

Order appointing receiver to take over assets of corporation, not claimed to have been dissolved, and all proceedings thereunder, *held* void (Code Civ. Proc. § 565).

Application by William H. Moore, Jr., as trustee in bankruptcy of John H. Mills and another, doing business as the Mills Walker Company, bankrupt, for a writ of prohibition, restraining the Superior Court in and for Los Angeles County from proceeding further in the matter of the receivership of Fanchon, Inc.

Writ granted.

Samuel A. Miller and Samuel Reichler, both of Los Angeles, for petitioner.

Haines & Bisher, of Los Angeles, for respondent.

Paul Lowenthal and William Berger, both of Los Angeles, amici curiæ.

CRAIG, J.

A receiver having been appointed by the superior court of Los Angeles county, and having qualified and taken over the assets of Fanchon, Inc., a corporation, the petitioning trustee in bankruptcy of Mills-Walker Company, applied to and received from said court an order to show cause why the appointment of the receiver should not be vacated and set aside. Following a hearing and adverse determination upon such application, a petition was filed by said trustee, praying a writ of prohibition to restrain further proceedings in the receivership matter.

A referee was appointed to take evidence upon certain alleged questions of fact, and, from the pleadings and the report of said referee, it appears that said bankrupt company was the owner of and in possession of two-thirds of the shares of the capital stock of said corporation, and that the latter was indebted to it; that the plaintiff at whose instance the receiver was appointed was a creditor of said corporation to the extent of about $200, and held the claim of another creditor by assignment for a lesser amount.

It is strenuously insisted by the respondent, as is apparent from the record, that Fanchon, Inc., was insolvent; that other creditors were threatening suit, and that the defendant had not sufficient property with which to defray its indebtedness; that the plaintiff in the Superior Court was without any plain, speedy, or adequate remedy; and that consent by the defendant debtor was alleged to have been obtained to the appointment of said receiver. However, it was not alleged below, nor is it contended on behalf of the respondent, that said receivership proceedings were predicated upon the fundamental requisite specified in section 565 of the Code of Civil Procedure as a basis for their existence. It is therein provided that: "Upon the dissolution of any corporation, the superior court of the county in which the corporation carries on its business or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members." Since no other valid jurisdictional ground for usurping the powers of regularly constituted officers of the corporation is known to our statutes, it must be held that the order appointing a receiver and all proceedings had thereunder were null and void. Elliott v. Superior Court, 168 Cal. 727, 145 P. 101; A. G. Col Co. v. Superior Court, 196 Cal. 604, 238 P. 926. We have examined authorities cited by amici curiæ as well as by the respondent, and find none in point holding to the contrary for the views above expressed. For example, First National Bank of Auburn v. Superior Court, 12 Cal. App. 335, 107 P. 322, is one involving a partnership, not a corporation. The court expressly states in its opinion that prohibition under certain circumstances enumerated and which may be said to exist in the instant proceeding is a proper remedy. Under the issues of that case also the question of the propriety of the writ or the legality of the receivership were not in issue.

The writ of prohibition is granted as prayed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

⊂=For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

ROBB v. CARDOZA (two cases).

SAME v. MULHERN.

Civ. 8507.

District Court of Appeal, First District, Division 2, California.

Nov. 21, 1932.

Hearing Denied by Supreme Court Jan. 19, 1933.

1. Bills and notes ⇐358.

Indorsee of promissory note as security for pre-existing debt is "holder for value" in usual course of business (Civ. Code, § 3138).

[Ed. Note.—For other definitions of "Holder for Value," see Words and Phrases.]

2. Bills and notes ⇐358.

Statute respecting one being holder in due course only to extent of amount of payments made by purchaser before receiving notice of infirmity *held* inapplicable, where indorsee received note as security for pre-existing debt (Civ. Code, § 3135).

3. Trial ⇐397(3).

Court properly refused to make additional findings not responsive to allegations of pleading.

4. Trial ⇐397(5).

Court properly refused to make additional findings which were immaterial.

5. Bills and notes ⇐358.

Bona fide holder taking notes as collateral to secure payment of pre-existing debt was unaffected by equities or defenses between prior parties, of which he had no notice (Civ. Code, § 3138).

Appeals from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Three separate actions by M. Robb against T. J. Cardoza, against W. P. Mulhern, and against T. J. Cardoza, on three different notes. The actions were consolidated for trial, and, from a judgment for plaintiff, defendants appeal.

Affirmed.

Douglas A. Nye, of Mill Valley, and Vincent Surr, of San Francisco, for appellants.

C. H. Sooy, of San Francisco, for respondent.

STURTEVANT, J.

As assignee of the Pacific National Bank, the plaintiff commenced three separate actions against three different defendants on three different notes. The defendants answered, and by consent of the parties the actions were consolidated for trial. The trial court made findings in favor of the plaintiff, and the defendants have appealed. The pleadings were quite full, and the findings are long, full, and complete. The defendants claim that several of the findings in part were not sustained by the evidence. The general facts which involved the parties in this litigation are stated in detail in the decision on a former appeal, Robb v. Cardoza, 110 Cal. App. 116, 293 P. 851, and need not be repeated.

The defendants contend (1) the taking by a creditor from his debtor of a promissory note of a third party given to the debtor as payee is not a taking for value and does not create a bona fide holder for value in due course, where such note is merely taken as added collateral, where no credit is given upon the indebtedness prior to some payment by said third party, and where said note is infirm as between such third party and said payee, and where no payment is ever made or credit given; (2) in other words, a pre-existing indebtedness is usually a sufficient consideration to constitute a pledge holder a bona fide holder, and it is not so where third party rights exist to be protected by equity; (3) where third party rights are concerned, no one party is allowed to lose while another makes a profit, but justice is done between them all, such title as the bank has it holds by an estoppel, and the doctrine of estoppel discountenances and denies any and all profit at the expense of innocent third parties; and (4) in no view was the bank a bona fide purchaser.

[1] For the sake of brevity, we answer the last point first. The bank claimed, and the trial court found, that the bank held the note sued upon as collateral to secure the payment of another note theretofore delivered to the bank. No question of being a purchaser was involved.

In support of points 1 and 2, the defendants cite and rely on Bank of Italy v. Welbilt Auto Body Co., 101 Cal. App. 526, 281 P. 1060; Pacific Nat. Bank v. Corona Nat. Bank, 113 Cal. App. 366, 298 P. 144; Pacific Acceptance Corp. v. Goodman, 72 Cal. App. 143, 236 P. 964; Oppenheimer v. Radke & Co., 20 Cal. App. 518, 129 P. 798; Sargent v. Sturm, 23 Cal. 359, 83 Am. Dec. 118; Peoples F. & T. Co. v. Matthews F. Co., 104 Cal. App. 630, 286 P. 710; Civ. Code, § 3135. No one of the authorities is in point. On the former appeal, Robb v. Cardoza, 110 Cal. App. 116, at page 122, 293 P. 851, 853, the court said: "The rule is well settled that the indorsee of a promissory note as security for a pre-existing debt is a holder for value in the usual course of business (Payne v. Bensley, 8 Cal. 260, 68 Am. Dec. 318; Smitton v. McCullough, 182 Cal. 530, 189 P. 686; Hunt v. Glassell, 47 Cal. App. 774, 191 P. 373; Griswold v. Morrison, 53 Cal. App. 93, 200 P. 62; People's State Bank v. Penello, 59 Cal. App. 174, 210 P. 432; Williams v. Walker, 66 Cal. App. 672, 226 P. 939); and, as held in Goodale v. Thorn, supra [199 Cal. 307, 249 P. 11], and Blochman Commercial, etc., Bank v. Moretti, 177 Cal. 256,

170 P. 419. * * *" An examination of the authorities there cited will disclose that every single case is in point. See, also, West Rutland Trust Co. v. Houston, 104 Vt. 204, 158 A. 69, 80 A. L. R. 664, and exhaustive note attached; see, also, 8 C. J. 488, and exhaustive note.

[2] In support of their third point, the defendants cite and rely on Ramsey v. Chilson, 57 Cal. App. 785, 208 P. 319; Little v. Union Oil Co., 73 Cal. App. 612, 238 P. 1066; Evans v. Marsh & Co., Inc., 116 Cal. App. 441, 2 P.(2d) 882; Martin v. Hollins, 118 Cal. App. 561, 5 P.(2d) 899; and Civ. Code, § 3135. No one of the authorities is in point. The rights of the plaintiff are defined by section 3138 of the Civil Code.

[3, 4] At the time the trial court was settling the findings, the defendants requested the trial court to make certain additions to its findings, but it refused to do so. The findings so requested were as follows:

"That in all two permits were issued by the Corporation Commissioner for the sale of stock of Big Creek Ranch, Inc., to-wit: an original permit dated December 31, 1925, for the sale of seven shares for cash, and for the sale of 3993 shares in exchange for certain ranch property, subject to certain liabilities, in all 4000 shares; and a supplemental permit dated February 5, 1926, for sale of a further 1000 shares at par with selling expense not to exceed 5 per cent, etc., and the existence and terms of said permits were at all times known to plaintiff's predecessor herein and to said Hopkinson and to said Big Creek Ranch, Inc."

"* * * At said time insufficiently secured and the said Big Creek Ranch, Inc., and said Hopkinson both then and ever since being insolvent and owning no property other than that hypothecated to said bank. That neither at the time of receiving said added collateral security, nor ever, was any credit entered reducing said indebtedness of Big Creek Ranch, Inc., nor of said Hopkinson nor was any credit intended or contemplated by said bank to be entered reducing said indebtedness unless, and until and only in such amount as might be, eventually, collected from defendant herein, and no amount has yet been collected from the note of said defendant, nor at all credited upon said indebtedness of Big Creek Ranch, Inc., or of said Hopkinson, to said bank."

[5] There are two reasons, each of which is sufficient, why the trial court did not err. The findings so requested were not responsive to any allegations contained in the pleadings. In the second place, the finding first set forth merely tended to show that, as between the maker and the payee of the note, there may have been a defense; however, as to this plaintiff and his assignor, the subject-matter was immaterial. The second request was based on the theory that the Pacific National Bank should have made some entries showing payment or credits. The trial court made findings that the bank received the notes as collateral. When such instruments are taken as collateral to secure the payment of a pre-existing debt, the question whether there should be a further showing before the holder could be said to be a holder for value was formerly debatable. The federal courts and the state courts were in conflict. 7 Cyc. 932–935. The adoption of the Uniform Negotiable Instruments Act put these questions to rest. In Brooklyn City & N. Railroad Co. v. National Bank, 102 U. S. 14, at page 28, 26 L. Ed. 61, the court said: "Our conclusion, therefore, is that the transfer, before maturity, of negotiable paper, as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case, the bona fide holder is unaffected by equities or defences between prior parties, of which he had no notice. This conclusion is abundantly sustained by authority. A different determination by this court would, we apprehend, greatly surprise both the legal profession and the commercial world. [Citing authorities.]" The above statement constitutes the federal rule. In re Hopper-Morgan Co. (D. C.) 154 F. 249. See, also, the extensive note, 80 A. L. R. 670. In short, the federal rule was in effect incorporated into the Negotiable Instruments Act. In those states, where a different rule obtained prior to the adoption of that act, it has been held that the adoption of said act changed the rule. Exchange National Bank v. Coe, 94 Ark. 387, 127 S. W. 453, 31 L. R. A. (N. S.) 287, 21 Ann. Cas. 934.

The defendants earnestly rely on cases which involved an antecedent debt that had been discharged in bankruptcy, an antecedent debt that was barred by the statute of limitations, and an antecedent debt that had become worthless. Such facts are not involved in this litigation, and we shall reserve a discussion of the law pertinent to such facts when the occasion arises.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

DAVIS v. BORTVEIT et al.

Civ. 8409.

District Court of Appeal, First District, Division 2, California.

Nov. 23, 1932.

Rehearing Denied Dec. 23, 1932.

1. Appeal and error ⇐719(8).

Appellant not specifying in bill of exceptions desire to attack finding was not entitled to have finding reviewed on appeal.

2. Mechanics' liens ⇐281(2).

In action to foreclose mechanic's lien, evidence supported finding that work on dwelling was stopped on certain date for over 30 days.

3. Mechanics' liens ⇐132(4).

Where work was stopped on dwelling on July 21 for more than 30 days, mechanic's lien claim, filed October 24, was filed in time.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Elmer Davis against Martin L. Bortveit, Margaret J. Church, and others. From a judgment for plaintiff, defendant Church appeals.

Affirmed.

Mark R. Averill and M. S. Hamilton, both of Oakland, for appellant.

Walter S. Chamney, of Oakland, for respondent.

KING, Justice pro tem.

The action is for the foreclosure of a lien for a balance due for labor and materials furnished in plastering a dwelling constructed for defendant Margaret J. Church, the contractors being Bortveit & Morton. The action was dismissed as to all except Margaret J. Church, and judgment went for plaintiff against her.

The question before the court is largely one of fact, the specifications of error being that the evidence is insufficient to justify the findings and decision as to (1) finding IV; (2) finding V; (3) the court erred in not finding that the building was completed and accepted on July 21, 1928; (4) the court erred in rendering judgment against appellant; and (5) that the decision is against law.

The plastering was performed, and respondent received $300 on account, the balance $402, forming the basis of the action. The lien claim was filed October 24, 1928. No notice of completion was ever filed.

Finding IV, which is attacked, is that beginning on the 21st day of July, 1928, and continuing for more than 30 days thereafter, no work was done on the building. Finding V, also attacked, finds that the sewer work was not finished, until September 25, and that it was a "necessary and integral part of said building and was provided for in the original plans and specifications of said building." If either finding to be true, respondent's lien claim was filed in time, and appellant's main contention must be decided against her.

It appears by the testimony of defendant's husband that he paid the balance due before leaving on a trip on July 14.

[1] Appellant also maintains in her brief that finding II is not supported by the evidence, but failed to specify in the bill of exceptions that she desired to attack this finding. Respondent contends that under these circumstances "the court cannot now review finding No. II," and cites Mills v. Brady, 185 Cal. 317, at page 321, 196 P. 776, 778, in which the Supreme Court says: "The respondent makes and insists upon the point that because of the lack of the bill of exceptions in this respect it is not open to us to examine the merits of the appellants' contentions, and we can but concede the point." The point is well taken by respondent, yet we have examined the record pertaining to this finding and believe the finding supported by the evidence and by stipulation of counsel.

[2] As to finding IV: At the time Dr. Church left, July 14, appellant's witness Woolpert testified: "I represented the Church's in the matter of the completion of this house. The building was completed the week following the Doctor's leaving Berkeley. I have a list given me by Mrs. Church at the time they left. This list is a list of small items to be finished before the house was accepted. We devoted that following week to finishing these up in order that I might accept the house, and have it off our hands, and so we could devote our time to the completion of the sewer, which was a separate item at that time. They completed these items the week following. * * * I then accepted the building for and on behalf of Mrs. Church the week following his departure."

There was some testimony as to a few hours' work done on August 2 in "washing around the front porch with white cement," but several witnesses contradicted this, and the court found that the work was stopped on July 21 for a period of more than 30 days. The evidence supports this finding.

[3] The claim of lien was filed October 24, within 120 days after the cessation of work, and was in time.

Finding V, holding that the sewer work was an "integral part of said building," etc., is also attacked. However, it is unnecessary to consider this finding, because the findings are sufficient without this.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

127 Cal.App. 738

MARCKWARDT v. HAYWORTH.

Civ. 947.

District Court of Appeal, Fourth District, California.

Nov. 29, 1932.

Hearing Denied by Supreme Court Jan. 27, 1933.

1. Appeal and error ⇐1002.
Reviewing court would not disturb verdict rendered on conflicting evidence.

2. Appeal and error ⇐930(1).
All conflicts in evidence must be resolved in favor of judgment from which appeal is taken.

3. Husband and wife ⇐333(9).
In action for alienation of husband's affections, evidence *held* sufficient to sustain verdict and judgment for plaintiff.

4. Divorce ⇐171.
Wife's failure to contest divorce action brought by husband *held* not to operate as estoppel barring wife's right of recovery in action for alienation of husband's affections.

5. Appeal and error ⇐1004(1).
Damages awarded cannot be held excessive, unless judgment is so plainly and outrageously excessive as to suggest at first blush passion, prejudice, or corruption on jury's part.

6. Husband and wife ⇐334(3).
$7,500 to wife for alienation of husband's affections where husband procured divorce and married defendant *held* not excessive.

Appeal from Superior Court, San Diego County; V. N. Thompson, Judge.

Action by Anna C. Marckwardt against Ida Hayworth, also known as Mrs. Henry C. J. Marckwardt. From a judgment for plaintiff, defendant appeals.

Affirmed.

Adam Thompson and Renwick Thompson, both of San Diego, for appellant.

J. L. Hoffiund, of San Diego, for respondent.

JENNINGS, J.

This action was brought by plaintiff, Anna C. Marckwardt, to recover damages from defendant, Ida Hayworth, also known as Mrs. Henry C. J. Marckwardt, for the alienation of the affections of plaintiff's husband, Henry C. J. Marckwardt. Upon the conclusion of the trial of the issues of fact, the matter was submitted to the jury, which returned a verdict in favor of plaintiff in the amount of $15,000 compensatory damages. The jury made no allowance for punitive damages. The defendant thereupon moved the court to render judgment in her favor, notwithstanding the verdict, which motion was by the court denied and judgment in conformity with the verdict was entered. A motion for a new trial was then made by defendant, and the court made its order granting said motion unless plaintiff should, within ten days, file a remission of one-half of the amount specified in the verdict. Within the time provided in the court's order, plaintiff filed a remission of the sum of $7,500. Defendant appeals from the judgment in plaintiff's favor reduced as aforesaid.

The judgment is attacked on two grounds, first, that the evidence presented during the trial is insufficient to support the verdict and judgment rendered thereon; and, second, that the damages awarded to plaintiff are excessive. The contention with respect to the insufficiency of the evidence may, for the purposes of this opinion, be divided into two general subdivisions. It is first urged that plaintiff's evidence failed to show that, at the time the separation between herself and her husband occurred, there existed between them any love and affection; and, second, that the evidence failed to show that any action of defendant was the producing cause of the separation of the spouses. Intelligent consideration of the problem thus presented requires a statement of the facts presented by the voluminous record herein.

It appears that plaintiff and her husband were married in 1911, and that thereafter they resided in various sections of the United States. In the year 1924, they came to California and took up their residence in the city of San Diego. Plaintiff's husband was engaged in various vocations. At the time when the events preceding their separation occurred he was a stock salesman. No children were born to plaintiff and her husband. In the month of February, 1930, plaintiff's husband made a visit to the race track near the town of Tijuana, Mexico. On this occasion he met the defendant Ida Hayworth and her daughter and together with a male companion returned to San Diego in defendant's automobile. A few days subsequent to this occurrence, plaintiff's husband called on defendant for the ostensible purpose of inducing her to purchase stock in a certain corporation by whom he was employed. He again called upon the defendant in the month of March, 1930, for the purpose of interesting her in the purchase of stock. So far as appears, these visits were entirely without solicitation on defendant's part. During the month of March, 1930, plaintiff's husband invited defendant and her daughter to accompany him and a male companion on a visit to the race track. Both defendant and plaintiff's former husband testified that, when this invitation was extended, defendant inquired of the husband if he were a married man, and was told by him that he was not.

The invitation was thereupon accepted. Numerous calls were thereafter made by plaintiff's husband upon defendant at her home, all of which, so far as appears from the record, were made without solicitation on defendant's part. At some time during the spring or summer of 1930, defendant was told by plaintiff that Henry C. J. Marckwardt was her husband, and was requested to cease her entertainment of him. The evidence with respect to the time when this information was conveyed to defendant is in irreconcilable conflict. On May 21, 1930, the separation between plaintiff and her husband occurred. During the evening of August 7, 1930, plaintiff called at defendant's home and introduced herself to defendant as Mrs. Marckwardt. She was thereupon invited to enter the house by defendant, and did so. Upon entering, she found her husband present, whereupon a conversation took place between husband and wife. The evidence with respect to this conversation is decidedly conflicting. In the meantime Henry C. J. Marckwardt had gone to the state of Nevada to engage in some employment, and while there instituted an action for divorce against plaintiff. The divorce action was brought on the ground of cruelty. Plaintiff was served with process in the action in California, and entered no appearance therein. On November 22, 1930, a decree of divorce was granted to Henry C. J. Marckwardt, and on the day following defendant and he went to Yuma, Ariz., where they were married. On December 10, 1930, this action for alienation of affections was instituted by plaintiff.

[1] With respect to appellant's contention that the evidence shows that, prior to the time appellant was informed that respondent's husband was a married man, no affection existed between the spouses which could be the subject of alienation, it must be observed that the evidence upon this feature is hopelessly conflicting. Respondent presented the testimony of a considerable number of witnesses who had known respondent and her husband for varying periods of time. Some of these witnesses had visited respondent and her husband in their home and had observed their conduct towards one another. This evidence indicated that, to all outward appearances, respondent and her husband were happily married and were reciprocally affectionate one towards the other. Respondent herself testified that their marriage was a happy one, and had continued so until she noticed some slight coolness on the part of her husband towards her during the month of March, 1930, and that he then began to remain away from his home until late hours of the night; that on April 5, 1930, however, he begged her forgiveness for being so cross with her, and promised that he would never see appellant again, and would live with respondent and treat her properly; that her husband had always supported her well except at such times as he was unable to secure employment, at which times respondent herself obtained employment for the purpose of their joint maintenance. Appellant, on the other hand, produced evidence, consisting of the testimony of a number of witnesses and that of respondent's former husband, which indicated that respondent was a woman of ungovernable temper, extremely jealous of her husband, given to the use of vulgar and profane language, addicted to excessive use of intoxicating liquor, unwilling to bear children, and a nagging, querulous person. The former husband testified that long before he had met appellant his marriage had ceased to be a happy one; that he had suggested a separation; that her attitude towards him had caused him to threaten to institute divorce proceedings; that before he met appellant he had lost all affection for respondent. Much more space might be devoted to a delineation of the evidence relative to the particular feature of the case here being considered. It could serve no useful purpose so to do. Enough has been described to indicate that it is irreconcilably conflicting. Obviously the only two persons who could, with certainty, testify to the continued presence or total loss of the highly intangible element of connubial affection were respondent and her former husband. From his testimony we can only conclude that long prior to his meeting with appellant he had entirely lost all affection for respondent. Respondent's testimony, on the other hand, indicates that she labored under the delusion that she possessed the true coin rather than merely the counterfeit of affection. Under the circumstances with respect to this particular feature of the case, it is one peculiarly fitted for strict application of the well-established rule that a reviewing court will not disturb a verdict rendered upon conflicting evidence. The opportunity was afforded to the triers of fact to hear the testimony at first hand and to observe the demeanor and manner of the witnesses who testified in their presence.

[2] A somewhat more interesting and more puzzling problem is presented by appellant's second contention relative to the insufficiency of the evidence. It is urged that, conceding that the evidence indicates that respondent's husband had not entirely lost all affection for his wife prior to his meeting with appellant, nevertheless the evidence is entirely lacking to support the finding necessarily implied by the verdict that appellant's conduct and actions were the producing cause of respondent's loss of her husband's affection. Particular stress is laid upon the fact that respondent's former husband was the aggressor, the actor, the wooer. It must be conceded that the testimony of appellant and her witness, the ex-husband, fully sustains the argument thus advanced. The testimony of these individuals indicated that appellant did not at any time solicit or invite respondent's for-

mer husband to call upon her, but that on the other hand he consistently made the advances and sought her out. In this connection another irreconcilable conflict in the evidence must be noted. Appellant testified positively that she was never informed that Henry C. J. Marckwardt was a married man until the evening of August 7, 1930, when respondent called upon her and introduced herself as the wife of the man who was at that time present in her home. Equally positive was the testimony of respondent that she had telephoned appellant during the latter part of April or the early part of May, 1930, and had informed her that Henry C. J. Marckwardt was married and that he was her husband, and that appellant then promised she would not again permit said Marckwardt to call upon her. This feature of the time when appellant was advised that Marckwardt was married is of importance when it is remembered that the separation of respondent and Marckwardt occurred on May 21, 1930. In accordance with the usual rule that all conflicts in evidence are to be resolved in favor of the judgment from which the appeal is taken, we must assume that the jury accepted respondent's testimony in toto, and that thereafter, in violation of the promise she had made to respondent, appellant permitted Marckwardt to call upon her and entertained him in her home. However, it is urged that, since the uncontradicted testimony of appellant and of respondent's former husband shows that at all times the latter was the wooer and not the wooed, and the former was merely the passive recipient of his attentions, it cannot be said that appellant enticed the husband away from respondent, and therefore no recovery can properly be had from appellant since the gist of the action is the enticing away of respondent's husband and alienating his affections. 13 Cal. Jur. p. 904; De Bock v. De Bock, 43 Cal. App. 283, 184 P. 890, 895.

Appellant places much reliance upon the case of De Bock v. De Bock, supra, and it must be conceded that there is language in the court's opinion which is decidedly pertinent to the contention in this regard. However, in the De Bock Case, it is said that "the record discloses very slight evidence, the effect of which is to negative the proposition that Louis De Bock's whole conduct towards Millie Fisher was his own voluntary act, uninfluenced by any active interference on her part." A careful and painstaking investigation of the record in the instant case has produced the conviction that a statement similar to that above quoted is not here justified. The record contains evidence that in the latter part of April, or early in May, 1930, appellant was apprised of the fact that Henry C. J. Marckwardt was respondent's husband, and promised respondent that she would not see said Marckwardt again; that appellant did not keep her promise, but that very shortly thereafter she did again see him and permitted him to call upon her, and continued to entertain him in her home in spite of repeated requests by respondent to desist such action; that on the day following respondent's visit to appellant's home respondent talked with appellant over the telephone, on which occasion appellant took exception to respondent's visit of the preceding evening, and declared that she would entertain respondent's husband at any hour of the day or night she wished; that, after respondent's husband had become acquainted with appellant during the month of February, 1930, and within a period of less than ten months, there occurred, first, the separation of respondent and her husband on May 21, 1930; second, the institution of divorce proceedings in the state of Nevada against respondent by her husband culminating in the rendition of a decree of divorce on November 22, 1930; and, third the marriage of appellant and respondent's former husband in the state of Arizona on November 23, 1930. The almost indecent rapidity with which the marriage between the former husband and appellant was consummated after the rendition of the divorce decree introduces an evidentiary element that was entirely lacking in the case of De Bock v. De Bock, supra. From the happening of this event at the time and place heretofore indicated, the jury may well have inferred that, despite her assertions to the contrary, appellant was fully aware of the institution of the divorce suit and encouraged its successful prosecution. In other words, it is a circumstance that has the ring of enthusiastic co-operation rather than the more modest sound of passive acquiescence.

[3] With respect generally to appellant's contention that the evidence is insufficient to sustain the verdict and judgment in respondent's favor, the following language from Slaughter v. Van Winkle, 213 Cal. 573, 574, 2 P.(2d) 789, is peculiarly apropos: "The record presents a case of conflicting inferences and conclusions. The evidence is such that the verdict of the jury could have been either for the plaintiff or the defendant, and this court would have been compelled to sustain it."

[4] A further contention of appellant is entitled to brief consideration. It is urged that respondent's cause of action was barred by her failure to contest the action for divorce brought by her husband. This contention is based upon the theory that full knowledge by respondent of the pendency of the divorce action and her failure to defend said action operates as an estoppel barring her right of recovery in the present action. Such is not the rule. The correct rule is thus stated in 13 Cal. Jur. p. 905: "Since an estoppel by judgment can only arise and be invoked where the subject matter of the litigation and the parties are the same, the pleadings and judgment in an action for divorce

do not estop the plaintiffs therein from alleging different facts in a subsequent action for alienation of affections." It is immediately apparent that neither the subject matter of the divorce action is the same as that of the present action, nor are the parties identical in the two actions. A contention similar to that here advanced was made in De Bock v. De Bock, supra, and was held lacking in merit, for the reason that the subject-matter of the two actions was entirely different and the parties in the actions were not the same.

[5, 6] Appellant's final complaint is that the damages awarded to respondent are excessive. In order that this objection may be efficacious, it must appear that the judgment is "so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury." Hale v. San Bernardino, etc., Co., 156 Cal. 713, 106 P. 83, 84; Mohn v. Tingley, 191 Cal. 470, 217 P. 733; Martin v. Pacific Gas & Electric Co., 203 Cal. 291, 264 P. 246. From the facts appearing in the record herein, we are unable to conclude that the amount of recovery is, of itself, so grossly disproportionate to any compensation reasonably warranted as to produce the necessary shock to the sense of justice and raise an immediate presumption that the award was the result of passion and prejudice rather than honest and sober judgment. Bate v. Jolin, 206 Cal. 504, 274 P. 971. Arrival at this conclusion has been assisted by the action of the trial court in materially reducing the amount awarded by the jury on appellant's motion for a new trial.

For the reasons stated, the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

KALSON v. PERCIVAL.*

Civ. 8498.

District Court of Appeal, First District, Division 1, California.

Dec. 1, 1932.

Rehearing Denied Dec. 31, 1932.

Hearing Granted by Supreme Court Jan. 30, 1933.

1. Judgment ⇐138(1).

Policy of law is to have controversies tried on merits.

2. Judgment ⇐162(2).

On motion to set aside default judgment, presumption is indulged in favor of defendant, where it appears on face of answer that he has defense (Code Civ. Proc. § 473).

Strength is added to such presumption, where it appears extremely probable that the defense is well grounded in fact.

3. Judgment ⇐162(2).

On motion to set aside default judgment, where no reasonable excuse is shown why defendant has not acted to protect his interests, it is error to grant him relief (Code Civ. Proc. § 473).

4. Judgment ⇐162(4).

Affidavit on which motion to set aside default judgment was based showed no reasonable excuse for defendant's failure to appear and defend action; hence trial court erred in setting aside default (Code Civ. Proc. § 473).

Affidavit stated that shortly after automobile accident which happened on November 12, 1931, in Oakland, a police inspector told defendant that he was not at fault; that plaintiff's attorney called on defendant to effect a settlement, which he refused; that on January 3, 1932, defendant was served with summons and complaint, but paid no attention to summons; that he went to Los Angeles on business three days later, remaining away for ten days; that by reason of what had happened before, he treated the matter lightly, and forgot about complaint and summons until he happened to find them in a bureau drawer a week after his return from Los Angeles; that defendant then went to see his insurer's agent, who told him to attend to it at once, and shortly thereafter defendant was informed that judgment had been rendered against him on January 19.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Otto Kalson against W. E. Percival. From an order setting aside the default of defendant and the judgment in favor of plaintiff, plaintiff appeals.

Reversed.

L. L. Steele, of Oakland, for appellant.

Bronson, Bronson & Slaven, of San Francisco, for respondent.

STROTHER, Justice pro tem.

This is an appeal from an order setting aside the default and judgment against defendant, upon motion under section 473 of the Code of Civil Procedure.

The contention of appellant is that the affidavit upon which the motion was based stated no meritorious case of surprise, mistake, inadvertence, or excusable neglect, and that therefore the court abused its discretion in setting aside the default.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 20 P.2d 330.

The complaint states a good cause of action against the defendant for damages suffered by plaintiff as the result of defendant running him down with his automobile on a street crossing in Oakland. The verified answer filed by defendant with his motion states facts which, if proven, would constitute a perfect defense to the action, charging contributory negligence as a special defense, and, as a further special defense, facts from which it would appear that the plaintiff was entirely at fault.

[1, 2] The policy of the law always is to have controversies tried upon their merits, following the natural human instinct of revolt against the idea of any one getting an advantage over another to which he may not be justly entitled. And when, as in this case, it appears extremely probable that the defense is well grounded in fact, it adds strength to the presumption always indulged in favor of a defendant in such a case where it appears upon the face of his answer that he has a defense. The decisions to this effect are so numerous and unvarying that it is not necessary to refer to them.

[3] But it is equally true that, where no reasonable excuse is shown why the defendant has not acted to protect his interests, it is error to relieve him from the consequences of his neglect. Redding, etc., Min. Co. v. Nat. Surety Co., 18 Cal. App. 488, 123 P. 544; Coleman v. Rankin, 37 Cal. 247; Penryn Land Co. v. Akahori, 37 Cal. App. 14, 173 P. 612; Essig v. Seaman, 89 Cal. App. 295, 264 P. 552.

The accident upon which the action is based happened on November 12, 1931. The complaint was filed and summons issued on December 24, 1931. The return on the summons showed service on the defendant on December 26. The default was entered on January 7, 1932. Judgment was rendered and entered against the defendant on January 19. On February 2 defendant gave notice that he would, on February 11, 1932, move to set aside the default and judgment, and filed therewith his affidavit and verified answer.

In his affidavit defendant stated briefly his version of the circumstances of the accident; that shortly thereafter an Oakland police inspector told him to go home and forget it, that he was not in any way at fault; that plaintiff's attorney called on him and tried to effect a settlement, which he refused; that on January 3, 1932, he was served with summons and complaint, and read the latter, but paid no attention to the summons attached, thinking it was a cover; that he went to Los Angeles on business three days later, remaining away for ten days; that, by reason of what had gone before, he treated the matter lightly and as of no importance, and forgot about the complaint and summons until he happened to find them in a bureau drawer a week after his return from Los Angeles. He then went to see the agent of his insurer, who told him it was important to attend to it at once, and shortly thereafter he was informed that judgment had been rendered against him. Just what he thought would happen is not made to appear, except by inference.

[4] No reasonable, legal excuse is shown by the facts recited for defendant's failure to appear and defend this action. Manifestly, his neglect was due solely to the feeling of innocence of responsibility for plaintiff's injuries, which he claims to have had.

From a counter affidavit by plaintiff's attorney it appears that he not only urged a settlement on the defendant, but wrote to his insurer's agent, and received a reply, dated December 2, 1931, that as soon as he could get full details of the accident he would "be in a position to take care of" the claim, and asking for time. Between that time and the filing of the complaint he heard nothing from either of them. That is not denied.

The order of the trial court setting aside the default of defendant, and the judgment in the action, is reversed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

127 Cal.App. 649

BAUMGARTEN v. CALIFORNIA PACIFIC TITLE & TRUST CO. et al.

PEAK v. BAUMGARTEN et al. (JOHNSON et ux., Interveners).

Civ. 8189.

District Court of Appeal, First District, Division 1, California.

Nov. 23, 1932.

Hearing Denied by Supreme Court Jan. 20, 1933.

1. Assignments ⇐58.

Order on escrow holder to pay part of fund due drawer to another *held* not legal assignment thereof pro tanto, where never accepted by drawee.

2. Assignments ⇐50(1).

Order on escrow holder to pay part of fund due drawer to another operates as equitable assignment, taking precedence over subsequent assignments and judgment liens as between drawer and payee, where given for adequate consideration, with intent to effect assignment, though no fund was in escrow holder's possession at time.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

3. Assignments ⇐9.

Money to become due in future on happening of contingency may be assigned.

4. Assignments ⇐55.

Advancement of price of realty to purchaser and satisfaction of latter's indebtedness to lender constituted adequate consideration for purchaser's order on escrow holder to pay amount of such advancement and indebtedness from fund due purchaser.

5. Assignments ⇐55.

Antecedent indebtedness constitutes valuable consideration sufficient to support equitable assignment.

6. Assignments ⇐137.

Evidence *held* to justify trial court's finding that real estate purchaser's order on escrow holder to pay another amount of purchase price advanced and other indebtedness from amount deposited by lessee was intended as assignment.

7. Assignments ⇐49.

Assignment will be held to have occurred, where it clearly appears that drawer and payee of either negotiable or nonnegotiable bill intended to transfer title to chose in action, though assignor delivered order on debtor to assignee.

8. Assignments ⇐59.

Real estate purchaser, assigning part of sum deposited by lessee in escrow to persons advancing purchase money, could not revoke assignment.

9. Assignments ⇐85, 86.

Real estate purchaser's assignment of part of sum deposited by lessee in escrow to persons advancing purchase money took precedence over subsequent assignments to, and levies of execution under judgment for, another.

10. Assignments ⇐131.

Complaint, in action for amount deposited in escrow by lessee, *held* to state sufficient facts to support judgment for plaintiff on theory of equitable assignment of part of fund to plaintiff by lessor.

The complaint alleged agreement of lease, deposit of lessee's check for $18,000 in escrow, assignment of $16,500 of fund to plaintiff, execution and delivery of order, directing payment thereof to plaintiff by escrow holder, contemporaneous indorsement of check, and execution of assignment and order in consideration of money advanced to lessor at his instance and request to purchase realty.

11. Assignments ⇐131.

Failure of complaint to allege that defendant's order on escrow holder to pay plaintiff part of fund was in effect when action therefor was commenced, and that plaintiff was owner and holder of assignment, *held* not fatal, in view of allegation that he was owner of, and entitled to possession of, sum in dispute.

12. Parties ⇐7(2).

One to whom purchaser of realty assigned part of sum, deposited in escrow by lessee, for benefit of both assignee and another, in consideration of advancement of purchase money, could sue for entire amount assigned; being trustee of express trust to extent of latter's interest (Code Civ. Proc. §§ 367, 369).

13. Parties ⇐7(2).

Person with whom or in whose name contract is made for another's benefit is trustee of express trust, and may sue with like effect as if principal (Code Civ. Proc. §§ 367, 369).

14. Trial ⇐397(5).

Findings by trial court as to assignment and judgment liens alleged in cross-complaint *held* unnecessary, in view of conclusions as to validity of previous assignment to plaintiff.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by E. A. William Baumgarten against the California Pacific Title & Trust Company, George Peak, and others, in which defendant Peak filed a cross-complaint against E. A. William Baumgarten and others, and Axel A. Johnson and wife intervened. From a judgment for plaintiff, cross-complainant appeals.

Affirmed.

For prior opinion, see 14 P.(2d) 1072.

A. Don Duncan, of San Francisco, for appellant.

Bianchi & Hyman, of San Francisco, for interveners.

Arthur L. Shannon, of San Francisco, for respondent.

PER CURIAM.

After a further consideration of the merits of this appeal upon rehearing, we have concluded that the opinion written by Mr. Justice pro tem. Ogden, and filed herein on September 28, 1932, expresses the present opinion of this court in determining the issues presented on the appeal. Said opinion is therefore adopted as the opinion and decision of this court, and is as follows:

This action arises out of a controversy involving several conflicting claims to a sum of $16,500 held in escrow by the defendant California Pacific Title & Trust Company, a corporation, which will for the sake of brevity be hereinafter referred to as the title company. The trial court, after deducting

the expenses of escrow, awarded the entire balance of the fund to the respondent. From this judgment the defendant and cross-complainant George Peak has appealed. None of the other parties to the action below, except the interveners Johnson and wife, have appealed, and, as the appeal of the latter has been dismissed, we are concerned on this appeal only with the respective claims to the fund of the appellant and the respondent.

Respondent claims the fund as assignee thereof of the Blackmore Investment Company, a corporation. Appellant bases his claims thereto both as assignee and as a judgment creditor of the same company. Both the purported assignment and the levies of execution upon which appellant's claims are based are admittedly subsequent in point of time to the assignment claimed by respondent.

The facts in so far as they have any bearing upon the points involved in this appeal, are substantially as follows: The interveners Johnson and wife owned a vacant lot adjoining the building of the Pacific Nash Motor Company on Van Ness avenue in the city and county of San Francisco. The latter being desirous of increased building space, the following real estate transaction was promoted and consummated. The Blackmore Investment Company purchased from the Johnsons their lot for $15,000 cash, giving for the balance of the purchase price a promissory note secured by a second incumbrance upon the property, placed a building loan thereon as a first incumbrance, with the proceeds of the loan erected a building thereon, and leased the premises to the Pacific Nash Motor Company. The agreement of lease between the Blackmore Investment Company and the Pacific Nash Motor Company provided for the deposit in escrow by the lessee of the sum of $18,000 to be paid to the lessor, upon the completion and acceptance of the building and the execution of the lease, to apply on the last year's rental under the lease. Accordingly, on October 9, 1926, the Pacific Nash Motor Company deposited with the title company its check, drawn on the Wells Fargo Bank and Union Trust Company, in the sum of $18,000, payable to the order of the Blackmore Investment Company, together with instructions that the check be delivered to the latter upon the completion and acceptance of the building and the execution of the lease. Why this deposit was not made in the form of cash as required by the agreement does not appear, but apparently no objection was made to the form of the deposit.

As the transaction for the purchase of the lot was originally contemplated, the $15,000 cash payment due the Johnsons as down payment was to be derived from this deposit of $18,000. This arrangement, however, not being satisfactory to the Johnsons, who insisted upon immediate payment, it became necessary, in order that the transaction be consummated, for the Blackmore Investment Company to raise the required sum of $15,000.

The Blackmore Investment Company was a corporation, the entire capital stock of which, with the exception of a few qualifying shares, was owned by one F. P. Mozingo, who was its secretary and apparently in sole control of the affairs of the corporation. Actively participating in the promotion of the transaction was one J. L. Stewart, a licensed architect, and acting as such in the designing of the building. The respondent, Baumgarten, was employed by Stewart as a draughtsman, on a salary and commission basis, in connection with the construction.

According to the testimony of respondent, and as corroborated by that of Stewart, Mozingo explained to them both that he could not raise the $15,000 necessary to pay the Johnsons on the purchase price of the lot, and suggested that they, Stewart and Baumgarten, advance that sum to the Blackmore Investment Company for that purpose, stating that, if they would do so, he would turn over to them the deposit of the Pacific Nash Motor Company above referred to. This was thereupon agreed to, respondent giving Stewart his check for $6,000, which Stewart, in company with Mozingo, took to his bank, where he, with respondent's $6,000 check and an additional $9,000 of his own money, purchased a cashier's check in the sum of $15,000, which he gave to Mozingo. This check was deposited by Mozingo with the title company for payment to the Johnsons. At the time of agreeing to make the advance, Stewart told Mozingo that respondent wanted something in writing about the assignment of the Pacific Nash Motor Company deposit, and also that the fee of the structural engineer in connection with the construction of the building amounting to $1,500, for which he (Stewart) had become obligated, was due and should be paid. Accordingly Mozingo agreed to make the order in the amount of $16,500 to take care of both the advance and the engineering fees. Stewart further suggested to him that the order be made payable to respondent, as he was the one who wanted it.

Thereupon the following order was executed by Mozingo on behalf of the Blackmore Investment Company, one copy being delivered to the title company and the other to Stewart, who delivered it to respondent:

"San Francisco, California

"November 15, 1926.

"California Pacific Title Insurance Co., 148 Montgomery Street, San Francisco, California

"Gentlemen:—For, and in consideration of certain moneys heretofore advanced to the Blackmore Investment Company, and for certain other services heretofore performed for the benefit of the Blackmore Investment Company you are herewith instructed to pay the sum of Sixteen Thousand Five Hundred ($16,-

500.00) Dollars to E. A. Wm. Baumgarten. This said sum of $16,500.00 is to be paid out of the deposit heretofore made with you by the Pacific Nash Motor Company to secure a lease to be entered into between the Blackmore Investment Company and the Pacific Nash Motor Company and which deposit amounts to the sum of Eighteen Thousand ($18,000.00) Dollars.

"The balance due out of the deposit of $18,000.00 namely $1,500.00 is to be paid to George Peak for services rendered in full, for negotiating the lease herein above referred to.

"It is understood, and you are hereby instructed to disregard any other orders, instructions, or demands on this said deposit of $18,000.00 without the written consent of said E. A. Wm. Baumgarten being first had and obtained.

"Yours very truly,
"Blackmore Investment Company,
"Per F. P. Mozingo, Secretary."

Thereupon, although the exact time thereof does not appear, Mozingo indorsed in blank on behalf of the Blackmore Investment Company the check on deposit with the title company.

On May 23, 1927, and again on June 13, 1927, Mozingo, on behalf of the Blackmore Investment Company, instructed the title company to cancel and disregard the above order in favor of respondent. On June 20, 1927, he directed the title company to cancel his indorsement of the check, and subsequently executed a purported assignment of the fund and check to appellant. Mozingo claimed, as his reason for doing so, that Stewart had been amply repaid for the $15,000 out of excessive and secret architect's fees received from the contractor. No sufficient evidence to support this contention was, however, produced at the trial.

The building was completed and accepted and the lease executed, and thereupon, on June 10, 1927, the title company cashed the check. Subsequently the $1,500, less the title company's charges, was paid to appellant's assignee pursuant to the second paragraph of the order. Due to the several conflicting claims to the balance of the $16,500 the title company refused to disburse it, and respondent thereupon brought this action for its recovery.

A considerable portion of appellant's briefs is devoted to a discussion of his version of the circumstances under which the advance of $15,000 was made and the order upon the title company executed and to the contention that Stewart by "padding" the contract price has been more than compensated for any advances made. Appellant's contentions as to these matters are based upon conflicting testimony at variance with that of respondent and Stewart and which upon this appeal it must be assumed were determined by the trial court adversely to appellant.

[1] The above order, being one for the payment to respondent of a part only of the whole fund due the drawer, and never having been accepted by the drawee, cannot be said to constitute a legal assignment, pro tanto, of the obligation due the Blackmore Investment Company or of any part thereof. Donohoe-Kelly Banking Co. v. S. P. Co., 138 Cal. 183, 71 P. 93, 94 Am. St. Rep. 28; Fidelity Sav., etc., Ass'n v. Rodgers, 180 Cal. 683, 182 P. 426; Guggenhime & Co. v. Lamantia, 207 Cal. 96, 276 P. 995, 997; Harlan v. Gladding, McBean & Co., 7 Cal. App. 49, 93 P. 400.

[2] However, it has been repeatedly held that where an order, such as the one at bar, is given for a valuable and adequate consideration, and with the intent to effect an assignment, it will as between the payee and the drawer operate as an equitable assignment taking precedence over subsequent assignments and judgment liens. Wheatley v. Strobe & Wilcoxson, 12 Cal. 92, 73 Am. Dec. 522; Pierce v. Robinson, Adm'r, 13 Cal. 116; Pope v. Huth, 14 Cal. 403; Curtner v. Lyndon, 128 Cal. 35, 60 P. 462; McIntyre v. Hauser, 131 Cal. 11, 63 P. 69; Fidelity Sav., etc., Ass'n v. Rodgers, supra; Dunlap v. Commercial Nat. Bank, 50 Cal. App. 476, 195 P. 688.

[3] It is immaterial that there was no fund actually in the possession of the title company at the time of the execution of the order. The subject of the assignment was not the check or any particular fund of money, but was the right of the Blackmore Investment Company to receive the sum of $18,000 upon compliance with the terms of the escrow. Money to become due at a future time upon the happening of a contingency may be the subject of an assignment. Pope v. Huth, supra; Bridge v. Kedon, 163 Cal. 493, 126 P. 149, 43 L. R. A. (N. S.) 404; Smitton v. McCullough, 182 Cal. 530, 189 P. 686; Bank of Yolo v. Bank of Woodland, 3 Cal. App. 561, 86 P. 820; Union Collection Co. v. Oliver, 23 Cal. App. 318, 137 P. 1082.

[4, 5] The order was given for valuable and adequate consideration, to wit, the advance of $15,000 by Stewart and respondent and the satisfaction of the indebtedness of the Blackmore Investment Company to Stewart in the sum of $1,500 on account of engineering fees. An antecedent indebtedness constitutes a valuable consideration sufficient to support an equitable assignment. Smitton v. McCullough, supra.

[6] That the order was intended by the parties as an assignment is in accord with the evidence. The agreement of Mozingo was to "turn over the deposit." At the time of the delivery of the order, Stewart said to Mozingo, "Now it is understood that $16,500 of this

money goes to Baumgarten and $1,500 goes to Peak," and the latter replied, "Yes, I will turn over the money to you fellows and I get the building." In January of 1927, it was suggested to respondent by an official of the title company that he procure another order on a regular form of the title company. After signing this additional order, Mozingo stated to respondent, "Now you got it all, it is all yours now." By indorsing the check, the Blackmore Investment Company divested itself of any further control over the fund. The concluding paragraph of the order specifically agrees and instructs the drawee to disregard any other orders, instructions, or demands on the fund without the written consent thereto of the payee. The trial court was amply justified in determining, as we must assume it did, that an assignment was intended.

[7] The situation at bar therefore comes within the rule as stated in Guggenhime & Co. v. Lamantia, supra, that: "Although neither a negotiable or nonnegotiable bill of itself constitutes an assignment, if it clearly appears from the entire transaction that it was the intention of the drawer and payee to transfer title to a chose in action, an assignment will be held to have taken place, and the nature of the transaction is not changed because the assignor in the course of the transaction may have delivered to the assignee an order upon the debtor."

[8, 9] An assignment having taken place, it was beyond the power of the assignor to revoke it, and Mozingo's subsequent attempts to do so were ineffectual. It likewise takes precedence over the subsequent assignments and levies of execution which form the basis of appellant's claims to the fund. Title Ins., etc., Co. v. Williamson, 18 Cal. App. 324, 123 P. 245, 247.

[10] Appellant contends that the complaint does not state, nor do the findings of the trial court find, sufficient facts to support a judgment on the theory of an equitable assignment. The complaint alleges the agreement of lease; the deposit thereunder in escrow of the check of the Pacific Nash Motor Company in the sum of $18,000; the assignment to respondent of "the sum of $16,500 of said fund of $18,000"; the execution and delivery of the order directing the payment to respondent of the sum of $16,500 and the contemporaneous indorsement of the check; and that the "assignment and order" were made in consideration of moneys advanced to the Blackmore Investment Company, at its instance and request, to be used, and which were actually used, in the purchase of the real property therein mentioned. It also contains a second count containing the usual allegations found in actions to quiet title. A general and special demurrer was filed by appellant and overruled by the trial court. Although it is true that the adequacy of the consideration is not definitely shown, there being no averment as to the amount of money advanced, the case was, as stated by appellant in his briefs, tried on the theory of an equitable assignment. The matter of the true consideration and its sufficiency and adequacy was fully gone into by all the parties, apparently without objection, upon the trial and determined to be as found by the trial court upon competent evidence, "moneys advanced and services rendered to Blackmore Investment Co., at its instance and request, of the value of $16,500." Both the evidence and the findings of fact show the assignment to be just and reasonable and the consideration therefor adequate.

The complaint is contended to be further defective, in that it alleges an assignment of "the sum of $16,500 of said fund of $18,000," whereas in fact there was at the time of the assignment no fund in existence. The trial court properly found the assignment to be of all of the assignor's "right, title and interest in and to its said claim against Pacific Nash Motor Company and the fund represented by said check, to the extent of $16,500 thereof." And this is what the complaint, reading it in its entirety, alleges in effect. From the facts alleged it definitely appears that the subject of the assignment was neither the check nor a portion of any existing fund of money, but was rather a chose in action, to wit, the claim of the Blackmore Investment Company against the Pacific Nash Motor Company.

[11] The failure of the complaint to allege that, at the time of the commencement of the action, the order was in force and effect, and the plaintiff was the owner and holder of the assignment, is not fatal. It is alleged that the plaintiff is the owner of, and entitled to possession of, the sum of money in dispute. His ownership in the assignment at the time of the commencement of the action is by "fair intendment" shown. Irish v. Sunderhaus, 122 Cal. 308, 54 P. 1113.

[12, 13] Respondent is not limited in his recovery to the sum of $6,000, which was the extent of his personal contribution to the consideration for the assignment. The Blackmore Investment Company received, for the assignment, adequate consideration of the value of $16,500. The assignment was made to respondent for the benefit of both respondent and Stewart. In so far as the extent of Stewart's interest therein is concerned, respondent is the trustee of an express trust, and entitled to sue thereon in his own name. Section 369, Code Civ. Proc. The rule that every action must be prosecuted in the name of the real party in interest (section 367, Code Civ. Proc.) is subject to the further rule that a person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust which permits him to sue with like effect as though he were the

principal. Earl Fruit Co. v. Herman, 90 Cal. App. 640, 266 P. 592.

[14] Appellant complains that the findings of the trial court fail to find on the allegations of his cross-complaint. He does not, however, point out in his briefs the issues raised thereby which are not determined in the findings, nor does he point out in what manner he has been prejudiced from any failure to find thereon. However, in view of the conclusions reached by the trial court as to the validity of the assignment in favor of respondent, admittedly prior in point of time to the alleged assignment and judgment liens upon which appellant relies, findings as to the latter became immaterial and unnecessary. 2 Cal. Jur. 1032.

The judgment is affirmed.

127 Cal.App. 715

LONG v. SACRAMENTO VALLEY SUGAR CO.

Civ. 4614.

District Court of Appeal, Third District, California.

Nov. 28, 1932.

1. Contracts ⇐350(2).

Evidence sustained finding of existence of contract that plaintiff should harvest barley at agreed unit price.

2. Contracts ⇐56.

Plaintiff's promise to harvest barley at agreed price per acre with certain equipment *held* sufficient consideration for defendant's promise to pay therefor (Civ. Code, § 1605).

3. Contracts ⇐10(2).

In damage action for breach of contract engaging plaintiff to harvest barley, whether plaintiff could specifically enforce contract *held* immaterial (Civ. Code, § 1605).

4. Contracts ⇐324(1).

One agreeing to perform services for which another has agreed to pay certain compensation may sue for damages for other's breach.

5. Contracts ⇐9(2).

In one contractor's damage action for not permitting contractor to harvest crop, contract that two contractors who did work preceding year should harvest defendant's barley *held* sufficiently certain as to acreage.

There was sufficient certainty as to acreage to maintain action for damages, where evidence disclosed that acreage for preceding year was certain number of acres of which plaintiff harvested a little more than one-half; that acreage for year for which contract was made was increased to certain amount; and that both contractors agreed to use same outfits; and jury could take into consideration all circumstances surrounding performance of work in preceding year in determining damages.

Appeal from Superior Court, Glenn County; R. M. Rankin, Judge.

Action by N. H. Long against the Sacramento Valley Sugar Company. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

George R. Freeman, of Willows, and Farrand & Slosson, of Los Angeles, for appellant.

W. T. Belieu, of Willows, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment in this action based upon a complaint alleging breach of contract on the part of the defendant, in which contract it was agreed that the plaintiff should harvest for the defendant approximately 1,500 acres of barley for and during the cropping season of 1930, at an agreed price of $3 per acre; the plaintiff to furnish all men and equipment for operating the harvester and thresher, the defendant to furnish sacks and twine.

The complaint sets forth that the crop for 1930 matured and was threshed; but that the plaintiff was not permitted by the defendant to harvest the crop as had been previously agreed upon. Plaintiff was awarded damages in the sum of $2,000. From this judgment the defendant appeals.

The record shows that the defendant is a corporation, and engaged in farming on a large scale in Glenn county, and had been so engaged for over twenty years prior to the year 1930. As a part of its farming operations the defendant had usually prepared, planted, and harvested approximately 3,000 acres of grain annually. The plaintiff was the owner of farming machinery and equipment prepared for plowing, harrowing, seeding, harvesting, and threshing grain, and had previously to the year 1930, performed services for the defendant in plowing, harvesting, seeding, and threshing grain.

The record shows that during the year 1929 the defendant had planted and harvested between 2,300 and 2,400 acres of grain, of which acreage the plaintiff harvested and threshed 1,219 acres, and Henry Gianella 1,171 acres. Approximately the same acreage was harvested by the plaintiff in 1928.

The record further shows that the plaintiff

in 1928 and 1929 plowed, harrowed, and put in the grain raised by the defendant.

Upon this appeal it is contended that no contract was entered into; that there was lack of consideration; and also that the contract was indefinite and uncertain.

According to the rules of construction as found in the Civil Code, sections 1641 to 1649, inclusive, the following excerpts of the testimony taken from the transcript we think sufficiently answer every contention of the appellant, and sufficiently support the verdict of the jury. A. M. Gelston, a witness called and examined on behalf of the plaintiff, testified as follows:

"Q. Are you acquainted with the defendant in this action, the Sacramento Valley Sugar Company? A. I am.

"Q. How long have you been acquainted with them? A. Twenty-five years.

"Q. Have you ever had any business identity with the Sacramento Valley Sugar Company? A. Yes.

"Q. How? A. I was in their employ for the same period. No, for twenty-four years, a little over twenty-four years I was in their employ.

"Q. In what capacity? A. For the first eight years I occupied the position known as cashier for the Company, then the first of January, 1914, up until I severed my relations I occupied the position of manager.

"Q. In what business during the last two years has the Company been engaged? A. In farming. * * *

"Q. During the last three years to what extent in acreage—if you want to state it—have they farmed in that vicinity? A. In 1929 I think we had in the neighborhood of twenty-three or twenty-four hundred acres. In 1930 they seeded a little over three thousand, that is, they had that growing. Part of it was volunteer they harvested it, they harvested the volunteer growth.

"Q. Who carried on for the Sugar Company the farming operations? A. A farming superintendent under my control.

"Q. How was the work of farming or your farming operations carried on, by yourself using your own equipment and outfit or in recent years were they hired? A. In recent years we hired it done, in the more recent years. * *

"Q. That crop of barley which was planted in the year 1930, did it mature? A. It did.

"Q. Was it harvested? A. It was.

"Q. By whom? A. The person working in the field was Henry Gianella.

"Q. Are you acquainted with N. H. Long, plaintiff in this action? A. I am.

"Q. How long have you known him? A. For a number of years; I don't know when I first became acquainted with him.

"Q. Did you have any contract relations with him or any business relations with him, with respect to the threshing of the barley acreage in the year 1930? Just answer that yes or no. A. Yes. * * *

"Q. What was the agreement which you had with Mr. Long with regard to threshing the barley, if any? A. That he and Mr. Gianella already referred to would together do the three thousand or more acres of threshing that we had to do. Each one to do all that his outfit, his harvester was capable of doing, and to take such field as developments might show were best adapted to the character of the different machines.

"Q. Was there any agreement or understanding with regard to the compensation they were to get for doing this work? A. Three dollars an acre.

"Q. Payable when? A. Whenever they happened to want it except the final settlement which was to be made as soon as the work was completed.

"Q. Did Mr. Long do this threshing? A. In 1930? * * * A. Not to my knowledge.

"Q. You testified Mr. Henry Gianella did the threshing? A. He was on the work, I think he did it all. I am not positive.

"Q. Did you have occasion during the growing and maturing season of this crop, did you have occasion to notice the kind of crop you had as to whether it was a full crop or part of a crop or a poor crop? A. It was so considered, it was considered an exceptionally good crop. * * *

"Q. Had you occasion to observe the condition that outfit was in in 1930, at the time you say the agreement was made? A. No, my understanding was it was a new rig.

"Q. That had done any threshing or had he done any threshing for you in the preceding year, preceding that year? A. Yes.

"Q. What year? A. 1929.

"Q. Did he do all the threshing that year or did he do but a part of it? A. He did the most of it according to my recollection. I believe Mr. Gianella did some of it also; I am speaking from memory, however. * * *

"Q. Did you have to do with the preparation with this barley land for seeding? A. Did I have to do with it?

"Q. Yes. A. I had control of it.

"Q. You had it prepared for seeding? A. Yes.

"Q. Who did the preparatory work on the land? A. Mr. Long.

"Q. Employed by whom? A. Employed by me as representative of the Sacramento Valley Sugar Company. * * *

"Cross-Examination: By Mr. Freeman:

"Q. In 1929, Long also did some work for you, didn't he, in harvesting? A. Yes.

"Q. And Gianella did? A. Yes.

"Q. Those are the only two that did the harvesting work in 1929? A. In 1929, yes.

"Q. Were there any written contracts with them for the work in 1929, for the harvesting work? A. No, not that I remember. * * *

"Q. In the winter of 1930, do you recollect you had some talk with both Gianella and Long about the harvesting for the then coming season, is that correct? A. Yes.

"Q. Where was that conversation had? A. In my office, the office of the Sugar Company.

"Q. Just the three of you present? A. That time there were just the three of us, at the time I finally talked with them. I had previous talks with each one of them privately.

"Q. When did you have this conversation in your office in February, 1930? A. That, as I recall it, was in the last part of January or first of February. I have no proof of it except my memory.

"Q. You say you had previous talks with each one of them separately? A. Yes, sir.

"Q. Do you recall when you talked with Mr. Long? A. I have no means of locating it as to time. I talked to him several times.

"Q. What was the gist of the talks? A. That I expected him and Henry to do the work as they had done it the last year.

"Q. You had more than one talk of that kind, did you? A. Yes.

"Q. And the substance of each and every conversation was practically the same? A. Yes. * * * As near as I can recall it he wanted to know how much each one would do or what fields they would do and the crop had not progressed at that time to a point at which I felt I could say which field was the best adapted to which machine. Gianella had a slightly larger machine than Mr. Long had, and I told them at that time that while it was understood that they would do the work, I would have to defer until a later date before I could decide just which field would be done by which rig.

"Q. Was there any discussion at that time whether or not, when you did come to the conclusion as to which field each one would harvest, whether the contract would be reduced to writing? A. No, that was not considered.

"Q. You didn't contemplate reducing it to writing at all? A. No. * * *

"Q. My information was that three dollars an acre was paid in 1929. In your discussion with these two men you assumed the same price would be paid. A. Yes.

"Q. Was it stated? A. Yes it was.

"Q. Was it stated at this discussion of January or February, 1930? A. Yes. * * *

"Q. When, if you recall at all, did you tell Mr. McGrath or anybody else about the arrangement for harvesting? A. I did tell him but I don't know when. I have no means of saying when.

"Q. Whether you discussed the matter of this contract or not can you say whether or not after the meeting in February or January you ever saw Nate Long again to talk to him? A. I have seen him every day or two pretty near—to pass him on the street or pass the time of day with him. I don't know how many times I talked to him. * * *

"Q. You say, prior to June first you told Mr. McGrath you had promised the cutting to Mr. Long and Mr. Gianella? A. I did."

A. M. Gelston recalled for further cross-examination by Mr. Freeman:

"Q. Mr. Gelston, do you recall an occasion when Mr. McGrath came up to Hamilton and talked to you about the threshing for 1930? A. I presume that he did. I don't recall the particular instance.

"Q. You don't recall any conversation with Mr. McGrath in which was discussed the question of who was to thresh the grain during the year 1930? A. No further than that I told Mr. McGrath that I had let the contract, and further said, 'Perhaps you had better not do anything more about it until we discuss the matter further.'"

The plaintiff, called as a witness in his own behalf, testified as follows: That during the years 1928, 1929, and 1930 he was contracting for farm work for the defendant, putting in grain and harvesting it; that he harvested grain for the defendant for the years 1928 and 1929; that he had a "Rumley" harvester, a new outfit; that he had an understanding or agreement with Mr. Gelston, the manager of the defendant, in respect to harvesting the grain for the cropping season of 1930; that in the conversation concerning the harvesting, Gelston stated that he expected the plaintiff and Gianella to do the harvesting for 1930 the same as they did last year; that he had a crew of men, and was prepared to do the harvesting for the defendant; that counting upon the agreement to harvest the crop for the defendant he did not contract for harvesting grain for other parties; that the crop of 1930 was a good crop. This witness also testified as to the approximate cost of cutting the crop; that in June, 1930, he received notice from J. D. McGrath that Gianella was to harvest all the crop. As to the equipment and price this witness testified as follows:

"Q. You never had any discussion at any time with Mr. Gelston about the equipment you were to use? A. I did in 1929.

"Q. I am talking about 1930? A. Absolutely, Mr. Gelston knew it. He knew I would use the same equipment. * * *

"Q. Was anything said as to whether you would be paid by the day or by the acre? A. We were to do it the same as we did it the year before.

"Q. How do you know? A. Because Mr. Gelston told me.

"Q. When? A. I just got through telling you. When we got the bid on the plowing.

"Q. You also got through telling me you

never discussed the price. A. Of course I discussed it sometimes.

"Q. Did you discuss it in 1929? A. For 1930?

"Q. Your understanding then was what? A. Three dollars an acre. * * *

"Q. You didn't discuss price for 1929, you discussed it for 1928, isn't that correct? A. We discussed the price for 1929.

"Q. You set a price for 1929? A. Yes, that's what it was.

"Q. When did you set it? A. I don't remember just when it was, sometime before harvest time. * * *

"Q. In 1928? A. 1928, when I had the Holt machine, but in 1929 when I had the Rumley, I got $3.00 an acre straight through. * * *

"Q. You got $3.00 an acre because your machine did the work you thought it would? A. Yes.

"Q. You didn't make any change in the agreement as to price. That never was discussed again? A. He said the same price. We were to do it at the same price. * * *"

Henry Gianella, a witness called on behalf of the plaintiff, testified as follows:

"Q. Did you ever have any other conversation with Mr. Gelston at a later time with regard to you and Mr. Long's cutting this grain? A. Yes.

"Q. When was that? A. It was along in the spring, early in the spring of 1930.

"Q. What was said on that occasion? A. Mr. Gelston said that we would have the harvesting contract.

"Q. Mr. Gelston said you and Mr. Long would have the threshing? A. Yes. * * *

"What was the price for cutting for the acreage you cut in the year 1930, the acre price? A. You mean the price I received for the cutting? Two dollars and six bits. * *

"Mr. Belieu: Was anything said in your presence, either by yourself or Mr. Gelston, prior to the first of June, 1930, with regard to the price per acre for the threshing? A. I was wrong on the price for 1930. I figured $3.00. It was $3.00. Other things in it made it two seventy-five.

"Q. Were you figuring the old thresher they sold you? A. Yes, that is what I was figuring when I figured that $2.75. * * *

"Q. He made your getting the entire contract depend upon your taking the old thresher, didn't he? A. Yes.

"Q. So in reality the harvesting price per acre was $3.00 wasn't it? A. It was, yes."

The record further shows that after the contract was entered into between A. M. Gelston and the plaintiff and Gianella, relative to harvesting the grain, a change in management was made by the defendant, Gelston being superseded by J. D. McGrath; that McGrath entered into negotiations with Gianella, by the terms of which Gianella was to do all the harvesting, and accept as a part of his compensation an old harvester outfit belonging to the defendant valued at the sum of $1,000.

[1, 2] The evidence satisfactorily discloses that the price per acre for which the work was to be performed was understood by all of the contracting parties. The appellant's contention to the contrary overlooks the testimony of the witness Gelston, where the price was specifically mentioned, and of the other witnesses to the effect that the work was to be performed for the same consideration as was paid in 1929; the language of the witness being that "we were to do the work at the same price." The contention that there was no consideration is fully answered by section 1605 of the Civil Code, specifying in effect that a promise for a promise, where benefits are to be conferred, constitutes a good consideration. Here, the plaintiff, with a practically new, and admittedly efficient threshing outfit, promised to use the same in harvesting and threshing the grain growing upon the lands and premises belonging to the defendant. It cannot be gainsaid that the harvesting and threshing of the grain would accrue as a benefit to the defendant. On the other hand, the defendant promised and agreed to pay the plaintiff the sum of $3 per acre. The testimony shows that this would be beneficial to the plaintiff in that he would receive compensation for his services in a considerable sum over and above the wear and tear attendant upon his harvesting and threshing outfit, in performing the services and the expense of maintaining an efficient crew in harvesting and threshing the grain for the defendant.

[3] In 6 California Jurisprudence, p. 187, § 127, the rule of law relative to a promise as consideration for a promise, supported by numerous authorities, reads as follows: "A promise by one party may be a sufficient consideration for the promise of another, and where there are mutual or reciprocal promises in a written agreement, each constitutes a consideration for the other, particularly where it is expressly so declared." While the contract in this instance is oral, nevertheless there are mutual and reciprocal promises each to the other, and it does not matter whether the appellant could or could not maintain an action for specific performance as against the plaintiff on account of it being an agreement for personal services. The contract is not thereby rendered invalid, for, as said in the case of Noble v. Reid-Avery Co., 89 Cal. App. 75, 264 P. 341, 342: "A greater degree or amount of certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is the basis of an action at law for damages." Citing Durst v. Jolly, 35 Cal. App. 184, 169 P. 449.

[4] We also think that the testimony set forth herein sufficiently shows that each party accepted the terms of the contract and understood all the terms and conditions thereof to be performed by the respective parties. That one who has agreed to perform services for which another has agreed to pay him a certain compensation, may bring an action for damages, is established by the following cases: Cederberg v. Robison, 100 Cal. 93, 34 P. 625; Shoemaker v. Acker, 116 Cal. 239, 49 P. 62; Rosenberger v. Pacific Coast Ry. Co., 111 Cal. 313, 43 P. 963. Other cases might be cited but these sufficiently support what we have stated.

We do not need to follow or review the cases cited by the appellant, for the reason that an examination thereof discloses that in every instance the contract was optional on the part of one of the parties thereto. One case is sufficient as an example of all. Thus, in Foley v. Euless et al. (Cal. Sup.) 6 P.(2d) 956, 958, the record shows that the plaintiff agreed to handle all the raisins, for a certain year, that the defendants might deliver. The facts set forth in the opinion as reported show that the defendants did not agree to deliver any specified quantity of raisins. Where the contract on the part of one is optional, it follows as a matter of course that the principles set forth in the cases cited by the appellant are controlling, and no judgment for damages can be maintained. Such, however, is not the case here.

[5] The certainty as to the acreage, to all intents and purposes sufficient to maintain an action for damages, is supplied by the exhibits introduced by the defendant. The acreage, as we have stated, for 1929 was approximately 2,400, of which the appellant harvested a trifle more than one-half. The acreage for 1930 was increased to 3,000. The contract was awarded to the same parties who harvested and threshed the grain for 1929, both using the outfits which were used that year.

These facts furnished a basis for the jury in determining damages. The fact that the plaintiff and Gianella were to do the work the same as they had performed it for the year 1929 justified the jury in taking into consideration all the circumstances surrounding the performance of the work in 1929, just as stated in the case of Dunham, Carrigan & Hayden Co. v. Thermoid Rubber Co., 84 Cal. App. 669, 258 P. 663, where it is said (quoting from the syllabus): "The making of an agreement may be inferred by proof of conduct as well as by proof of the use of words; and in this action by a tire jobber against the manufacturer for breach of a contract to take back tires on hand at the termination of the contract, the evidence justified the finding of the trial court that the parties had agreed that the life of the agreement, which originally was made for one year, should be for the succeeding year as well." See, also, authorities cited in the foregoing case on page 673 of 84 Cal. App., 258 P. 663, 665.

No useful service would be rendered by incorporating in this opinion a discussion of the law relative to implied and express contracts. We may say, however, that the testimony set forth herein furnished a sufficient basis for holding that an express contract was created and existed in this case. All the promises in this case were made at the same time. One party agreed to do the work; the other party agreed to pay a definite price; both parties knew approximately the number of acres of grain that would be harvested and threshed by the plaintiff. The plaintiff was prepared to do the work. The defendant subsequently breached the contract. The evidence shows that the breach of the contract occurred so late in the season that the plaintiff could not procure other acreage of grain to harvest and thresh. These facts make out a case sufficient to support the verdict. No contention is made that the verdict is excessive.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

127 Cal.App. 610

McINTOSH BROS. et al. v. FUNGE.

Civ. 8360.

District Court of Appeal, First District, Division 1, California.

Nov. 22, 1932.

Appeal and error ⇐612(2).

Transcript certified by judge who did not participate in hearing or determination of proceedings could not be allowed to serve as record on appeal (Code Civ. Proc. § 953a).

Transcript filed was signed by and bore certificate of judge who did not participate in hearing or determination of proceeding under which appeals arose, and he certified merely that transcript contained full, true, and fair transcript of the papers filed in office of clerk on or after certain date, including judgment in action and minute orders of court which related to the appeal.

Appeals from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by McIntosh Brothers, etc., against W. W. Funge, Jr., in which Katherine C. Funge, as executrix of the estate of W. W. Funge, Jr., deceased, was substituted as de-

fendant. From orders granting motions to substitute parties and to tax costs, defendant appeals.

Appeal dismissed, and orders affirmed.

Leo A. Cunningham and W. W. Funge, Jr., both of San Francisco, for appellant.

Hartley F. Peart and Sylvester J. McAtee, both of San Francisco, for respondents.

KNIGHT, J.

Following the filing of the remittitur after affirmance of judgment on the merits in the above-entitled cause (McIntosh v. Funge, 210 Cal. 592, 292 P. 960, 74 A. L. R. 420), two motions were presented in the trial court, one on behalf of certain plaintiffs for substitution of parties, which was granted, the other on behalf of the defendant W. W. Funge, Jr., now deceased, to tax costs on appeal, which resulted in an order being made taxing costs against said defendant in the sum of $100; and he appealed from the order made in each proceeding. Plaintiffs now move to dismiss the appeals and to affirm the orders upon the ground that the purported transcript upon which appellant seeks to have the appeals heard and determined was not prepared, settled, certified, or filed in the manner prescribed by law and the rules of court.

The trial court proceedings took place in the superior court in and for the city and county of San Francisco. The notices of appeal were filed on January 8, 1931, shortly after the orders appealed from were made; and defendant proceeded to take both appeals by way of bills of exception, which eventually were prepared, settled, and certified in accordance with the provisions of section 650 of the Code of Civil Procedure. The bill upon which the appeal was taken from the order of substitution of parties was settled, certified, and filed on January 28, 1931, by Hon. E. P. Mogan, who heard and determined the motion therefor; and the bill upon which the appeal from the order taxing costs was taken was settled, certified, and filed on October 27, 1931, by Hon. James G. Conlan, who heard and determined that proceeding. In the meantime and on July 1, 1931, which, as will be noted, was approximately six months after the notices of appeal were filed, appellant filed with the clerk of the trial court a request to prepare transcripts on appeal pursuant to the alternative method provided by section 953a of the Code of Civil Procedure, in which request appellant specified the documents and papers the transcript should contain, "including defendant's proposed bill of exceptions and plaintiffs' proposed amendments thereto and all orders of the court thereon"; and on November 4, 1931, he applied for an extension of time to prepare and file such transcript, which extension was denied. Notwithstanding such denial, appellant on December 15, 1931, filed with the clerk of the trial court a purported (typewritten) transcript, but which did not contain a copy of either of the bills of exception theretofore certified and filed as aforesaid. The clerk of the court noticed said transcript for settlement before the court on December 15, 1931, and the matter came on for hearing on December 22, 1931, before Judge Conlan, at which time he refused to approve, sign, or certify the purported transcript upon the following grounds: "1st. That the said Superior Court has now no jurisdiction in said matter after the certification of the said engrossed bill of exceptions, as aforesaid; 2nd. That the said W. W. Funge, Jr., defendant herein, has perfected his appeal by proceeding under section 650 of the Code of Civil Procedure, and having failed to file a request for a transcript under section 953a, C. C. P., is now foreclosed from perfecting an appeal under said section 953a, C. C. P.; 3rd. That the said defendant has not filed herein a request for transcript under section 953a, C. C. P., within the time allowed by law and is not entitled to a transcript on appeal under section 953a, C. C. P.; 4th. That the appellate tribunal is the proper tribunal in which to apply for time to prepare and file the Clerk's transcript on appeal which accompanies the engrossed bill of exceptions as certified by the trial Court." Defendant then asked permission to withdraw the transcript, but the court denied such permission and directed that the same remain on file with the clerk. Subsequently, however, and without notice to respondents' attorneys, appellant presented the purported transcript for certification to Hon. Lile T. Jacks, the presiding judge of said superior court, who had neither participated in the trial of the action nor in the determination of either proceeding out of which the appeals arose; and on December 24, 1931, without notice to respondents' attorneys, he signed and attached to the purported transcript a certificate in limited terms reading as follows: "* * * I have examined the foregoing Clerk's Transcript and find the same to be a full true and fair transcript of the papers filed in the office of the Clerk on and after the 28th day of November, 1930; and also of the judgment as recorded on the 31st day of July, 1928 in Volume 281 at page 212 in the Book of Judgments in the Clerk's office in the City and County of San Francisco, State of California; and of the minute orders of the court; that said papers relate to the appeal of the defendant herein to the District Court of Appeal of the State of California, First Appellate Division, dated January 8, 1931." On December 28, 1931, said purported transcript was filed with the clerk of this court, and it is the only transcript filed in furtherance of either appeal.

From the foregoing it will be seen that after proceeding to take the appeals by way of bills of exception and after having one of said bills settled, certified, and filed, appellant proceeded to take the appeals anew pursuant

to the alternative method set up by section 953a of the Code of Civil Procedure. Even assuming for the moment, as appellant contends, that this may be done, it is evident that the purported transcript filed herein as a result of such subsequent proceedings was neither prepared, settled, approved, nor authenticated in the manner prescribed by said code section for the following reasons: Said section declares that the request for the transcript must be filed with the clerk within ten days after notice of the entry of the order from which the appeal is taken; and here said request was not filed for more than five months after the notices of appeal were filed. True, the failure to file such request within the time prescribed is not jurisdictional to the appeal (Lynch v. Coe, 203 Cal. 422, 264 P. 747), and no formal application for relief from default in failing to file such request in time is necessary, the act of certification of the record by the trial judge being in effect the equivalent of granting relief from such default under section 473 of the Code of Civil Procedure. Keys v. Mother Lode Extension Mines, 212 Cal. 612, 299 P. 524. But the admitted fact here is that when the purported transcript was presented to the judge presiding in one of the proceedings he expressly refused to settle or certify the same, assigning as one ground therefor the failure to file said request in time; and said transcript was never at any time or for any purpose presented to the judge presiding in the other proceeding for such settlement and certification. Furthermore, said Code section declares that when the transcript is completed it shall be presented to the judge for his approval and the judge shall examine the same and see that the same is a "full, true and fair transcript of the proceedings had at the trial, the testimony offered or taken, evidence offered or received," etc., and that thereupon the judge shall certify to the truth and correctness of said transcript and the same shall "when so settled and allowed" become a portion of the judgment roll and may be considered in lieu of the bill of exceptions. As will be remembered, two separate appeals were taken, from orders made by different judges; and admittedly the transcript filed herein was not settled, allowed, or certified by either of those judges. As stated, one of them refused to certify the same and so far as the record before us shows the transcript was never presented to the other for settlement and certification. Instead, the purported transcript was signed by and bears the certificate of a third judge who did not participate in the hearing or determination of either proceeding out of which the appeals arose, and who was not in a position to know upon what testimony or other evidence the judges who made the orders based the same because, as appellant admits in his brief, there was no court reporter present at the hearing of either of those proceedings. In fact, the judge who signed the transcript did not certify as contemplated by said section 953a that the transcript contained a full, true, and fair transcript of the proceedings had at the trial, the testimony offered and taken, and the evidence offered and received; merely that the transcript contained a full, true, and fair transcript of the papers filed in the office of the clerk on or after a certain date, including the judgment in the action and the minute orders of the court which "relate to the appeal."

Therefore, since it affirmatively appears that said transcript was not settled, approved, or certified in the manner prescribed by the statute and does not purport to contain a full, true, and fair transcript of the proceedings had at the hearing of said motions, nor of the testimony taken or evidence adduced thereat, the same cannot be allowed to serve as the record on the appeals.

Accordingly, the appeals are dismissed, and the orders are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

127 Cal.App. 661

CRAGHILL v. FORD.

Civ. 592.

District Court of Appeal, Fourth District, California.

Nov. 23, 1932.

1. Dismissal and nonsuit ⇐60(1).

Court of record has inherent discretionary power to dismiss action for want of prosecution, except as limited by statute (Code Civ. Proc. § 583).

2. Dismissal and nonsuit ⇐60(1).

Court's power to dismiss action for want of prosecution is, under statute, suspended for two years after answer is filed, and five years thereafter dismissal becomes mandatory (Code Civ. Proc. § 583).

3. Dismissal and nonsuit ⇐60(2).

Where court granted plaintiff sixty days to correct bill of particulars, court did not abuse discretion in dismissing action thirteen months thereafter for want of prosecution (Code Civ. Proc. § 583).

Facts disclosed that continuance was granted at plaintiff's request for the express purpose of permitting him to correct and amplify his bill of particulars, that, although he would not need more than thirty days, he was granted an additional thirty days, and that upon the

hearing of the motion he failed to offer evidence to justify his delay, and did not move to reset the case for trial.

4. Dismissal and nonsuit ⇐60(2).

Upon hearing of motion to dismiss action for lack of prosecution after plaintiff had been granted continuance, motion by plaintiff to reset case for trial was not "bringing action to trial" (Code Civ. Proc. § 583).

Such motion by plaintiff was not "bringing action to trial" within Code Civ. Proc. § 583, providing that court may in its discretion dismiss action for want of prosecution when plaintiff has failed for specified period to bring such action to trial, but would have been merely a proceeding to bring about a resumption of the trial which had previously been commenced.

[Ed. Note.—For other definitions of "Bring," see Words and Phrases.]

5. Dismissal and nonsuit ⇐60(1).

Where trial is continued at party's request for specific purpose, court's power to dismiss action for want of prosecution is not suspended for two years after answer filed (Code Civ. Proc. § 583).

6. Dismissal and nonsuit ⇐60(1).

Plaintiff granted continuance had burden of using diligence to expedite trial to final termination within reasonable time to prevent dismissal for want of prosecution (Code Civ. Proc. § 583).

7. Appeal and error ⇐966(1).
Dismissal and nonsuit ⇐60(1).

What would constitute reasonable time within which party granted continuance should expedite trial *held* within trial court's discretion, conclusive, unless abused.

8. Dismissal and nonsuit ⇐60(1).

In action on notes and open account, dismissing counts upon notes as well as upon open account for failure of plaintiff to prosecute action *held* proper, where one issue to be tried was payment of notes sued on.

9. Witnesses ⇐275(7).

In action on notes and open account, where plaintiff on cross-examination made reference to entry of amounts of notes on plaintiff's books of account, defendant had right to interrogate plaintiff upon that subject.

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

Action by E. W. Craghill against H. H. Ford, in which defendant cross-complained. From the judgment dismissing the action, plaintiff appeals.

Affirmed.

William Guthrie, of San Bernardino, and Walter E. Bennett, of Los Angeles, for appellant.

Fred A. Wilson, of San Bernardino, for respondent.

AMES, Justice pro tem.

This is an appeal from an order dismissing the action for failure on the part of the plaintiff to prosecute the same with reasonable diligence. The complaint was filed on the 18th day of October, 1929, and contains four separate causes of action, the first three of which are based upon three several promissory notes aggregating the sum of $14,000 and contains the usual allegations of execution, delivery, and nonpayment. The fourth cause of action was brought for the purpose of recovering the sum of $4,513.52 as a balance due upon a mutual, open, and current book account. In his answer, defendant denied generally the nonpayment of the several notes, denied the indebtedness upon the mutual, open, and current book account, and filed a cross-complaint in which he alleged that the complainant and cross-defendant was indebted to him in the sum of $3,934.34 for money had and received for the benefit of the cross-complainant. Prior to the trial, the defendant demanded of the plaintiff a bill of particulars of the account on which the fourth cause of action in the complaint was based. Pursuant to such demand, the plaintiff prepared and delivered to defendant such bill of particulars. In due time, the action was set for trial on the 24th day of April, 1930, and the trial was commenced on that date.

At the trial, plaintiff took the witness stand in his own behalf, and his direct examination was confined to proof of the first three causes of action in the complaint. Upon cross-examination and over the objection of the plaintiff, counsel for defendant interrogated him with reference to the items contained in the bill of particulars and the accounts upon which it was based. It appears from the evidence elicited from plaintiff upon cross-examination that he was a broker engaged in dealing in stocks, bonds, securities, and grain, and that he had had various transactions with the defendant and had on several occasions purchased grain for him and kept a book account of his transactions. He further testified that, at the time of the execution and delivery of the promissory notes involved in this action, defendant was indebted to the plaintiff in an amount considerably in excess of the aggregate amount of the three promissory notes upon which the action was predicated; and that the amount of the notes were entered and credited upon his book of accounts. During the course of the cross-examination, it developed that the bill of particulars was inaccurate and incomplete.

This discovery was apparently made by counsel for the plaintiff, and, upon that discovery having been made, he said, "I checked it (referring to the bill of particulars) over during the noon hour and I find some errors in this account, just what the errors are, I don't know." He then made the following statement: "Now, I suggest that, since we are going to get into this account—I didn't think we would get into it from this angle, it is perfectly apparent that at some stage of the proceeding this account has got to come out, and we might as well set down and make a transcript of it, and present it in transcript form properly supported with documents and books, which we can do in a very short time, if submitted by a transcript, and which would take a long time to submit it item by item." At that point the following colloquy occurred between the court and counsel for the plaintiff:

"Mr. Call: It is apparent the account here is not specific, we would like to have it,—if a continuance would give us some information arriving at a true understanding of just what was—what the profit and loss was on these various transactions, I would be highly in favor of such a continuance.

"The Court: I understand it would be your purpose, then, to render such a statement, such information?

"Mr. Guthrie (counsel for plaintiff): Yes, sir.

"The Court: At this stage of the case, I believe it is within the power of the court to order a further and more detailed account; is such an order necessary in this case?

"Mr. Call: We will stipulate it may be entered, if necessary.

"Mr. Guthrie: We will furnish it.

"The Court: In order that the purpose of the continuance, to keep our record straight here—

"Mr. Call: Yes, your honor.

"The Court:—in the absence of the stipulation, the Court will deem it necessary to make such an order; otherwise, you might take a continuance and come back into court with nothing done.

"Mr. Call: So that we may not misunderstand the rule to be followed we will stipulate that a continuance be granted, and the plaintiff be given whatever time is necessary, 30 days, to prepare and serve and file a more detailed copy of the account sued on.

"Mr. Guthrie: That is good.

"The Court: Very well, it will be so ordered.

"Mr. Call: Any further time than that?

"The Court: Thirty days is sufficient time?

"Mr. Guthrie: Yes, I think we can make it in less than that time, ten or fifteen days.

"The Court: Of course, you don't have to take thirty days.

"Mr. Call: I assume, when this is filed, we will have a further hearing.

"The Court: Very well, then, the matter will be continued upon those conditions."

It will be observed that defendant did not join in the stipulation proffered by plaintiff, and the court's order directing the preparation and service of a more detailed bill of particulars and continuance of the case were made without his express consent, but without any objection from him. It will also be noted that the trial was not continued to a day certain.

It is conceded that no amplified bill of particulars nor any further bill of particulars was delivered to defendant, and, with the exception of an order continuing the time for filing the bill of particulars hereafter noted, no further proceedings were had in the action until the 29th day of May, 1931, on which date defendant filed in the office of the clerk of the superior court, a notice of motion which had been duly served on plaintiff that he would on the 1st day of June, 1931, move the court "for an order granting judgment to the defendant on said cause," upon several grounds, one of which was that plaintiff had not, with reasonable or any diligence, prosecuted said action or the trial thereof. The notice notified the plaintiff that the motion would be made and based upon all the pleadings, records, and files in said cause, the minutes of the court, and the testimony introduced at the trial. Upon the hearing of the motion, no affidavits or other evidence were presented or filed by plaintiff explaining why he had remained inactive in the prosecution of the action for a period of more than thirteen months. Thereafter, on the 16th day of June, 1931, the court made and entered its judgment to the effect that the motion to dismiss be granted, that plaintiff have and recover nothing from the defendant, and that defendant have and recover his costs. It appears, from a recital in the judgment, that the court on the 23d day of May, 1930, made and entered the following order: "Good cause appearing therefor, it is ordered that plaintiff have thirty days from date hereof within which to file an amended bill of particulars. Dated this 23rd day of May, 1930." From the judgment of dismissal, plaintiff appeals.

It is the contention of appellant that the superior court was without jurisdiction to grant the order to dismiss the action and to enter the judgment of dismissal thereon until the period of two years had elapsed. Section 583 of the Code of Civil Procedure, upon which he relies, in so far as the same is applicable to the question here involved, is as follows: "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice

to the plaintiff, whenever plaintiff has failed two years after action is filed to bring such action to trial. Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended."

[1, 2] It has been held in many decisions in this state that a court of record possesses an inherent discretionary power to dismiss an action for want of prosecution. That power is limited only by the provisions of section 583, above quoted. When the action is not brought to trial, that power is suspended for the period of two years after answer filed, and is terminated at the expiration of five years from that time, when the operation of the statute becomes mandatory and the court has no discretion but to dismiss the action. In the case of Romero v. Snyder, 167 Cal. 216, 138 P. 1002, 1004, this rule is announced as follows: "The court, as we have seen, has general discretionary power, without the aid of legislation to dismiss an action for want of prosecution. This power remains in full force, affected only by the implied legislative determination of section 583 that two years' delay is not unreasonable in cases where an answer has been filed." In Oberkotter v. Spreckels, 64 Cal. App. 470, 221 P. 698, 699, the court said: "There is nothing in the record before us to show that the trial court abused its discretion. If, therefore, the Legislature intended that section 583 should be applicable where, as here, the action was brought to trial within two years after answer filed, but the jury disagreed and nothing more was done during the ensuing two years, then the dismissal was proper because authorized by the statute. If, on the other hand, this Code section was not intended to cover a situation such as that here presented, then we have a case where no statutory authority for the dismissal exists. But if the case is not embraced by the terms of the statute, then the court could resort to its inherent power to pass on the motion and to grant it or deny it. See Kaster v. Superior Court, 34 Cal. App. 88, 166 P. 852. 'It is settled by numerous decisions in this state that the superior court, without the aid of statutory authority, has power to dismiss an action because of the failure of the plaintiff to prosecute it with reasonable diligence.' Romero v. Snyder, 167 Cal. 216, 138 P. 1002."

[3-7] That a court of record possesses such inherent power was recognized in the following cases: Kaster v. Superior Court, 34 Cal. App. at page 88, 166 P. 852; Romero v. Snyder, 167 Cal. 216, 138 P. 1002; Overaa v. Keeney, 169 Cal. 628, 147 P. 466; Raggio v. Southern Pacific Company, 181 Cal. 472, 185 P. 171. Such inherent discretionary power exists independently of statute, and remains unimpaired except where limited by the terms of the statute. That limitation exists by virtue of section 583 of the Code of Civil Procedure "whenever plaintiff has failed two years after action is filed to bring such action to trial." But the situation here is not one in which the plaintiff failed to bring the action to trial. The action was brought to trial on the 24th day of April, 1930, when the trial proceeded and a witness was sworn and examined, as above related. The continuance was granted at the request of plaintiff for a limited and express purpose, namely, to permit him to correct and amplify his bill of particulars. In the colloquy between the court and counsel it clearly appeared that he would not require in excess of thirty days within which to perfect his bill of particulars, but the court, in the exercise of its discretion, granted to him an additional thirty days within which to comply with the condition upon which the continuance had been granted. From his failure upon the hearing of the motion to offer evidence, by affidavit or otherwise, to justify his delay, the court was warranted in assuming that no justification existed. Plaintiff did not comply with the condition upon which he sought and was granted a continuance, nor did he move to reset the case for trial. The latter step would not be a bringing of the action to trial within the meaning of section 583, under the circumstances disclosed by the record here, but merely a proceeding to bring about a resumption of the trial which had been previously commenced. After a trial has been commenced and is continued at the request of the plaintiff for the specific and limited purpose here disclosed, the inherent power of the trial court to dismiss the action is not suspended for the period of two years after answer filed, but remains unimpaired by the provisions of section 583. It has been held that it is the duty of the plaintiff at every stage of the proceeding to use due diligence to expedite his case to a final termination, and it was he upon whom the burden rested to prosecute it with diligence. Raggio v. Southern Pacific Company, supra; Overaa v. Keeney, supra; Kaster v. Superior Court, supra; Pallett v. Guenther, 59 Cal. App. 434, 210 P. 969. It devolved upon the plaintiff to expedite the trial of the action within a reasonable time. As to what would constitute a reasonable time is committed to the sound discretion of the trial court, and its exercise will not be disturbed unless its abuse is shown. The dismissal of the action after the plaintiff's inaction for thirteen months is not an abuse of such discretion.

[8, 9] The appellant next suggests that it might have been proper for the court to have

dismissed the fourth cause of action in plaintiff's complaint for failure to deliver the bill of particulars, but that it was error to dismiss the entire action. With this contention we cannot agree. In the cross-examination of plaintiff, reference was made to entries in his book account as the same were disclosed in his bill of particulars. One issue of fact to be tried by the trial court was payment of the promissory notes sued on. Clearly, in view of the testimony of the plaintiff that an entry of the amount of the notes was made in his books of account, defendant had a right to interrogate him upon that subject. The bill of particulars was before the court and its use was available to the defendant for any legitimate purpose, and the questions propounded were within the proper scope of cross-examination. Furthermore, plaintiff had not abandoned this fourth cause of action upon the trial; but one witness, the plaintiff himself, had been called to the witness stand and was being cross-examined when the continuance was granted. The plaintiff had not rested nor intimated, in so far as the record shows, that he intended to abandon his fourth cause of action, and the court could not assume that he would do so.

The judgment appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

127 Cal.App. 710

OLSEN v. GREAT WESTERN POWER CO. OF CALIFORNIA (two cases).

Civ. 4507, 4508.

District Court of Appeal, Third District, California.

Nov. 28, 1932.

Hearing Denied by Supreme Court Jan. 27, 1933.

1. Eminent domain ⇐318.

Owners awarded compensation for lands taken for highway *held* not entitled to recover damages in trespass for taking of dirt, rock, and gravel from condemned strips.

2. Release ⇐29(1).

Landowner releasing lumber company from damages for trespass in construction of highway embankment by it and power company jointly cannot recover damages from latter.

3. Release ⇐29(1).

Release of one or more joint tort-feasors releases all.

Appeals from Superior Court, Plumas County; J. O. Moncur, Judge.

Actions consolidated for trial by Nelson A. Olsen and George W. Olsen, respectively, against the Great Western Power Company of California. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Roy L. Daily, George Olshausen, and John K. Hagopian, all of San Francisco, for appellants.

Thomas J. Straub, W. H. Spaulding, and J. C. Wood, all of San Francisco, for respondent.

PER CURIAM.

Plaintiffs sued defendant for trespass upon their lands. The suits were consolidated for the purpose of trial. A trial was had before the court without a jury, and judgment was rendered for defendant that plaintiffs take nothing by their actions. From this judgment plaintiffs have appealed. The facts, in substance, are as follows:

Respondent had secured water rights in and about Lake Almanor for hydroelectric power purposes, including the privilege of flooding the lands adjacent to said lake. In the year 1926, respondent had under consideration the construction of a dam at the southern extremity of the lake where it empties into the north branch of the Feather river. This contemplated project would raise the waters of said lake above the 4,500-foot contour line, the result of which would be to submerge the then existing highway between Red Bluff and Susanville. Under these circumstances, the state planned to raise the level of said highway where it would pass through said submerged area.

On May 27, 1926, the California highway commission and respondent entered into an agreement for the erection of the said embankment and the elevation of said highway above the said flooded area.

It appears from the letter written by respondent to the Red River Lumber Company on June 21, 1926, that an understanding existed between them that they were to undertake jointly the construction of said highway embankment; the letter stating that respondent had contracted with one Phillips for the work, and that the said Red River Lumber Company was to pay a designated pro rata of the costs of construction.

On June 24, 1926, the said lumber company indorsed thereon its acceptance and approval of the contents of said letter. A more formal contract was entered into on July 13, 1928, between respondent and the Red River Lumber Company, wherein it was stated that respondent, as the agent of the state of California, and for it and in its behalf, had constructed the highway embankment aforesaid jointly with the Red River Lumber Company. This contract was ap-

proved and accepted in all respects by the department of public works (said commission having been succeeded by said department).

On December 29, 1929, an agreement was entered into between the department of public works and the Red River Lumber Company in which it was recited that on the 27th day of May, 1926, the state highway commission commenced and thereafter completed the said highway embankment, and that, in consideration of the agreement of said company to defray a portion of the cost of said work, did grant unto said company the right to use the southerly 18 feet of said highway for a standard gauge railroad to be used for the private purposes of said company in its lumber business.

The trial court found that the said embankment was completed prior to the 11th of October, 1928.

On October 11, 1928, the state of California commenced an action against the appellants to condemn a right of way and easement over certain lands owned by appellants, being the same lands involved in the instant action. The complaint in that action is in the usual form, and the land sought to be claimed was 2.31 acres owned by appellant Nelson A. Olsen and 10 acres owned by appellant George W. Olsen.

In their amended answer to said complaint, among other things, appellants alleged that, by the construction of the highway in the manner contemplated, they would be damaged by reason of the borrow pits and the taking therefrom dirt, rocks, and gravel in an amount upwards of $100,000. It was stipulated that the items for which damages are sought in the instant action are the same items that are set forth in the amended answer in the condemnation action.

The appellants offered evidence in the condemnation case in support of these damages, but, upon objection by the state, the court refused to permit its introduction.

In the condemnation action the jury returned a verdict for appellants for the value of the lands taken, allowing no damages for the land not taken. These amounts were paid to appellants after the judgment became final.

There were no improvements on this land condemned, and it was stipulated that all of the dirt, rocks, and gravel were taken from the land so condemned.

The present actions were commenced on August 1, 1929, and are actions in trespass for damages against respondent for the alleged wrongful entry on said lands, for the injury to same by the excavation of borrow pits thereon and for the value of the dirt, rocks, and gravel taken from said excavations and used on construction of the said embankment.

Appellants contend that the entries by respondent upon the said lands and excavating said borrow pits and taking dirt, rocks, and gravel therefrom, prior to the said condemnations, were trespasses for which it is liable to appellants for the damages thereby caused. Appellants cite many authorities from other states holding that an entry upon lands of the owner without his consent before condemnation amounts to a trespass, for which an action lies for damages. This contention is supported by decisions of our own state. Gurnsey v. Northern Cal. Power Company, 160 Cal. 699, 117 P. 906, 36 L. R. A. (N. S.) 185; Robinson v. So. Cal. Ry. Co., 129 Cal. 8, 61 P. 947. But in neither of these two cases had there been an award of compensation for the taking of the land.

The rule where compensation has been made for the taking or injury to property is thus stated in Corpus Juris, at page 1069, as follows: "The award and payment of compensation for the taking of the property, or injury to it, will bar an action for damages for trespass upon the land, or injury to it, or unlawful occupation of it, by the appropriating company, in connection with the purposes of the appropriation, but before formal institution of the proceedings, although some authorities have held that the award does not include damages for the wrongful use and occupation of the land prior to the appropriation."

[1] The said Olsens appealed from the judgment in the condemnation case to the Appellate Court, Third District, and, after a decision of that court affirming the judgment (People v. Olsen, 109 Cal. App. 523, 293 P. 645, 649), a petition for a rehearing was denied, and a petition for a hearing in the Supreme Court was also denied. In the course of the opinion rendered in that case the court used the following language: "The gravel and sand which were taken from the borders of the condemned strips of land for use in constructing the highway at that point were necessary and incidental to the reasonable enjoyment of the easement for which the land was condemned. The taking of this sand and gravel created no added burden on the fee retained by the owners, and they are therefore entitled to no special damages on that account. 13 R. C. L. 128, § 112. * * * It must be assumed the appellants were fully compensated for the market value of the land taken.

"Under the circumstances of this case it must be assumed this award of damages included the value of the materials taken from the condemned land and used for highway purposes at that point. * * * No effort

was made to show that the fee was injured or the land damaged by the taking of the sand and gravel. Nor was any effort made to show that these excavations would damage the adjoining land from which the condemned strips were severed. The appellants were fully compensated by the general award of damages."

We are of the opinion that appellants were fully compensated for the dirt, rock, and gravel taken from the condemned strips by the award in the condemnation suit.

[2, 3] It also appears from the record that there is another reason why the judgment against appellant George W. Olsen should be affirmed. The record in this case clearly shows that the construction of the embankment on said appellant's land was the joint act of respondent and the Red River Lumber Company. On September 19, 1929, the said George W. Olsen executed a release to the Red River Lumber Company for all damages arising from the trespass upon said land, referring to the land in controversy. It is the well-settled law that the release of one or more joint tort-feasors operates as a release of all. 22 Cal. Jur. 763; Hawber v. Raley, 92 Cal. App. 701, 268 P. 943.

Respondent has submitted other grounds for the affirmance of said judgment, but, in view of the decision we have reached, we do not consider it necessary to consider them.

The judgment is affirmed.

PEOPLE v. ROMER et al.*

Cr. 2117.

District Court of Appeal, Second District, Division 2, California.

Nov. 22, 1932.

Hearing Granted by Supreme Court Dec. 22, 1932.

1. Criminal law ⇐351(3), 369(1).

Officer's testimony regarding defendant's removing of wearing apparel from automobile and his disappearance after being questioned regarding stolen automobile *held* inadmissible to show flight and consciousness of guilt in prosecution for diamond robberies.

Such testimony was inadmissible to prove flight and consequent consciousness of guilt of diamond robberies, since it did not tend to prove consciousness of guilt under the charges of burglary and robbery for which defendant was being prosecuted, in that the wearing apparel and suitcases removed from the automobile were not the fruits of the diamond robberies, and the flight was either because of fear of a prosecution for or because of consciousness of guilt of the theft of an automobile, and since such testimony could have been construed by jury only as an attempt to show that defendant had committed a crime other than the one for which he was prosecuted.

2. Witnesses ⇐337(5).

Permitting prosecutor for impeachment purposes in robbery prosecution to cross-examine defendants regarding numbers and names of previous felonies convicted of *held* error (Code Civ. Proc. § 2051; Pen. Code, § 969a, as added by St. 1927, p. 1064; Const. art. 1, § 13).

Cross-examination of such defendants regarding whether they had been convicted of a felony and as to the names and number of felonies convicted of was error, in view of close case made by evidence and that under Code Civ. Proc. § 2051, prior to the enactment of Pen. Code, § 969a, as added by St. 1927, p. 1064, evidence of a prior conviction of a felony was only important as affecting the credibility of the defendant as a witness, while under Pen. Code, § 969a, as added by St. 1927, p. 1064, such questioning constitutes an invasion of the defendant's constitutional rights, in that he was compelled to testify against himself and to furnish to the prosecutor evidence on which the extent of his punishment may be increased.

3. Witnesses ⇐337(5).

In questioning defendant regarding prior felonies, questioner is limited to question whether defendant had ever been convicted of felony (Code Civ. Proc. § 2051; Pen. Code, § 969a, as added by St. 1927, p. 1064; Const. art. 1, § 13).

4. Criminal law ⇐369(1).

Evidence that robberies similar to ones prosecuted for were committed by persons of defendants' description at time defendants were in jail *held* irrelevant.

5. Criminal law ⇐572.

Where defendants were prosecuted together as to every charge in information, evidence of alibi by one inures to benefit of other.

6. Criminal law ⇐1186(4).

Where prosecution was on several counts with varying degrees of evidence, and it could not be determined what effect errors had on jury, reversal must be general (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Lawrence M. Romer and Charles Barnett were convicted of burglary and of robbery, and they appeal.

Reversed.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 23 P.2d 749.

Frederic H. Vercoe, Public Defender, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Clarence S. Hunt, Deputy Dist. Atty., both of Los Angeles, for the People.

WORKS, P. J.

Defendants were convicted of the crime of burglary under five counts and of the crime of robbery under seven counts; a robbery or robberies being charged to have followed in each instance a burglarious entry. Defendants appeal from the judgments of conviction and from orders of the trial court denying their motions for a new trial.

The first 350 pages of the 400-page brief of appellants are devoted to quotations of large portions of the evidence, and of arguments based upon it, all intended to show, as appellants put it, that the record exhibits a "close case." This presentation is made as a basis for the claim that any errors committed by the trial court operated to harm appellants to a greater extent than if the case were one in which the evidence against them was strong and the evidence in their favor was weak. In other words, as was remarked by the Supreme Court in People v. Goodwin, 202 Cal. 527, 261 P. 1009, 1014: "With a record as unconvincing against the defendant as the one in the instant case, any error in the matter of instructions or rulings upon evidence looms large." Respondent attempts to meet the argument of appellants in the portion of the brief to which we have referred, but, we think, with but little success. The case is a "close case." Indeed, we think it proper to say that, as to at least five of the counts, two on burglary and three on robbery, we find it difficult to understand, from the printed page, how the jury could have found appellants guilty. The warring evidence was, principally, on the one side, that tending to prove the defense of alibi, and, on the other, that purporting to identify appellants as the two men who committed each of the crimes charged. Under some of the counts, the evidence of identification was weak. Under all of the counts, with possibly two exceptions, one on burglary with its accompanying charge of robbery, both applying to but one defendant, the evidence tending to prove alibis as to both defendants was satisfactory, and in a few instances very strong. Under every count, however, the evidence upon the part of the prosecution was sufficient to create a conflict with that received on behalf of appellants, and the latter make no point that the evidence under any count was insufficient to support the verdict. Upon this background we proceed to consider the questions of law actually presented.

At the trial the court received, over the objections of appellants, the testimony of C. F. Fordice, a police officer. The following portions of the record on direct examination will serve to introduce a discussion of the point which is made by appellants:

"Q. And were you on duty on the day of June 15th, 1930, if you recall? A. Yes, sir, I was. * * * I was assigned to patrol duty in charge of a church crossing at Western Avenue and Country Club. * * *

"Q. Did you see him [Romer] on that date, June 15th, 1930? A. Yes, sir.

"Q. Where did you see him? A. On Western Avenue in front of 1250. * * * It is the number of an apartment house. * * *

"Q. How was your attention called to Mr. Romer on that occasion? A. I was checking cars parked along there for stolen autos.

"Q. Did you see Mr. Romer at that time? A. Yes, sir. * * * He was taking some stuff out of the car * * * a LaSalle sedan. * * *

"Q. What stuff was he taking out of his LaSalle sedan? A. Some grips and ladies' wearing apparel; a coat.

"Q. Were they unpacked? A. The coat and a couple of ladies' wraps.

"Q. Did you have any conversation with Mr. Romer there? A. Yes. * * *

"Q. What conversation did you have with Mr. Romer there? * * * A. Well, I looked on the sheet of paper [I had] and I seen that the car was a wanted car, and I spoke to Mr. Romer and told him that he was wanted at the station for some information, and he said, 'What is the matter?' and I said, 'There seems to be something wrong with the car.' I said, 'I have the number of the car, and the make of your car on this sheet.' He says, 'There cannot be anything wrong. I made the last payment on the car, and I have been on a four-day trip.' He says, 'If you will wait until I take this stuff up to the room to the women, I will go to the station with you.' Well, I waited one trip and he could not carry everything—

"Q. What did he take up on that first trip, do you recall? A. Some suitcases and some grips. * * *

"Q. After you saw him go into the apartment, did you see him after that? A. Yes, he came back again to get the rest of the stuff.

"Q. What stuff was left there, do you recall them? A. One more grip and some ladies' wearing apparel.

"Q. Did you have any conversation with him at that time, any further conversation? A. Yes, sir, I wanted to help him carry some of the stuff, but he didn't think it was well for me to go up, me being a police officer in uniform, and he being a stranger, that it would not look very well. So I waited outside for about 20 minutes, and he didn't show up. * * *

"Q. Well, during those 20 minutes that you waited there, were you waiting in front of the * * * apartments? A. Yes, sir.

"Q. By the car? A. Yes, sir.

"Q. And from where you stood, could you see the entrance to the apartment house? A. Not fully, no. Just a step was all that I could see; there was an alcove there and I could not see clear to the door.

"Q. During the time that you were standing there, did you notice those steps to see whether Mr. Romer came out of the same entrance, or not? * * * A. Yes, sir, I did.

"Q. Did Mr. Romer come out that entrance? A. No, sir, he did not.

"Q. And after you had waited there about 20 minutes, what did you do? * * * Did you have a conversation with the landlady? A. Yes, sir, I did.

"Q. After you had the conversation with her, what did you do? A. She went up with me [to] the apartment that the party had moved into. * * *

"Q. And did you go into that apartment? A. The door was locked; we did not go in. * * * She knocked on the door, but nobody answered. * * *

"Q. What did you do then? A. I went back up to Pico street and Western avenue, and called into the station for assistance. * * I waited there at the car until the detectives came out.

"Q. Do you recall now which detectives came up? A. I believe it was Officer Wilson. * * * I waited there with them at the car, and then went up to the room. The police call car came out also with a couple of officers in it, and we went up to the room then and, with the landlady's passkey, went in. * *

"Q. When you went into the apartment, what did you find, if anything? Did you find anyone there? A. No, no one was in it. * * There was a grip there. * * * It was the one that Romer had carried up. * * *

"Q. Do you know whether or not at that time there was any other entrance or exit to the apartment house than the entrance where Mr. Romer had gone in? A. Yes, there is a rear entrance.

"Q. From where you were standing when you were waiting for Mr. Romer that morning, could you see that rear entrance? A. No, sir."

[1] The reception of this evidence is defended by respondent upon the ground that it was offered to prove flight and a consequent consciousness of guilt, but the flight did not tend in the least to prove consciousness of guilt under any of the charges of burglary and robbery made in this action. The articles carried into the apartment house were not the fruits of any of the robberies. The men who committed the crimes charged here were diamond robbers, although they sometimes took watches, money, and small articles of jewelry. Note, too, some particular parts of Fordice's testimony. He told the jury that he "was checking cars parked along there for stolen autos." He said he examined a paper he had, and saw that Romer's automobile "was a wanted car." He testified that he told Romer he was wanted at the station, that Romer asked what was the matter, and that the officer then said: "There seems to be something wrong with the car," and "I have the number of the car, and the make of your car on this sheet."

The events described by Fordice occurred two days after the date upon which the last crimes with which appellants are charged were committed, but the testimony of the witness showed clearly that the flight of Romer was either because of fear of a prosecution for or because of a consciousness of guilt of the crime of theft of an automobile. Therefore the flight, notwithstanding the proximity of dates, could not have been ascribed by the jury to fear or consciousness of guilt of the charges made here. The testimony of Fordice plainly tended to induce the jury to believe that Romer was liable to prosecution for the theft of the car, and any other belief upon the part of its members to the detriment of Romer would have derived no support from the evidence. In short, the testimony of Fordice could have been construed by the jury only as an attempt to show its members that Romer had committed a crime other and different from those for the commission of which appellants were on trial.

The following questions and answers are shown in the record of the cross-examination of appellant Barnett:

"Have you ever been convicted of a felony? * * * A. I have. * * *

"Q. Have you been convicted of more than one felony? * * * A. I have, but I was also pardoned. * * *

"Q. How many felonies have you been convicted of? * * * A. Two times, but I was pardoned * * * once.

"Q. What was the first felony you were convicted of? * * * A. Robbery.

"Q. When were you convicted of that felony? * * * A. 1911, I believe.

"Q. What was the second felony that you have been convicted of? * * * A. Assault with a weapon."

Here follows the record of a part of the cross-examination of appellant Romer:

"Q. Have you ever been convicted of a felony? * * * A. Yes, sir.

"Q. Have you ever been convicted of more than one felony? * * * A. I have.

"Q. How many felonies have you been convicted of? * * * A. Four; one pardon. * * *

"Q. What felonies have you been convicted of? * * * A. A confidence case, embezzlement and two grand larcenies."

Objection was made to each of the questions

thus addressed to the two appellants, the objection was overruled in each instance, and it is now contended that each of the rulings was error. The assailed inquiries were all propounded pursuant to that part of the language of section 2051 of the Code of Civil Procedure relating to the impeachment of witnesses, to the effect that "it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony;" and it is possible that the questions all may have been proper under the section prior to 1927, but upon that point we express no opinion.

In the year named a new section, 969a, was added to the Penal Code (St. 1927, p. 1064). It read, as originally enacted, although it has been amended since the commission of the crimes with which appellants are charged: "Whenever it shall be discovered that a pending indictment or information does not charge all prior felonies of which the defendant has been convicted either in this state or elsewhere, said indictment or information shall be forthwith amended to charge such prior conviction or convictions, and such amendment may and shall be made upon order of the court, and no action of the grand jury (in the case of an indictment) shall be necessary. Defendant shall promptly be rearraigned on such information or indictment as amended and be required to plead thereto. Whenever after sentence, and before the sentence has expired, it shall be discovered that the indictment or information on which defendant was convicted did not charge all felonies of which defendant had theretofore been convicted, either in this state or elsewhere, it shall be the duty of the district attorney of the county wherein defendant was sentenced to cause to be filed a supplemental information setting up such prior conviction or convictions. Said supplemental information may be filed either in the county from which defendant was sentenced or in the county in which he is then confined. Defendant shall thereupon be arraigned upon such supplemental information and be required to plead thereto. In whichever county the supplemental information is filed, the district attorney of the county from which defendant was sentenced shall sign the same and prosecute the proceedings. If defendant admit the prior conviction or convictions charged, the court shall resentence him to the sentence which would have been legal if such prior conviction or convictions had been admitted at the time of defendant's conviction, and such resentence shall operate as of the date of the original sentence. If defendant deny the prior conviction or convictions so charged, the issue shall be tried by a jury, or by the court if a jury be waived. If the issue be found in defendant's favor, such supplemental information shall be dismissed. If the issue be found against defendant, the court shall resentence defendant to the sentence which would have been legal if such prior conviction or convictions had been admitted at the time of defendant's conviction, and such resentence shall operate as of the date of the original sentence."

[2] It is vigorously contended by appellants that by the provisions of this section the Legislature effectually emasculated the language of section 2051 of the Code of Civil Procedure, which is above quoted, in so far as it may be claimed to apply to defendants in criminal cases when they take the stand as witnesses in their own behalf. Let appellants speak here for themselves, as they do in their opening brief: "In view of said section 969a we contend that to compel a defendant-witness to testify under that portion of section 2051 of the Code of Civil Procedure above quoted, in all cases where a defendant has previously been convicted of a felony and would be compelled to answer 'Yes,' is a violation of his constitutional rights under the Constitution of the State of California and under the Constitution of the United States, in that it compels said defendant to be a witness against himself or to give incriminating evidence against himself which may subject him to further criminal prosecution and further punishment. It has been permissible, under the decisions of your honorable court and of the Supreme Court of this state to further interrogate a defendant who had answered in the affirmative to a question inquiring as to whether or not he had been convicted of a felony, as to the number of felonies of which he had been convicted and as to the names of said felonies. It has not been permissible to inquire as to the time or location of the court where the defendant-witness had suffered his conviction, but the testimony given by the defendant as to his prior conviction and the name of the felony can be seized upon by the district attorney, and by resorting to the criminal identification bureaus of this state and other well-known criminal identification bureaus in other locations which receive records of felony convictions from all other jurisdictions he can obtain, through the lead given him by the defendant-witness, enough additional information to enable him to amend the pending information against a defendant and charge him with said prior convictions; or a supplemental information charging said prior convictions may be filed against the defendant after he has been sentenced and he may be prosecuted, convicted and sentenced thereon."

It seems clear to us that, while under section 2051 of the Code of Civil Procedure, prior to the enactment of section 969a of the Penal Code, evidence of a prior conviction of a felony and of related evidence allowed under the authorities was only important as affecting the credibility of a defendant as a witness, the situation has been materially changed by the terms of section 969a. Now, when a defendant is asked what felony charges he has been convicted upon, and where and when

he has been convicted, his constitutional rights have been invaded when he is compelled to answer the questions. It seems that he is thus forced to testify against himself and that his rights as a defendant, and not merely his credibility as a witness, have been thereby affected. He has been compelled to furnish to the prosecutor evidence upon which the extent of his punishment may be increased, for it is plain that, since the enactment of section 969a, and of other sections which need not be mentioned here, proof of prior convictions has that result.

We need not pause to determine whether, as contended by appellants, a mere affirmative answer to the question whether a prior conviction of a felony has occurred can be legally compelled, although there may be a doubt upon the point. Here the prosecutor, under the rulings of the court, went further, and we think the rulings, to that extent, at least, were error. The question here determined is one of first impression. It was neither presented nor decided in People v. La Verne, 212 Cal. 29, 297 P. 561, 562, a late case relied upon by respondent, and in which the Supreme Court said: "Appellant took the witness stand; he did not testify as to the circumstances of the murder, but did give evidence on some collateral matters. The alleged incriminating questions asked him, of which amici curiæ complain, were whether he had ever been convicted of a felony, answered in the affirmative; then 'What felony?' and other questions along the same line. Had these questions been asked for other than purposes of impeachment, the provisions of section 1025 of the Penal Code would be applicable; appellant, however, having voluntarily offered himself as a witness, was subject, upon cross-examination, to the usual rules for testing his credibility by impeachment, and in particular became subject to the provision of section 2051 of the Code of Civil Procedure to the effect that a witness may be impeached 'by evidence that his general reputation for truth * * * is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness * * * that he had been convicted of a felony.'" In appraising the effect of these words, it becomes necessary to determine what the Supreme Court meant, after it had stated the question "What felony?" by referring to "other questions along the same line." This point is cleared by an examination of the transcript of the testimony in the case. In addition to the question specifically stated by the court, to which La Verne answered, "Burglary," he was asked "along the same line": "What degree?" and "From what county were you convicted of that crime?" Both these questions were subject to the same objections we have made to some of those put to Romer and to Barnett in the present case. However, an examination of the briefs in People v. La Verne shows that the question presented to the Supreme Court was very different from that offered here for our consideration. As shown by the Supreme Court opinion, the point made there was presented by a friend of the court, but the brief referred neither to section 969a of the Penal Code nor to any of the other sections dealing with increase of punishment because of prior convictions, although a reference was made to section 13 of article 1 of the state Constitution, which contains the usual guaranty against compelling self-incriminating evidence. It will be observed also that the opinion in People v. La Verne mentions none of the sections of the Penal Code which refer to the effect of prior convictions upon punishments. As we have already observed, we cannot perceive that the case is decisive of the point here presented.

[3] The courts of the state were very liberal, before the enactment of section 969a of the Penal Code, in permitting questions under section 2051 of the Code of Civil Procedure to be addressed to defendants in criminal cases. Some questions have been allowed, as several of the decided cases will attest, which have gone beyond the mere query whether the defendant "had been convicted of a felony" (section 2051), but there is no case, decided even before section 969a, which has sanctioned an examination to such an extent as that upon which the prosecution embarked in the present case. Because of section 969a and related sections, we think the questioner is now limited to the asking of the one question expressly mentioned in section 2051, that is, "Have you ever been convicted of a felony?" There seems no other logical place at which to stop.

[4] One of appellants is a tall man; the other is of shorter stature. In view of this fact, appellants make a point which they thus state in their brief: "The trial court erred in refusing to allow appellants to prove at the trial of this case that while they * * * were in jail on the charges contained in the information herein, * * * other robberies were committed in Long Beach by a tall and a short man and in substantially the same manner as all of the robberies charged against appellants, to counteract the effect produced by such a large number of similar offenses being charged against them." The point is thus stated for the reason that the crimes with which appellants were charged were committed in Long Beach. We are so thoroughly convinced that the point made is not well taken that we find it unnecessary to enter into a discussion of the question. We think the proffered evidence was not relevant to the issues in the case.

Appellants contend that the trial judge erred in refusing to give to the jury several proffered instructions. While each of these was couched in language somewhat different from any instruction given, we think the charge which was presented to the trial body, taking it as a whole, covered in essence every

statement of law contained in the offered instructions.

Finally, it becomes necessary to measure the effect of the errors committed by the trial court under section 4½ of article 6 of the Constitution, to the effect that no reversal of a cause shall occur "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." We have already remarked that under the evidence this case is a close one. Something more should be said upon the question. Particularly, we desire to justify our assertion that it is difficult to perceive how the jury could have found appellants guilty under some of the counts of the information. As to two of the counts, one on burglary and one on robbery, there was testimony by several witnesses, their stories being well connected, which placed Romer upon a trip to Phœnix, Ariz., at such a time, if the testimony were true, that he could not have been at Long Beach upon the date to which the two counts related. In addition to this, however, there was undisputed written evidence to support the testimony. One witness testified that he was the proprietor of a pawnshop in Phœnix, and that some one signing the name of Romer pawned some articles at his place of business during the period fixed for the trip, and that the pledges were redeemed the next day after the pawning. The witness identified three photographs as correct reproductions of his records, although he stated that he was not present when the records were made. The photographs showed a signature of Romer's name when the pledge was completed, and, when that appellant was on the stand, he was shown a colored tag exhibiting his name in writing when the pledge was redeemed. He testified that he was present on each occasion, and that he made the two signatures himself. The prosecution made no effort whatever to prove that Romer did not sign the pawnship records and the colored tag, although they had the perfect right to secure exemplars of his handwriting upon his cross-examination if they had not procured or could not procure such exemplars by other means. Barnett offered well connected evidence of an alibi, from several witnesses, as to the crimes committed while Romer and his witnesses swore that the latter was on the Phœnix trip. We do not specify particulars as to Barnett's evidence of an alibi, as, for reasons hereafter to be stated, Romer's evidence to the same point was as good for both appellants as it was for him alone.

Barnett offered a most convincing chain of evidence of an alibi as to charges made in three of the counts of the information, one on burglary and two on robbery. This evidence, if it was true, precluded the possibility of Barnett's presence in Long Beach at the time the three crimes were committed, and much of it came from disinterested witnesses. The evidence related to a trip on a fruit truck to Oakland and San Francisco. It is to be noted, particularly, that this testimony was supported by wholly undisputed written evidence, the showing thus producing an impregnable defense were it not for the identification of the defendants as the criminals present upon the occasion in question. As it is, however, considering the nature of the evidence of an alibi, the showing on the part of the prosecution is so lamentably weak as hardly to produce a substantial conflict in the evidence. The writings in support of the alibi consisted of Barnett's signature under an assumed name in a hotel register at San Francisco, and a post card in Barnett's handwriting mailed by him in San Francisco and addressed to a woman in Los Angeles, with the accompanying postmark. The record affirmatively shows that exemplars of Barnett's handwriting were in evidence before the trial court, but the prosecution made no attempt to show by experts or otherwise that the hotel registration or writing on the post card was not in his handwriting. Romer also offered consistent evidence of an alibi as to the three offenses committed while Barnett contends he was in San Francisco, but to go over this evidence is not important.

We take these two instances of evidence upon the defense of alibi for the purpose of indicating how strong was the general defense made by appellants. As to none of the other counts was the evidence as strong, it is true, but as to many of them it was far from weak. In this connection we desire to have remembered what we have said upon the same subject at the beginning of this opinion, where we determined that this is a "close case" under the evidence.

[5] In considering further section 4½ of article 6 of the Constitution it is to be observed that the theory of the prosecution was that the two appellants were irrevocably tied together as to every charge made in the information. Therefore any evidence of an alibi presented by one inures to the benefit of the other. Under such a theory, if the jury was convinced that one of the defendants was not present at a particular scene of crime, the circumstances would be most persuasive of a conclusion that the other was not there. We think it can be said that there is not a single count of the information as to which one of the appellants did not present strong evidence of an alibi.

[6] We cannot but regard this as one of those unfortunate cases in which it is difficult to say what has been the effect upon the jury of the errors which occurred at the trial. There were so many counts, with differing degrees of weight of evidence offered by the prosecution when compared with that offered by the defendants, that it is hard to determine upon what of the counts, if any, a conviction would have resulted but for the errors shown.

They were not many, but they were damaging, considering all the circumstances surrounding the trial of so many charges together.

With the case presenting such a state of uncertainty and doubt, under the authorities and despite the terms of section 4½ of article 6, we think a general reversal must result.

Judgment and order reversed as to each and every count and as to each appellant.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

127 Cal.App. 699

FLEMING v. CITY OF LOS ANGELES et al.

Civ. 8300.

District Court of Appeal, First District, Division 1, California.

Nov. 28, 1932.

1. Municipal corporations ⇐513(8).

In action to annul street widening assessment, validity of assessment must be determined from widening proceedings themselves, regardless of ambiguity of description in condemnation action.

If there was any ambiguity of description in condemnation action, or if city sought to take thereby more land than was authorized by street widening proceedings before municipal government, landowner should have urged objection in condemnation proceedings or should have had matter corrected on appeal from any final judgment rendered therein.

2. Municipal corporations ⇐444.

That map, referred to in ordinance of intention for street widening, included strip over which easement had theretofore been granted by abutting owner's predecessor, *held* not ground for challenging validity of assessment after completion of widening proceedings before municipal government (St. 1903, p. 377, § 2, as amended).

Though maps referred to included such strip, it amounted to no more than irregularity in proceedings, which occurred during progress thereof, after city had acquired jurisdiction, and about which abutting owner could not complain after completion of proceedings because record failed to show that he challenged correctness of maps while proceedings were in progress before municipal board, and at most mistake complained of could be construed only as admission on part of city that it did not claim any right in such easement.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Victor L. Fleming against the City of Los Angeles and others. From a judgment sustaining a demurrer to the complaint without leave to amend, plaintiff appeals.

Affirmed.

Hall & Kranz and Donnell G. Montgomery, all of Los Angeles, for appellant.

Erwin P. Werner, City Atty., and Jerrell Babb, Deputy City Atty., both of Los Angeles, for respondents.

KNIGHT, J.

Defendants' demurrer to plaintiff's complaint was sustained without leave to amend, and plaintiff appeals.

The action was one to have declared void a street assessment levied against plaintiff's lot pursuant to proceedings taken under the authority of the Street Opening Act of 1903 (Stats. 1903, p. 376, as amended), and to enjoin the enforcement of said assessment. It appears from the complaint that the improvement contemplated by the proceeding was the widening of Los Feliz boulevard in Los Angeles, for a certain distance, and that in order to accomplish such purpose it was necessary to take a narrow strip of land from the abutting lot of plaintiff. The assessment plaintiff sought to have nullified was levied on the remaining part of his lot in proportion to the benefit derived thereby from the widening of the street.

The point plaintiff makes against the validity of the proceedings relates to the matter of the description of the land to be taken, and arises out of the following facts, as shown by the complaint: The ordinance of intention definitely and with exactness described by metes and bounds, and courses and distances, the exterior boundaries of a twenty-foot strip of land along the southeasterly side of Los Feliz boulevard which the city intended to take for the widening of the street; and the description concluded as follows: "* * * Excepting therefrom so much of said land which may be included within the lines of any public street or alley." And in this connection the complaint alleges that prior to the time said proceedings were initiated plaintiff's predecessor in interest conveyed to the city for street purposes an easement over and along a ten-foot strip of his lot adjacent to Los Feliz boulevard, which was accepted as such by the city. Continuing, the complaint alleges that said ordinance referred to a map upon which was delineated the land intended to be taken, which included the ten-foot strip in front of plaintiff's lot covered by the easement theretofore granted; and that a similar map was prepared and accepted by the city for assessment purposes. The complaint then goes on to allege that subsequent to the com-

pletion of the street widening proceedings before the municipal government and pursuant thereto the city filed an action for the condemnation of the land needed for said improvement, and obtained an interlocutory decree therefor; that the strip of land sought to be taken was described in the complaint and interlocutory decree therein as follows: "All that portion of Lot 17 * * * lying between the southeasterly line of Los Feliz Boulevard and a line parallel with and distant 20 feet southeasterly, measured at right angles, from said southeasterly line of Los Feliz Boulevard." And in this connection plaintiff complains that it cannot be determined therefrom whether the city condemned a twenty-foot strip measured from the original line of Los Feliz boulevard or from the line thereof as established by the grant of said easement.

[1] It is evident, however, that the matter of the condemnation proceeding can have no effect whatever upon the question of the validity of the assessment levied pursuant to the street widening proceedings had before the municipal government. As stated, the sole purpose of the present action was to annul the street assessment and to enjoin its enforcement against plaintiff's property; and therefore the question of the validity of such assessment must be determined from the street widening proceedings themselves, regardless of what may have happened afterwards in the condemnation action. If there was any ambiguity of description in the latter action, or if the city sought to take thereby more land than was authorized by said street widening proceedings, plaintiff should have urged his objection in the condemnation proceeding or had the matter corrected on appeal from any final judgment rendered therein. Nor is the case of O. T. Johnson Corp. v. City of Los Angeles, 198 Cal. 308, 245 P. 164, helpful to plaintiff's theory because that action did not have for its purpose the object sought by the present one. No attack was made therein upon the validity of a street assessment, nor did the action involve a question of alleged faulty description of property. As stated in the opening paragraph of the decision, it was an action to enjoin the city from expending any money in furtherance of certain street widening proceedings including the cost of the prosecution of pending condemnation actions, upon the ground that the ordinance of intention contemplated and described one improvement, namely, the widening and extension of certain specified streets, whereas the improvement sought to be carried out thereafter was entirely different, namely, the laying out and opening of an entirely new street, 1800 feet in length, through private property. It was held, therefore, that since the ordinance of intention failed to describe the improvement sought to be carried out, the city should be enjoined from expending any money in attempting to do so.

[2] Turning, then, to the question of the validity of the assessment in the present case, the act (section 2, as amended) provides that the ordinance of intention shall "briefly describe the improvement proposed," which has been held to mean that the improvement shall be described with such reasonable certainty that a person of ordinary understanding may know what is proposed to be done (19 Cal. Jur. 239, and cases cited) and shall not be so ambiguous as to mislead. Piedmont Paving Co. v. Allman, 136 Cal. 88, 68 P. 493. In the present case it is not claimed that the description of the proposed improvement, as set forth in the ordinance of intention, was either ambiguous or misleading. As already pointed out, it described with accuracy and exactness the land intended to be taken; and even though the maps referred to did include in the delineation of the land to be taken the ten-foot strip over which the easement had theretofore been granted, it amounted to no more than an irregularity in the proceedings which occurred during the progress thereof, after the city had acquired jurisdiction, and about which plaintiff may not now complain, because so far as the record shows he failed to challenge the correctness of the maps while the proceedings were in progress before the municipal board. Buckman v. Landers, 111 Cal. 347, 43 P. 1125; Ahlman v. Barber Asphalt Paving Co., 40 Cal. App. 395, 181 P. 238. At most, the mistake complained of can be construed only as an admission on the part of the city that it did not claim any right in said easement. City of San Jose v. Reed, 65 Cal. 241, 3 P. 806; City of San Jose v. Freyschlag, 56 Cal. 8.

After reviewing the entire complaint, we agree with the trial court that no legal grounds were set forth therein upon which to base a finding that the assessment was void.

The judgment appealed from is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

127 Cal.App. 521

CITY OF SAN DIEGO et al. v. MILLAN, City Treasurer.

Civ. 1038.

District Court of Appeal, Fourth District, California.

Nov. 17, 1932.

1. Municipal corporations ⇐925.

Though preliminary proceedings provided that bonds should be payable in gold, city could make them payable in lawful money of United States (St. 1901, p. 27, as amended; St. 1927, p. 6; St. 1929, p. 16; St. 1931, p. 983).

City could make bonds so payable because no greater burden was thereby imposed upon taxpayers.

2. Municipal corporations ⇐935.

Curative acts *held* to have cured all defects resulting from failure to comply with provisions of municipal bonding act which were merely directory of mode of exercise of power, but could not cure defects going to power to act at all (St. 1901, p. 27, as amended; St. 1927, p. 6; St. 1929, p. 16; St. 1931, p. 983).

3. Municipal corporations ⇐917(1).

Proceedings leading to issuance of municipal bonds create between city and taxpayers relation in nature of contract.

4. Municipal corporations ⇐887.

Where purpose of bond issue was to develop, impound, and distribute waters of river, and bonds were issued providing for dam of certain type, change of type of dam made necessary by statute *held* not to prevent use of money for building new type of dam (St. 1901, p. 27, § 9½, as added by St. 1907, p. 634; St. 1901, p. 29, § 6; St. 1927, p. 6; St. 1929, pp. 16, 1505; St. 1931, p. 983).

St. 1929, p. 1505, gave state engineer power to supervise construction of all dams and to determine the type of dam to be built by any political subdivision of the state. State engineer refused to approve the arched, gravity section, masonry type of dam provided for in the proceedings, but specified a hydraulic, earth-filled rock embankment type of dam. Voters approved use of money raised from bonds as in original election except that dam to be constructed was described as one to be approved by state engineer as provided by law. There was no proof that any greater burden was placed on taxpayers, or that the dam was not as efficient as the one originally provided for, or that it was to be constructed at any different place.

5. Municipal corporations ⇐884.

City may temporarily invest surplus money raised by one bond issue in city bonds issued for different purpose and then sell such bonds when the money is needed (St. 1901, p. 29, § 6; St. 1913, p. 76).

6. Mandamus ⇐5.

Fact that civil actions are pending against city which raise some of the questions raised in mandamus proceeding *held* immaterial in mandamus proceeding against city treasurer.

Application by the City of San Diego, the Council of the City of San Diego, John F. Forward, Jr., and others, as members of and constituting the Council of the City of San Diego, for a writ of mandate to be addressed to J. T. Millan, as Treasurer of the City of San Diego, requiring him to invest certain surplus funds in bonds of the City of San Diego.

Writ granted.

C. L. Byers, City Atty., of San Diego, and Hunsaker & Cosgrove, of Los Angeles, for petitioners.

O'Melveny, Tuller & Myers and Paul E. Schwab, all of Los Angeles, for respondent.

Charles C. Crouch, of San Diego, amicus curiæ for respondent.

MARKS, J.

This is an original proceeding instituted in this court for the purpose of compelling respondent to invest certain surplus funds, now in the treasury of the city of San Diego, in bonds of that city. Respondent has appeared by a demurrer to the petition, thereby admitting all of its material allegations.

The city of San Diego is a municipal corporation organized and existing under a freeholders' charter. The individual petitioners are the mayor and members of the council of that city. Respondent is its treasurer.

In accordance with the provisions of an act of the Legislature of the state of California, approved February 25, 1901 (Stats. 1901, p. 27, and acts amendatory thereof), which we will refer to as the Municipal Bonding Act, the city of San Diego authorized the issuance of bonds in the sum of $4,500,000. We will hereafter refer to them as the El Capitan dam bonds. These bonds were authorized and issued for the acquisition of lands, dam site, reservoir, reservoir site, rights of way, pipe lines, conduits, and a water filtering plant for a dam, and the acquisition, construction, and completion of a dam "of the arched, gravity section, masonry type," on the San Diego river in San Diego county, and for the acquisition, construction and completion of a pipe line from the dam to one of the city

reservoirs in the city of San Diego "for the purpose of developing, impounding, conserving, storing and distributing the waters of the San Diego river and its tributaries, for the use of the inhabitants of the City of San Diego." The bonds were authorized in 1924 and the petition recites that a portion of such bonds of the par value of $1,630,000 have been sold and that bonds of the par value of $2,695,000 remain unsold and in the possession of the city. We assume that an immaterial typographical error has occurred in these allegations of the petition as the total par values of the bonds sold, and the bonds unsold, do not correspond with the total par value of the bonds authorized.

All the proceedings up to the ordinance providing for the issuance of these bonds recited that their principal and interest should be payable in gold coin of the United States. The ordinance issuing the bonds and the bonds themselves provided that the principal and interest should be payable in lawful money of the United States.

The Legislature in 1929 (Stats. 1929, p. 1505) passed an act vesting in the state engineer the power to supervise the construction of all dams in the state of California and to determine the type of dam to be built by any political subdivision of the state. In accordance with this act the city of San Diego filed an application for approval of its proposed El Capitan dam. While the proceedings before the state engineer are not set forth in detail, we accept as a fact the statement of counsel for respondent during the oral arguments, that petitioners "are prevented from constructing the original type of dam by the state engineer," which was not only not disputed by counsel for petitioners, but affords the foundation for one of their principal arguments in favor of the issuance of the writ. The record justifies the inference that the state engineer withheld authority for the construction of the arched, gravity section, masonry type dam, which dam had not been commenced prior to the taking effect of the act just referred to, and it is clear that he did approve the construction of a hydraulic, earth-filled rock embankment type of dam. The city of San Diego called a special election and obtained the consent of more than two-thirds of the qualified electors to use the money raised from the sale of the El Capitan bonds for the same purposes as in the original election except that the type of dam to be constructed was described as one "to be approved by the State Engineer of the State of California, pursuant to the requirements of law." The El Capitan dam bonds have been validated by three acts of the Legislature. Stats. 1927, p. 6; Stats. 1929, p. 16; Stats. 1931, p. 983. The last validating act was passed prior to the election authorizing construction of a type of dam to be approved by the state engineer.

The electors of the city of San Diego had at some prior date authorized bonds for the purpose of constructing what is referred to as the Sutherland dam. It appears from the petition that there was the sum of $472,634.22 in the Sutherland dam fund and only $47,990.71 in the El Capitan bond project fund.

On the 1st day of August, 1932, the city council of the city of San Diego passed a resolution whereby it determined that there was then in the city treasury, to the credit of the Sutherland dam bond fund, surplus moneys in excess of $99,000 not required for the immediate necessities of the city or the purposes for which the Sutherland dam bonds were authorized, and directed respondent, as city treasurer, to purchase $99,000 of the El Capitan bonds at their par value plus accrued interest with such surplus moneys from the Sutherland dam bond fund. He refused to do this and this proceeding is brought to compel him to make such purchase.

Respondent urges four principal grounds upon which he maintains the writ should be denied. He urges: First, that because in all proceedings leading up to and including the election at which the El Capitan dam bonds were authorized, the bonds and interest were payable in gold coin of the United States, the bonds could only be made payable in such gold coin and not in lawful money of the United States; second, that the money derived from the sale of the bonds could only be used to build a dam of the arched, gravity section, masonry type, and not of the hydraulic earth-filled rock embankment type which the city now proposes to build; third, that under the proceedings at which the electors of the city of San Diego purported to authorize the use of the money raised by the sale of the El Capitan bonds for the construction of the latter type dam, only such monies in the possession of the city at the time of the election, which amounted to $47,990.71, could be used for the construction of the proposed new type dam and not money to be raised by the future sale of the El Capitan dam bonds; and, fourth, that as the issuance of the Sutherland dam bonds was authorized by the electors of the city of San Diego for a particular purpose, the funds derived from the sale of these bonds could not be used for any other purpose and particularly for the construction of the El Capitan dam.

Under respondent's contention that the bonds could not be made payable in lawful money of the United States, he cites and relies upon the cases of Skinner v. City of Santa Rosa, 107 Cal. 464, 40 P. 742, 29 L. R. A. 512; Murphy v. City of San Luis Obispo, 119 Cal. 624, 51 P. 1085, 39 L. R. A. 444; and Peery v. City of Los Angeles, 187 Cal. 753, 203 P. 992, 19 A. L. R. 1044.

The Skinner and Murphy Cases were decided under the provisions of an act of the Legislature of March 19, 1889 (Stats. 1889, p. 399, and acts amendatory thereof), the provisions of which varied in material respects from those of the Municipal Bonding Act now in force. The cases are not decisive

of the questions we are considering. They recognize the rule that by the issuance and sale of municipal bonds a greater burden cannot be placed upon the taxpayers than the one to which they assented at the bond election. In the Murphy Case, Mr. Justice Harrison, the author of the opinion, discussed the relative values of gold coin and lawful money as mediums of exchange and as a matter of argument expressed the view that from "the history and experience of the last forty years" lawful money as distinguished from gold coin was subject to fluctuation and depreciation and did not possess the same stability of value as gold coin. From this it might follow, if the assumption of the learned justice be correct, that bonds payable in lawful money might place a lesser burden upon the taxpayers than if payable in gold coin.

Peery v. City of Los Angeles, supra, holds that a greater burden cannot be placed upon the taxpayers of a city than that which they authorized in voting in favor of the issuance of bonds bearing interest at the rate of 4½ per cent., by selling them at a price less than their par value so as to yield the purchasers a rate of interest in excess of 5 per cent. per annum, under the authority of an act of the Legislature approved May 31, 1921 (Stats. 1921, p. 844). The court was of the opinion that a status similar to a contractual relation between the electors and the city was created by the election which would not permit the city to place a burden upon the taxpayers which they had not voluntarily assumed.

In the case of Town of Martinez v. Johnson, 201 Cal. 397, 257 P. 853, 854, the court said: "In the resolution of February 23, 1927, directing the issuance of said bonds it is provided that—'All of said bonds shall bear interest from their date until paid at the rate of five per cent. per annum, payable semiannually.' It will thus be seen that, while the ordinance calling said election provided for a 6 per cent. bond, the resolution directing the issuance of the bonds called for a 5 per cent. bond. On account of this variance between the ordinance and the resolution as to the rate of interest the bonds should bear, the town clerk has refused to countersign the bonds prepared in pursuance of and in conformity with the resolution. The sole question involved in this controversy is the power of the board of trustees to direct by resolution the issuance of bonds bearing 5 per cent. interest, when the ordinance calling the election to vote upon their issuance provided that they should bear interest at 6 per cent. * * * It would have been a simple matter, had the Legislature desired to limit the power of the governing body of the municipality in this respect, to have inserted such a provision in the statute. It did provide for certain limitations as to the rate of interest the bonds should bear —that is, not exceeding 6 per cent. per annum, payable semiannually. It can well be claimed that this studied effort on the part of the Legislature to avoid providing that the bonds should bear the same rate of interest as recited in the ordinance and in expressly specifying the maximum rate of interest the bonds might bear, evinces an intention to confer upon the legislative body a discretion in fixing the rate of interest within the limitations provided. This discretion cannot be exercised so as to cast upon the taxpayers of the municipality a burden greater than that provided for in the ordinance calling the election, but we can see no good reason why it could not be resorted to in an attempt to lessen such burden. The only possible argument that has been presented against such a construction is that the board of trustees or other governing body of the municipality, after reciting in the ordinance a definite rate of interest and after the electors of such municipality had voted in favor of the bond issue upon the assumption that the bonds when issued would bear said rate, may thereafter fix a less rate of interest and one so low that would render the bonds unsaleable, and thereby defeat the whole scheme of public improvements which had been approved by the electors of the municipality. In answering this argument, we would repeat that the Legislature could have provided against such an exigency by a simple statement in the statute to that effect, and the fact that it did not include any such provision in the statute may well be taken as indicative of the belief on the part of the Legislature that such a contingency would seldom if ever arise. There are advantages in favor of giving such discretion to municipal authorities. A very substantial one is shown by the facts in the present proceeding, that of obtaining the funds for municipal improvements at 5 per cent. instead of 6 per cent. The Legislature may well have considered that the advantages to be gained in investing the municipal authorities with this discretion greatly outweighed any possible disadvantages which might arise in withholding said authority."

[1] The entire reasoning of the Supreme Court in the extract we have just quoted can be used with equal force in reaching the conclusion that a municipality may make its bonds payable in lawful money notwithstanding the fact that in all proceedings, including the proposition voted on by the electors, payment in gold coin was specified. The Municipal Bonding Act does not require that any medium of exchange in which the bonds will be paid, be specified in any of the ordinances or resolutions leading up to the election, or in the proposition to be voted upon. To paraphrase the foregoing language of the Supreme Court, it can well be claimed that this studied effort on the part of the Legislature to avoid providing that the bonds be payable in any specified medium of exchange, evidences an intention to confer upon the legislative body of a municipality a discretion in fixing any medium of exchange,

whether it be lawful money or gold coin, in which the principal and interest of the bonds may be paid. "This discretion cannot be exercised so as to cast upon the taxpayers of the municipality a burden greater than that provided for in the ordinance calling the election, but we can see no good reason why it could not be resorted to in an attempt to lessen such burden." Town of Martinez v. Johnson, supra. Gold coin has been regarded as the nonfluctuating medium of exchange in this country. Past fluctuations of lawful money, as distinguished from gold coin, have been downward. If the fears of Mr. Justice Harrison, as expressed in Murphy v. City of San Luis Obispo, supra, should prove warranted, it would result in a lessening of the burden placed upon the taxpayers below that placed upon them, were the bonds made payable in gold coin of the United States. There is nothing in the financial history of our country that would support the contention that the change in the medium of exchange would increase such burden. The taxpayers are protected against loss at the time of the initial sale of the bonds by the provision of the Municipal Bonding Act, which prohibits their sale at less than their par value. We conclude that, in making the bonds payable in lawful money of the United States, the legislative body of the city of San Diego did not place a greater burden upon the taxpayers than the one they assumed at the election and that its action was a proper exercise of the discretion with which the Legislature has endowed that body.

[2] If we correctly understand the briefs of counsel, there is no serious contention that the curative acts of the Legislature, to which we have referred, did not cure "all defects resulting from a failure to comply with provisions which are merely directory of the mode of the exercise of the power," but that they could not cure "defects and omissions which go to the jurisdiction of the board to act at all, and which make their action absolutely void." People v. Van Nuys Lighting District, 173 Cal. 792, 162 P. 97, 99, Ann. Cas. 1918D, 255. It is not contended that these acts cured defects, if any, that occurred in the proceedings leading up to and including the second election, whereby the electors attempted to authorize the use of the money derived from the sale of the El Capitan dam bonds for the construction of a new type of dam. These proceedings were taken and the election held after the passage of these curative acts.

It is next contended that the attempt to use the money to be derived from the sale of the El Capitan dam bonds for the construction of a dam of the hydraulic earth-filled rock embankment type as approved by the state engineer, instead of one of the arched, gravity section, masonry type, is unauthorized by law and a violation of the contract with the voters, unless the authority so to do be derived solely from the election held under authority of section 9½ of the Municipal Bonding Act (as added by St. 1907, p. 634). In support of this contention respondent cites the following California authorities: Section 6, Municipal Bonding Act (Stats. 1901, pp. 27, 29); O'Farrell v. Sonoma County, 189 Cal. 343, 208 P. 117; Jenkins v. Williams, 14 Cal. App. 89, 111 P. 116, 118; Hunter v. County of Santa Barbara, 110 Cal. App. 698, 294 P. 1082, and California Highway Commission v. Ballard, 77 Cal. App. 404, 247 P. 527, 529.

The case of O'Farrell v. County of Sonoma, supra, involved the expenditure of money derived from the sale of bonds issued under the provisions of section 4088 of the Political Code for the purpose of constructing four miles of paved highway. A contract was let for the paving of 1.93 miles of this road, which work would consume practically all of the bond money available for the entire project. This was held illegal, as departing from the purpose for which the bonds were authorized, which was to pave all of the four miles of road and not a minor fraction thereof. The case of Hunter v. County of Santa Barbara, supra, involved a similar question and a like conclusion was reached. These cases establish the rule that the omission of a substantial portion of the improvement contemplated at the time the bonds were voted is an unauthorized departure from the purpose for which the bonds were issued.

The case of Jenkins v. Williams, supra, involved the question of the expenditure of money derived from the sale of bonds authorized to construct certain specified bridges in Sacramento county, where the cost of each bridge had been specified by the board of supervisors prior to the election. The cost of the completion of several of the bridges fell short of the amount apportioned for their construction. The question decided was whether or not any of this surplus could be used to pay for the completion of another bridge, the cost of which exceeded the estimate. The court held it could not. The reasons for this conclusion were found in the language of section 4088 of the Political Code. This section required the board of supervisors, prior to an election, to specify by an order the purpose for which the indebtedness was to be incurred. The section also provided that the money derived from the sale of the bonds should be applied to no other purpose than that specified in the order and that any sum remaining after the completion of the work should be applied towards the payment of the bonds. In reaching its conclusions the court said: "In its order the board declared that it was necessary to incur a bonded indebtedness 'for the purposes hereinafter stated,' and that 'said amounts above specified and said purposes so stated

are more particularly designated and described as follows.' * * * This order or ordinance was published to give notice to the voters of its purpose and what it was proposed to do with the money derived from the bonds. It does not seem reasonable that the board of supervisors intended, or that the voters intended, that the power should be reserved to the board to expend the money at their discretion. The more reasonable construction to be given the order and the statute is that the purposes specified in the order should control."

The case of California Highway Commission v. Ballard, supra, contains language which tends to give some support to the contention of respondent. In July, 1919, the county of Modoc voted bonds for road improvements under the provisions of the County Highway Commission Act (Stats. 1907, p. 666). The project included the improvement of the 3.7 miles which was involved in this controversy. In 1925 the Legislature passed an act (Stats. 1925, p. 385) authorizing the supervisors to transfer to the state treasury, for the use of the California highway commission, moneys derived from the sale of bonds, and to be expended by the California highway commission for the improvement of local roads. The board of supervisors attempted to transfer $40,000 from the county highway improvement fund to the state treasury to be used on the 3.7 miles of road. The reasoning of the court on this question is contained in the following quotation: "The act then provides that the proceeds of the sale of bonds shall be placed in a special fund to be known as the highway improvement fund of the county, and shall be used solely for the purposes set forth in said report; also that no moneys shall be paid out of said funds, except upon a warrant of the auditor of said county issued upon the order of the highway commission, duly allowed by the board of supervisors. Following these provisions the act contains a full and complete procedure of carrying on the improvement, giving of notices, letting of contracts, requiring of bonds for the faithful performance of contracts, that the improvements to be made shall be durable and further general provisions not necessary to be further specified herein. * * * The petition filed in this matter sets forth that, in accordance with the provisions of subdivision (d) of section 365h of the Political Code, as amended in 1925, the board of supervisors of Modoc county and the highway commission of Modoc county did request the California highway commission to accept the said sum of $40,000, and to deposit the same in the state treasury, and to use and expend said funds so deposited for the construction of said 3.7 miles of road in Modoc county in accordance with the plans, specifications, and regulations for the construction, realignment, repair, and improvement of said road as set forth in said proceeding for the sale of said bonds, etc. This statement in the petition would be sufficient to show that the money is proposed to be used for the same purposes by the California highway commission, as voted by the electors of Modoc county, were it not for the fact that immediately following this statement the petitioner sets forth the resolutions adopted both by the highway commission and the board of supervisors of the county of Modoc, which fails so to provide. The resolution of the highway commission reads: "That your honorable board request and authorize the California highway commission to cause such plans, specifications, estimates, surveys, and maps to be prepared as may be necessary for the repair and improvement of said road, and that said board further request and authorize said California highway commission to take full charge of said repairs and improvements, to call for bids, etc., to do all things which the said California highway commission may deem necessary for the early and full completion of said repairs and improvements proposed to said road,' etc. * * The resolution adopted by the board of supervisors uses the same general language and leaves the question of the kind of improvement to be made wholly and entirely to the California highway commission. So far as the resolutions adopted by the county highway commission and the board of supervisors of the county of Modoc are concerned, there is nothing which indicates or requires the California highway commission to make the kind of improvement upon the road in question which constitutes the basis of the bond issue submitted to the voters of Modoc county."

Perhaps one of the underlying reasons for this portion of the opinion may be found in the language of section 10 of the County Highway Commission Act, supra (as amended by St. 1913, p. 327), where it is said: "All improvements constructed under this act shall be of a durable and lasting character; provided, that said commission shall have the power to determine how said highways shall be improved and constructed, and the character of the materials to be used in the improvements and construction thereof."

There is nothing in the opinion to indicate that the California highway commission would be required to use the Modoc county bond money to build "a durable and lasting" pavement. It was proposed to take the power to determine "how said highway(s) shall be improved and constructed, and the character of materials to be used" from the county authorities and vest it in the highway commission which then would have had authority to "improve" the road in any manner it pleased without any obligation to construct an improvement of "a durable and lasting character."

Section 6 of the Municipal Bonding Act provides in part as follows: "The proceeds of such bonds shall be placed in the municipal treasury to the credit of the proper improvement fund, and shall be applied exclusively to the purposes and objects mentioned in the ordinance." It becomes proper for us to consider what were "the purposes and objects" to be accomplished by the issuance of the El Capitan dam bonds. It would appear that the real purpose, as stated in the ordinance calling the election, was for "developing, impounding, conserving, storing and distributing the waters of the San Diego River and its tributaries for the use of the inhabitants of the City of San Diego." This general purpose was to be accomplished by means of several improvements which included the acquisition of lands, a dam site, a reservoir and reservoir site, rights of way, pipe lines, conduits, a water filtering plant, and the construction of a dam of the type originally described. The fact that approximately $1,600,000 had been spent upon parts of the project before the construction of the dam was commenced shows that the several undertakings of the project, other than the dam, were of very considerable importance. It is not suggested that the hydraulic, earth-filled, rock embankment type of dam would be built at a different location than the original dam, or that its cost would be any greater, or that it could not be built and the whole project completed within the amount authorized by the electors, or that it would not be as efficient, suitable, or as safe for impounding the waters of the San Diego river as the arched, gravity section, masonry type of dam first proposed. The question here presented is whether or not the change in the type of dam, which change was made necessary by a law passed by the Legislature after the bonds were issued, and by the lawful action of an officer of the state, could be considered such a departure from the purposes for which the bonds had been authorized as to prohibit the use of the bond money for such a type of dam. We have been cited to no California cases which definitely decide this question.

[3] In approaching this question we take as a starting point the principle, which has long been recognized by our courts, that the proceedings leading up to the issuance of municipal bonds create a relation between the city and its taxpayers which is in the nature of a contractual relation between parties whether they be public or private.

The California Dam Act (Stats. 1929, p. 1505) has been held to be a valid exercise of a police power by the state under its right to protect the lives and property of its citizens. Sawyer v. Board of Supervisors, 108 Cal. App. 446, 291 P. 892; Department of Public Works v. City of San Diego (Cal. App.) 10 P.(2d) 102. In the case of Bent Bros., Inc., v. Campbell, 101 Cal. App. 456, at page 463, 281 P. 717, 719, the court considered the effect upon contractual rights of the exercise of this police power by the state and said: "In Union Dry Goods Co. v. Georgia Public Service Corp., 248 U. S. 372, 9 A. L. R. 1420, 63 L. Ed. 309, 39 S. Ct. 117, 118 [see, also, Rose's U. S. Notes Supp.], we find the following in relation to the exercise of the police powers of the state, and also of private rights when they come in conflict. It is there said: 'That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court'—citing Manigault v. Springs, 199 U. S. 473, 50 L. Ed. 274, 26 S. Ct. 127 [see, also, Rose's U. S. Notes]. And further: ' "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from" properly exercising its police powers "for the general good of the public, though contracts previously entered into between individuals may thereby be affected" ' —citing a number of authorities. The opinion in the case from which we are quoting further sets forth the law that: ' "Contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority" '—citing authorities. Again: ' "There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint; not immunity from reasonable regulations and prohibitions imposed in the interests of the community." * * * "It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise." ' In the notes appended to the case of Salt Lake City v. Utah Light & Traction Co., 52 Utah, 210, 173 P. 556, as reported in 3 A. L. R. 715, are quoted so many cases as to prevent any review of them in this opinion, setting forth the extent to which the police powers of the state may be applied, and the manner in which private rights must yield thereto, establishing abundant authority for the support of the act of the Legislature now being considered. Many of the cases referred to in the notes mentioned have to do with the reg-

ulation of rates and charges by public service corporations where contracts had been made giving certain consumers or patrons special rates. In practically all of the cases the contracts were held subject to the police powers of the state as exercised through public service corporations. While differing in the circumstances presented, the principle is the same."

[4] Under the circumstances of this case, wherein the lawful exercise of its police power the state of California compelled the city of San Diego to change the type of dam which it proposed to build with money secured from the sale of its bonds, the dam not being the sole purpose to be attained by the bond issue, but one of a number of means whereby its general purpose was to be obtained and where the change in the type of dam to be constructed placed no greater burden upon the taxpayers of the city of San Diego than that originally contemplated at the time of the election, no such breach of the contractual relation between the city and the taxpayers occurred as would justify our holding that the type of dam approved by the state officers could not be constructed and paid for with the money derived from the sale of the bonds.

The conclusions we have already reached make it unnecessary for us to consider at length the third ground of defense. We are here concerned only with the disposition of the unsold bonds. If section 9½ of the Municipal Bonding Act, in so far as it grants to the governing body and electors of a city the right to change the original purpose for which bonds were issued, does not apply to issued and unsold bonds, then the proceedings taken by the city of San Diego to effect such a change in purpose cannot affect this proceeding. If the contrary is true, then the electors of San Diego have authorized the use of the bond money to construct the new type dam.

[5] Lastly, respondent maintains that funds derived from the sale of the Sutherland dam bonds cannot be diverted from that fund and used in the construction of the El Capitan dam without the express authority from the electors of the city of San Diego. He relies upon the provisions of section 6 of the Municipal Bonding Act, which we have already quoted, to support this contention. Undoubtedly his position should be sustained if any such diversion of these funds were contemplated. We do not understand that any such action is contemplated.

In 1913 the Legislature passed an act (Stats. 1913, p. 76), which provides that: "Any * * city * * * which * * * hereafter shall have, any surplus money in the treasury thereof, not required for the immediate necessities of the said * * * city * * is hereby authorized to invest such portion of any such surplus as to the governing body of the said * * * city * * * may be deemed wise or expedient in any bonds * * hereafter issued by such * * * city." The act further provides that the bonds so purchased may be sold and the proceeds "applied to the purposes for which the money, with which the bonds were originally purchased, was placed in the treasury." This act clearly contemplates a purchase of bonds for a temporary period. The money from the Sutherland dam bonds will not be diverted from the purposes for which the bonds were authorized. When the surplus money is required in the Sutherland dam project, the El Capitan dam bonds will be sold and the money returned to the Sutherland dam bond fund. In the meantime this fund will benefit by a higher rate of interest on its money than could be obtained otherwise. This procedure seems to be directly contemplated by the act from which we have quoted.

[6] In addition to joining in all the grounds of objection urged by respondent, amicus curiæ informs us that there are several actions pending in the superior court of San Diego county seeking, among other things, to enjoin the city from proceeding with the construction of the El Capitan dam and the use of the Sutherland dam bond funds for the purchase of the El Capitan dam bonds. He requests us to order copies of the pleadings in these cases brought up to be considered here. He admits that under the circumstances here presented a civil action pending is not a bar to a mandamus proceeding and that the converse is true. Madary v. City of Fresno, 20 Cal. App. 91, 128 P. 340.

It is ordered that a peremptory writ of mandate be issued as prayed for.

We concur: BARNARD, P. J.; JENNINGS, J.

128 Cal.App.(Supp.) 783

COHN v. THOMPSON et al.

Civ. 1491.

Appellate Department, Superior Court, Los Angeles County, California.

Nov. 25, 1932.

1. Assignments ⇐119.

Assignment for collection without consideration from assignee vests legal title in assignee, which is sufficient to enable him to recover, although assignor retains equitable interest in thing assigned.

2. Attorney and client ⇐11.

Collection agent who was not attorney *held* not engaged in "practice of law," where claim was assigned to him under agreement that, if he could not collect claim without suit, he was to hire attorney at his expense and sue in his own name, and, if collection was made, he was to remit balance to assignor after deducting costs and percentage for his services (St. 1927, p. 822, as amended).

"Practice of law" is the doing or performing services in a court of justice, in any matter pending therein, throughout its various stages, and in conformity to the adopted rules of procedure; in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be pending in a court.

[Ed. Note.—For other definitions of "Practice of Law," see Words and Phrases.]

3. Champerty and maintenance ⇐4(1).

Assignment of claim to collection agent who was not attorney, under agreement that, if he could not collect claim without suit, he was to hire attorney at his expense and sue in his own name, and, if collection was made, he was to remit balance to assignor after deducting costs and percentage for his services, *held* not void as against public policy (Pen. Code, § 161; St. 1927, p. 822, § 2).

BISHOP, J., dissenting in part.

Appeal from Municipal Court of Los Angeles; James H. Pope, Judge.

Action by David W. Cohn, doing business as the California Claim Service, against Howard Glover Thompson and others. Judgment in favor of plaintiff against named defendant, who appeals.

Affirmed.

Marion P. Betty, of Los Angeles, for appellant.

Samuel C. Cohn, of Los Angeles, for respondent.

Porter C. Blackburn, of Los Angeles, amicus curiæ.

S. Saul Klein and Kimball Fletcher, both of Los Angeles, for Lawyers' Club of Los Angeles.

McLUCAS, P. J.

This is an appeal on the judgment roll alone. The complaint was in two counts, an open book account and account stated, and alleged that, prior to the commencement of the action, Bullock & Jones, for a valuable consideration, assigned to plaintiff all their right, title, and interest to said claim, and that plaintiff is now the owner and holder thereof. Judgment was awarded to the plaintiff against defendant Howard Glover Thompson, who presents this appeal.

Findings were made that the following allegations in the amendment to the answer were true: "II. That the said David W. Cohn is not an attorney-at-law, and is not admitted to practice law in the state of California. IV. That the said claim described in the said complaint against the defendants was assigned by Bullock and Jones, a corporation, to plaintiff herein, and that under and by virtue of the contract of assignment of said account by Bullock and Jones, a corporation, to the plaintiff, David W. Cohn, it was contracted and agreed by and between the said plaintiff, and the said Bullock and Jones, in consideration of said assignment, that the plaintiff would endeavor to collect the account described in the complaint from the defendant at plaintiff's expense, if possible, and if successful would receive a certain percentage of the amount collected, contingent upon collection thereof, but in the event that the said account could not be collected from the defendant without suit, then in that event, plaintiff would sue in his (plaintiff's) own name, and hire an attorney at his own expense to bring said suit and prosecute same to judgment, and if successful, and a collection was made, plaintiff was to deduct the costs and a certain percentage of the account collected from the amount collected for his services, and then remit the balance due to plaintiff's assignors, Bullock and Jones. That by the terms of said contract, the plaintiff was to retain and pay said attorney at his own expense for said services and to pay all costs likewise. V. That pursuant to said contract, the plaintiff did hire and retain as his attorney, one George M. Wicke, attorney of record for the plaintiff herein, and did have said attorney institute the above entitled action in plaintiff's name, and did appear in court by his attorney of record, George M. Wicke, and attempt to attain [obtain] a judgment in the above entitled action against the said defendant, above named; that said attorney, George M. Wicke, is the attorney for the plaintiff, David W. Cohn, and that the relation of attorney and client

does not exist between plaintiff's assignors, Bullock and Jones, a corporation, and the said George M. Wicke."

Appellant urges that the contract is illegal and void because it was made for the purpose of collection only, and to thus enable plaintiff to make a profit from the practice of law; that the contract provided that the plaintiff would pay all expenses and would collect the said account, and receive, as compensation therefor, a certain percentage of the amount collected, and, if a suit was filed by the plaintiff, that he should receive a certain percentage of the amount collected, and that the plaintiff's counsel, George M. Wicke, the attorney for the said plaintiff, would be paid entirely by the said plaintiff; that the relation of attorney and client did not exist between Bullock and Jones, the plaintiff's assignor, and the said George M. Wicke, attorney for the plaintiff. The defendant further maintains that the plaintiff is not the real party in interest, and has no interest in the claim more than any attorney who sues on a claim for collection on a contingency basis, the whole purpose and intent of the assignment being to enable the plaintiff to sell the legal services of his attorney, and make a profit thereon. The defendant contends that said contract is void as against public policy, that by this means plaintiff is not under the jurisdiction of the state bar of California, and is not under the state bar's rules of conduct, and thereby restrained from soliciting lawsuits, and, if allowed to hire an attorney and maintain this action in his own name, his attorney will be thus soliciting indirectly.

It is contended in the brief of amicus curiæ that the findings sufficiently show that plaintiff is engaged in the unlawful practice of the law; that said contract of assignment is illegal and void, as it is in derogation of the express provisions of the law, against public policy, and tends to aid or abet an unlicensed person to practice law or to receive compensation therefrom.

It is conceded by amicus curiæ that under the laws of California an assignment of a chose in action for collection is valid; that a collection agency, or business, when promoted strictly as a collection agency, is a lawful business authorized by law (chapter 485, p. 822, Statutes of 1927, and amendments thereafter), and that a prosecution of an action by an assignee for collection does not, of itself, constitute the practice of the law.

[1] In construing the Code provision requiring every action to be prosecuted in the name of the real party in interest, our courts have followed the rule that whoever holds the legal title to a demand is the real party in interest, and may sue thereon in his own name. 3 Cal. Jur. p. 296. It is well settled that an assignment for collection, without any consideration being paid by the assignee, vests the legal title in the assignee, which is sufficient to enable him to recover, although the assignor retains an equitable interest in the thing assigned. Morrison v. Veach, 190 Cal. 507, 213 P. 945; Ralph v. Anderson, 187 Cal. 45, 200 P. 940; Woodward v. Brown, 119 Cal. 283, 51 P. 2, 542, 63 Am. St. Rep. 108; Hopkins v. Contra Costa County, 106 Cal. 566, 39 P. 933; Greig v. Riordan, 99 Cal. 316, 33 P. 913; Grant v. Heverin, 77 Cal. 263, 18 P. 647, 19 P. 493; Kelley v. Hampton, 22 Cal. App. 68, 133 P. 339; Ingle Mfg. Co. v. Scales, 36 Cal. App. 410, 172 P. 169.

[2] Does an assignee for collection who holds the legal title to a claim, and possesses the right to sue thereon and to employ attorneys to represent him, engage in the practice of law, where under and by virtue of the contract of assignment, and in consideration thereof, the assignee agrees, in the event that the claim cannot be collected without suit, to sue in his own name and hire an attorney at his own expense to prosecute the suit, and, if the collection is made, after deducting the costs and a certain percentage for his services, the assignee agrees to remit the balance to his assignor? No case has been cited, nor after thorough search have we been able to find any case, which holds that a collection agency is practicing law under such circumstances. Appellant relies upon the cases which hold that a corporation contracting with its clients to employ attorneys as agents to furnish them with legal services is engaged in the practice of law, and a corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it. People v. California Protective Corp., 76 Cal. App. 355, 244 P. 1089; People v. Merchants' Protective Corp., 189 Cal. 531, 209 P. 363. See, also, notes, 73 A. L. R. 1327; 32 L. R. A. (N. S.) 55, 56; Ann. Cas. 1918C, page 131. Here we find no such contract. The assignee merely contracts to file suit in his own name, if necessary to make the collection. But he does not agree to furnish any legal services whatever to the assignor. The assignee employs the attorney and controls his action. No legal services are performed for the assignor. The only duty of the assignee is to account to the assignor after the collection has been made. In making the agreement to bring suit, the assignee merely agrees to do that which he can legally do without any agreement, by virtue of the assignment. Provided the assignment is absolute, so as to vest the apparent legal title in the assignee, the latter is entitled to sue in his own name, whatever collateral arrangements have been made between him and the assignor respecting the proceeds. Ralph v. Anderson, supra. Practice of law is the doing or performing services in a court of justice, in any matter pending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts

by which legal rights are secured, although such matter may or may not be pending in a court. Smallberg v. State Bar, 212 Cal. 113, 119, 297 P. 916; State Bar v. Superior Court, 207 Cal. 323, 335, 278 P. 432; People v. Merchants' Protective Corp., supra; People v. California Protective Corp., supra. In the case now before us for consideration, we find that the plaintiff was not practicing law within the meaning of the foregoing definition. Certainly the plaintiff did not agree to furnish to his assignor legal advice or counsel, nor to prepare legal instruments, or contracts. Neither did the plaintiff agree to do or perform services in a court of justice for the assignor or to employ an attorney to perform such services for the assignor. The services performed by the attorney were for the assignee alone, who was the real party in interest and exercised entire control of the action; the assignor having no power to exercise any control whatsoever either over the action or the attorney in the performance of his services.

Our conclusion that the plaintiff was not engaged in the practice of law is fortified by a decision made by the court of appeal since the submission of this case. A hearing was denied by the Supreme Court. In that case, Schroeder v. Wheeler, 14 P.(2d) 903, the plaintiff, a patent attorney, had agreed to perform, as in this case, certain services which he was capable of performing, and, in addition thereto, agreed to furnish the services of an attorney at law, if said services should be beneficial and necessary, for which the defendant agreed to pay on a contingent basis. The court said at page 907 of 14 P.(2d):

"A consideration of the entire contract forces the irresistible conclusion that, as contended by plaintiff, the intention of the parties was that plaintiff should perform the necessary services as a patent attorney and act as defendant's agent and counselor in looking after her patent and trade-mark matters generally, employing counsel if and when necessary.

"The question thus arises as to the legality and the enforceability of such a contract; that is, Can a person who is not an attorney at law enforce a contract under which he agreed to if necessary employ the services of an attorney at law to assist in the performance of services, a portion of which services is to be and may be performed by such person?

"As hereinbefore stated, it is conceded by both parties that one who is not an attorney at law not only cannot practice law, but cannot recover compensation for legal services by him performed, but there is no law prohibiting persons other than attorneys from recovering the reasonable value of their services when performed at the request of another. Miller v. Ballerino, 135 Cal. 566, 67 P. 1046, 68 P. 600. In 6 Corpus Juris, page 721, it is stated as follows: 'An unlicensed person may recover for services not performed in a court of record, and of a character the performance of which would not constitute the practice of law.' See cases therein cited.

"Where, as here shown, by solemn contract in writing admitted to have been entered into by and between parties under the terms of which plaintiff agreed to perform certain services which he was capable of performing and further agreed to furnish the services of an attorney at law if said services should be beneficial and necessary and for and in consideration of which defendant agreed to pay plaintiff on a contingent basis, it cannot be held that the contract is illegal and void; neither is it unenforceable nor impossible of performance."

[3] Appellant urges that the contract is against public policy, and in support of his contention cites section 161 of the Penal Code, which forbids an attorney from buying any evidence of debt or thing in action, with intent to bring suit thereon. There is no such provision in the Code as to collection agencies. The courts have commented on the fact that such contracts are in general use. In Koepple v. Morrison, 84 Cal. App. 137, 140, 257 P. 590, 591, the court said: "It is common knowledge that collection agencies pursue the policy of taking assignments of claims for the purpose of bringing action, and that the only interest the assignee has in the subject-matter is a percentage thereof as his compensation for doing those things ordinarily performed by an attorney at law." Chapter 485, p. 822, Statutes of 1927, declares the public policy as to such contracts by recognizing the right of collection agencies to do business, including "obtaining in any manner the payment of a claim." Section 2. This provision is broad enough to include bringing a suit. The right of a collection agent to take an assignment of a claim and bring suit thereon in his own name has been so long recognized in this state, both by statute and decisions, that we cannot declare an assignment of a claim for the purpose of bringing suit to be against public policy. We find no merit in the contention that assignment of a claim with the intent that the assignee shall bring suit thereon is illegal and void. We have no power to make legislation. If legislation be desired forbidding collection agents, as well as attorneys, from buying claims with intent to bring suit thereon, arguments in support of such legislation must be addressed to the Legislature.

The judgment is affirmed, with costs of appeal to respondent.

SHAW, J.

I concur in the opinion of Judge McLUCAS, but I think the record discloses an additional reason for affirming the judgment. This appeal being presented on the judgment roll

only, the findings are conclusive upon us as to the facts. One of those findings is that the claim sued on "was assigned" to the plaintiff. This imports a completed assignment (including, if it was in writing, the signature and delivery of the writing), by which the title to the claim assigned passed to the plaintiff. 3 Cal. Jur. 233, 234; Burkett v. Doty, 176 Cal. 89, 92, 167 P. 518; Curtin v. Kowalsky, 145 Cal. 431, 434, 435, 78 P. 962. The remainder of this finding states that by the contract of assignment plaintiff agreed to do certain things. Conceding, for the purpose of argument, that this agreement was illegal, yet it amounts to nothing more than the consideration for which the assignment was made. A completed assignment is an executed contract, to which the rule regarding illegality of consideration does not apply. Burkett v. Doty, supra; Curtin v. Kowalsky, supra; Ripperdam v. Weldy, 149 Cal. 667, 676, 87 P. 276. It is no less effective as a transfer of title because made without consideration, or for an illegal consideration, or voidable for any other reason. Hence the plaintiff was, by the assignment, vested with title to the claim, and could maintain an action upon it. One who obtains property for an illegal consideration does not become an outlaw, nor is the property forfeited to any one who can gain possession of it. See Wayman Inv. Co. v. Wessinger, 13 Cal. App. 108, 110, 108 P. 1022; Calif., etc., Ass'n v. Stelling, 141 Cal. 713, 720, 75 P. 320. As against all except him from whom he obtained the property, such a person is the owner of it, and may resort to the courts to protect it, or, if it be a chose in action, to enforce it. His rights against the person from whom he obtained the property are not here in question, but would doubtless be determined on a consideration of the question whether both parties were in pari delicto.

BISHOP, J.

I concur. I am not able to agree that a contract by which one obligates himself to hire an attorney to prosecute an action for the collection of a debt due another, if more peaceful methods fail, is not a contract to furnish legal services just because an assignment of the debt, solely for collection, intervenes. See Elam v. Arzaga (Cal. App. 1932) 10 P.(2d) 805. I am of the opinion, however, that accepting the agreement as one to furnish legal services does not require the conclusion that it is invalid and unenforceable for that reason.

It is neither unlawful nor contrary to public policy in view of extant statutes. "Fundamentally it pertains to the lawmaking power to declare what contracts are against public policy." County of San Bernardino v. Gate City Creamery Co. (1930) 103 Cal. App. 367, 373, 284 P. 457, 459, quoting from 6 Cal. Juris 109. See, also, Maryland Casualty Co. v. Fidelity, etc., Co. (1925) 71 Cal. App. 492, 497, 236 P. 210. The legislation which seems to me to deny the existence of a public policy contravened by the agreement in question is embodied in the act defining and regulating collection agencies. Stats. 1927, p. 822, referred to in the main opinion. The practice of collection agencies in taking assignments of the claims intrusted to them for the purpose of bringing actions thereon is "common knowledge." Koepple v. Morrison (1927) 84 Cal. App. 137, 257 P. 590. The act respecting collection agencies was adopted, in the light of this common knowledge, at the same session of the Legislature which incorporated the state bar and made it a misdemeanor for any one, not an active member of the bar, to practice law. Both acts have received attention at the hands of the Legislature at each session subsequent to their passage. The overlapping of the collection agency field with that of the practice of law is recognized by the requirement of a license for an attorney engaged in the collection agency business, but exempting him from the provisions of the collection agency act if his services are those rendered to clients in the usual course of professional practice. In the premises I find neither the statutory law nor public policy forbidding an agreement whereby one, who makes it a business to collect claims, engages to make the collection by suit, if necessary. I agree with the remark in the majority opinion that, if there is to be a change in the law, it must come from the Legislature.

tracts was withheld until increase of prices was made through association.

3. Monopolies ⇐12(2).

Cleaning and dyeing industry *held* "business" within statute forbidding contracts in restraint thereof (Civ. Code, § 1673).

[Ed. Note.—For other definitions of "Business," see Words and Phrases.]

4. Contracts ⇐138(6).

Court properly refused to entertain action where plaintiff's case showed illegality of contract, even though not pleaded or urged as defense (Civ. Code, § 1673).

5. Evidence ⇐429.

That written contract, though lawful on face, was illegal, or part of illegal transaction, may be shown by parol.

In Bank.

Appeal from Superior Court, Los Angeles County; James W. Bartlett, Judge.

Action by Thomas P. Endicott against Harry Rosenthal and others, copartners doing business as the Bear Cleaners & Dyers. Judgment for defendants, and plaintiff appeals.

Affirmed.

For prior opinion, see 6 P.(2d) 321.

William Schreider, of Los Angeles, for appellant.

Harry W. Biddle, Holbrook, Taylor, Tarr & Horton, and Joseph K. Horton, all of Los Angeles, amici curiæ.

Fred H. Luth and W. H. Gregory, both of Los Angeles, for respondents.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Third Appellate District. Upon further consideration, we are satisfied that the opinion of the said court, delivered by Mr. Justice pro tem. Jamison, correctly disposes of the issues, and we adopt it as the opinion of this court. It reads as follows:

This is an action brought by plaintiff to recover from defendants commission upon the gross wholesale and retail business done by defendants since April 6, 1925, under a written contract. Defendants Harry Rosenthal and Robert Cowan, by their amended answer, admitted that they are copartners doing business under the name of Bear Cleaners & Dyers, but deny that they were indebted to plaintiff under said contract.

At the close of plaintiff's case defendants moved for a nonsuit upon the grounds that the contract sued upon is illegal, failure of consideration, and because the contract sued upon has been superseded by the agreement with the Plant Owners' Association. The

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ENDICOTT v. ROSENTHAL et al.

L. A. 11441.

Supreme Court of California.

Nov. 29, 1932.

Rehearing Denied Dec. 29, 1932.

1. Monopolies ⇐12(2).

Incorporated cleaners' and dyers' association *held* unauthorized to establish minimum price, even if price was reasonable and was reasonably necessary to produce fair profit (Civ. Code, § 1673).

2. Monopolies ⇐23.

Legal portions of business adviser's contracts with cleaners' and dyers' association and with individual members *held* inseparable from illegal portions contemplating elimination of competition and increase of prices, precluding recovery against individual member (Civ. Code, § 1673).

Evidence showed that as result of suggestions by a business counselor and adviser, so called, association of cleaners and dyers was formed and incorporated, two of main purposes of which were to eliminate competition and increase prices; that adviser entered into contract with each member whereby he was employed to improve methods, equipment, and working conditions, and also entered into contract with association, whereby he was employed for similar purposes; and that delivery to such adviser of members' con-

trial court granted the motion for nonsuit upon the ground that the contract was illegal, and thereupon rendered judgment for defendants, from which judgment plaintiff has appealed.

The contract provides, in substance, that respondents being engaged in the business of cleaning and dyeing wearing apparel, etc., and being desirous of securing the services of appellant as business counselor and adviser, have employed him in that capacity. That appellant shall maintain an office in Los Angeles, Cal., at his own expense, from which advice and counsel will be given respondent, appellant agreeing to use his best efforts to improve the methods of cleaning and dyeing, to improve the equipment and facilities for handling, cleaning, and dyeing, to improve the working conditions, and to standardize the methods generally of the industry. The respondents, irrespective of the extent that they may avail themselves of the advice and counsel of appellant, agreed to pay for said services so to be rendered by appellant, after the 6th day of April, 1925, the sum of 1 per cent. of the amount of their retail gross business, and 3 per cent. of the amount of their wholesale gross business during the life of the contract, remittance of said sums to be made to appellant on Wednesday of each week. The contract to continue in force for a term of five years from the date thereof, and not to be voidable for any cause whatsoever. The contract was dated March 11, 1925.

It appears from the testimony of appellant that, previous to coming to California, he had been engaged in the cleaning and dyeing business for 25 years, and at one time had been at the head of the National Association; that he came to Los Angeles in 1925, and during the latter part of January and February and the early part of March of that year he visited the various plants and consulted with the cleaners and dyers, and gave them suggestions as to contemplated improvements, and in what manner he could save them money. The result of this was that the cleaners and dyers resolved to form an association and incorporate it, and on March 2, 1925, the said association was formed and incorporated under the name of "Plant Owners Association of Cleaners and Dyers." The by-laws of said corporation provided, among other things, as follows: "That each member shall furnish the director general, within fifteen days after signing the agreement, with the names and addresses of all customers with which each member does a wholesale business. Each member shall refrain from soliciting wholesale business directly or indirectly. That if a member comes in contact with a wholesale customer, he shall decline accepting business from such customer pending approval thereof in writing by the director general. If through neglect or design, business should be taken from this customer, and it is later learned that such customer is, or has been a customer of any other member, then the member so dealing with said customer shall turn over to the member designated by the director general, as the member rightfully entitled to the business, the full amount of all charges collected from such customer, without allowance of any amount or kind for work or services rendered; that no member shall provide services of any kind in the cleaning and dyeing industry for less than the minimum reasonable charges fixed by the association, or its board of directors, provided that before a member shall change or vary his price from the established minimum, he shall give fifteen days notice of such intention to the director general."

The by-laws also provided that any member violating any of the provisions should be fined $100 and pay to the association, as liquidated damages, $500, and for the second offense should pay to the association, as liquidated damages, the sum of $3,000, and that each member was to deposit with the director general his note for $5,000, with the agreement that the sum due on the note should be applied to the payment of said fine and damages. The by-laws also provided that no member should accept business from new commission men or contractors. The association consisted of 135 members, and each of them, including appellant, signed said by-laws; the appellant was also constituted the director general. Each of the members executed to appellant a note for $5,000, and a contract similar to that executed to him by respondents; appellant indorsed said notes to the association, but it was agreed that none of the contracts should be delivered to appellant until an increase of price had been provided. On April 1, 1925, a meeting of the members of the association was held and a resolution was adopted ordering the board of directors to increase the retail price of a man's suit to $1.50, and at a meeting of said board the next day the increase was made, and thereafter, on April 6, 1925, all of said contracts were delivered to appellant. On April 10, 1925, appellant entered into a contract with said corporation, which is therein alleged to be an association of individuals, firms, and corporations engaged in the business of cleaning and dyeing wearing apparel, etc. By said contract said association employed appellant to give business advice on all problems affecting the cleaning and dyeing industry, and to equip and maintain an office in Los Angeles, the incidental expenses thereof to be paid from the income derived by appellant from the agreement for services with the individual members of the association. Appellant testified that all persons, firms, and corporations engaged in the business of cleaning and dyeing wearing apparel, etc., in Los Angeles and Orange counties, except one firm in Los Angeles county, became members of the association and

signed the by-laws. Appellant also testified that he expended $50,000 under his contract with the Plant Owners' Association of Cleaners and Dyers, of which the sum of $13,000 only has been received by him, leaving the sum of $37,000 still owing him by the association for money expended by him for its benefit; that he was told by the board of directors to sue the individual members upon their contracts to make up this default, and that the purpose of this suit is not to collect damages or salary for his services, but only for the purpose of recovering the money he has paid for the benefit of the association. That the commissions provided for in the individual contracts of the members were considered as dues owing to the association, and were to be used for its benefit. That within six or seven weeks after the price of $1.50 for cleaning and dyeing wearing apparel, etc., was established, a large number of the members cut said price, and thereupon numerous suits were instituted to enforce the provisions of the by-laws, by the imposition of fines and damages.

It is evident that the two main purposes for which this association was formed were to increase prices and eliminate competition. It included in its membership practically all of the cleaners and dyers in the counties of Los Angeles and Orange, and bound its members to be governed in their dealings with the public by price to be fixed by the association, and also bound them to cease competition with each other under heavy penalties.

The trial court held that the contract sued upon in this action violated the provisions of section 1673 of the Civil Code, and was therefore void. Said section provides that "every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void." The exceptions provided by the next two sections have no application here.

[1] Appellant contends that the association had the right to establish a minimum price, so long as that price is not unreasonable and is reasonably necessary to produce a fair profit upon the commodity sold or the services rendered, and in support of its contention cites Herriman v. Menzies, 115 Cal. 16, 44 P. 660, 46 P. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81, but as was said in Meyers v. Merillion, 118 Cal. 352, 356, 50 P. 662, 663, "In the Menzies Case it was held that the contract was not illegal, for it was not shown that it was designed to or did effect a control of business to an extent enabling the contracting firms to exclude competition or control the prices of the commodity."

In Pacific Factor v. Adler, 90 Cal. 110, 27 P. 36, 38, 25 Am. St. Rep. 102, the Supreme Court quoted with approval the following language used in the case of Salt Company v. Guthrie, 35 Ohio St. 672: "It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public." The general principle governing matters of this kind is thus stated in 19 R. C. L. 47: "A combination between independent dealers to prevent competition between themselves is, in the contemplation of the law, an act inimical to trade or commerce, whatever may be done under and in pursuance of it, and although the object of the combination is merely the due protection of the parties to it against ruinous rivalry, and no attempt is made to charge undue or excessive prices, * * * and * * * it is illegal however reasonable the prices fixed by the parties thereto."

In the case of United States v. Trenton Potteries Co., 273 U. S. 392, 47 S. Ct. 377, 379, 71 L. Ed. 700, 50 A. L. R. 989, 995, Justice Stone, delivering the opinion of the court, said: "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed."

[2] The next contention of appellant is that the contract of respondent sued upon in this action is separate and distinct from the contract of the association, and that any illegality of the latter will not render the former unenforceable. The evidence shows that appellant, together with the cleaners and dyers of the counties of Los Angeles and Orange, confederated together to form an association of cleaners and dyers that would include all of those engaged in that business in those two counties; that in furtherance of that design they did form an association that had for its principal objects raising the price of their output and stifling competition; that the main purpose that appellant and respondents had in view, when respondents entered into the contract with appellant, was the accomplishment of said objects. This is evidenced by the fact that prior to entering into said contract, the said association had been formed; practically all

of those engaged in the business of cleaners and dyers in the counties of Los Angeles and Orange had joined the association and had signed the by-laws, and had agreed to cease competition among themselves, and by the further fact that it was agreed that the individual contracts of the members should be withheld and not delivered to appellant until after the prices had been raised. In support of this contention appellant cites several opinions of the Supreme Court, in none of which the facts are similar to those of the case under consideration. In Pacific Wharf, etc., Co. v. Dredging Co., 184 Cal. 21, 192 P. 847, 849, cited by appellant, the court said: "Whether a contract is entire or separable depends upon its language and subject-matter, and this question is one of construction to be determined by the court according to the intention of the parties." And in Poultry Produce Co. v. Barlow, 189 Cal. 278, 208 P. 93, the court held that a promise to do two things, one legal and the other illegal, if the two are so mingled and bound together that they cannot be separated, the whole promise is void. The contract with the association and those with the individual members called for the same services to be performed by appellant. Among other things, those services included price raising and eliminating competition. While portions of said contracts may be said to be legal, they are so interwoven with the illegal parts that they cannot be separated.

[3-5] Appellant claims that section 1673 of the Civil Code does not apply to the industry of cleaning and dyeing, and cites State v. McClellan, 155 La. 37, 98 So. 748, 31 A. L. R. 527, and cases from other jurisdictions in support of this claim. These were under statutes that prohibited combinations in restraint of trade and commerce, and the courts held in those cases that the terms "trade" and "commerce" did not include laundrymen. The said section 1673 is much broader in its terms, for it not only specifies trades, but includes business of any kind. It could not logically be maintained that persons engaged in the industry of cleaners and dyers of wearing apparel were not engaged in some kind of business. Even if respondents did not set up in their answer the defense of illegality of the contract, but the case made by appellant showed its illegality, it became the duty of the court sua sponte to refuse to entertain the action. Dean v. McMerney, 91 Cal. App. 206, 266 P. 975. Parol evidence is always competent to show that a written contract, though lawful on its face, was illegal, or part of an illegal transaction, and the illegality, if serious, need not be pleaded or urged to enable the court to act upon it. 3 Williston on Contracts, 3060; Morey v. Paladini, 187 Cal. 727, 739, 203 P. 760.

Appellant calls attention to Anaheim C. F. Ass'n v. Yeoman, 51 Cal. App. 759, 197 P. 959, 961, which was a co-operative marketing association, formed for the purpose of enabling its members to jointly conduct the operation of harvesting and marketing citrus fruits grown upon land owned by such member. The by-laws which were signed by the stockholders provided that the association should have the sole and exclusive right to pick, grade, pack, and market and sell the citrus fruit raised by the members. The court said: "There is nothing in the articles of incorporation of the plaintiff or its by-laws, or in the evidence of its methods, which tends to show that any purpose of the association was to do acts in restraint of trade or produce an unlawful monopoly." In that case there was no evidence that a price had been fixed at which the fruit was to be marketed, nor any evidence that the purpose or effect of the association was to kill competition. The court held that the authority to form an association for the purposes indicated in that decision is expressly given by the Cartwright Act (St. 1909, p. 593).

We are of the opinion that the evidence produced at the trial of this case clearly shows that contracts entered into by appellant with the association, and with the individual members thereof, were in furtherance of the design to prevent competition in the business of cleaning and dyeing wearing apparel, etc., in the counties of Los Angeles and Orange, and are therefore void, as being in restraint of trade, and tending towards creating a monopoly.

The judgment is affirmed.

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MOORE v. DURRER.

Civ. 4528.

District Court of Appeal, Third District, California.

Nov. 30, 1932.

1. Malicious prosecution ⇐71(2).

In action for malicious prosecution, evidence of lack of probable cause *held* insufficient to take case to jury.

2. Malicious prosecution ⇐56.

In action for malicious prosecution, plaintiff has burden to prove both lack of probable cause and malice.

3. Malicious prosecution ⇐23, 32.

Malice may be inferred from lack of probable cause, but not want of probable cause from malice.

4. Malicious prosecution ⊂⊃71(2).

In malicious prosecution action, that defendant lost suit against plaintiff *held* insufficient evidence of lack of probable cause to take case to jury.

5. Malicious prosecution ⊂⊃64(2).

As regards malicious prosecution, information or facts sufficient to cause reasonable person to honestly believe charge is adequate proof of "probable cause."

"Probable cause" does not depend on the possession of facts which satisfactorily prove the guilt of an accused person, but has reference to the common standard of human judgment and conduct, and is a suspicion founded on circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.

[Ed. Note.—For other definitions of "Probable Cause," see Words and Phrases.]

6. Malicious prosecution ⊂⊃25(2).

In action for malicious prosecution of arson suit, defendant's failure to inform his attorney of district attorney's refusal to prosecute plaintiff *held* not evidence of lack of probable cause.

Refusal of district attorney to prosecute a criminal action against plaintiff was immaterial in determining the merits of a civil suit for damages arising from the charge of arson, since the district attorney may be convinced of the guilt of an accused person and yet refuse to prosecute him because he fears he would be unable to supply evidence which would satisfy the jury of his guilt beyond a reasonable doubt, whereas, in a civil suit for damages, a mere preponderance of evidence is required; and, moreover, the district attorney advised defendant to rely on the advice of his lawyer, who advised him that he had a good cause of action.

7. Malicious prosecution ⊂⊃25(2).

Reliance on attorney's advice is not valid defense to malicious prosecution action, unless defendant fairly and fully relates to attorney all facts affecting plaintiff's guilt, but relation of another attorney's opinion is unnecessary.

8. Malicious prosecution ⊂⊃71(2).

In malicious prosecution action, substantial conflict of evidence regarding probable cause requires submission of facts to jury.

9. Malicious prosecution ⊂⊃71(2).

In malicious prosecution action, where record is substantially uncontradicted, lack of probable cause is law question for court.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by Harry T. Moore, also known as H. T. Moore, against A. J. Durrer. Judgment for defendant, and plaintiff appeals.

Affirmed.

J. Oscar Goldstein, of Chico, for appellant.

Gaddis & McDonald, of Woodland, and James T. Matlock, of Red Bluff, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment which was rendered against the plaintiff pursuant to a directed verdict in an action for malicious prosecution. The sole question is whether the record contains substantial evidence of probable cause justifying the defendant in instituting a civil suit for damages against plaintiff in which he was charged with arson.

The plaintiff is a brother-in-law of the defendant. Plaintiff resides with his family near Beegum Peak in a sparsely settled portion of Tehama county. Within two or three miles of this home the defendant owned a summer cottage valued at $3,000. He resided at Rosewood some distance away. He was engaged in the cattle business. Considerable enmity existed between the plaintiff and defendant. Frank Ball is a stockman and a neighbor who resides in the vicinity of Beegum Peak. He had known both the plaintiff and the defendant for twelve years, and was on friendly terms with them.

On the evening of July 5, 1929, Ball was riding along a trail near the Durrer ranch in search of cattle. He passed the Durrer cottage situated at Old Man's Spring, and observed that the house was standing intact. It was then unoccupied. He rode that way again at 9 o'clock the following morning, and discovered that in the meantime the dwelling house had been completely destroyed by fire. The ruins contained live coals and were still smoking. The gate leading into the premises was open. In closing this gate, Mr. Ball saw the tracks of a man whose feet appeared to have been covered with burlap to conceal their identity. He immediately rode to Rosewood and informed Durrer of the destruction of his house, and the presence of the foot tracks. Durrer was then engaged in driving a band of cattle down to Cottonwood. The date of the occurrence of the fire was definitely fixed as the night of July 5th by recalling that it was the occasion of the birthday of Tony Durrer. The respondent was too busy to personally make an immediate investigation. He asked Roy Owen, a friend who was passing in an automobile, to inform the sheriff at Red Bluff of the fire and send out a representative of that office to investigate the affair. He also sent to the scene of the fire his son Tony Durrer and

Tom Tye, an Indian helper about the stock ranch, whom he described as "the best tracker in the bunch."

The deputy sheriff, Walter Williams, Tony Durrer, and the Indian, Tom Tye, met at the Durrer premises near Old Man's Spring on the evening of July 6th. The following morning these three men made a careful investigation. The footprints of a man whose shoes had been covered with burlap were plainly discernible about the ruins of the cottage and along a trail a distance of 250 yards to the open gate, thence up Coyote Gulch trail to a bunch of redbud bushes, to which it was evident a horse had been recently tied. About this clump of bushes there were many fresh tracks of a barefoot horse with inturned hoofs. The numerous hoof tracks in that vicinity indicated that a horse had stamped about the redbud bushes for some length of time. Near these bushes a bare spot was seen on the ground where some individual had evidently sat to adjust the burlap over his feet. Burlap cords were found at this place. From the clump of redbud bushes a trail of these tracks of a barefoot horse with pigeon-toed hoofs led up the gulch through Dry Lake directly to the corral on the premises of Moore. Similar tracks were observed in the corral. These same tracks also led down the trail from the Moore place to the clump of redbud bushes. Several threads of burlap were discovered clinging to the thorns of bushes along this trail adjacent to the pathway about the height above the ground of the stirrups of a horseback rider.

On July 10th, De Witt Nelson, supervisor of the Trinity National Forest Reserve, at the request of Mr. Strickland, a state forest inspector, accompanied Walter Williams, the deputy sheriff, to interview the appellant, Moore, and to procure plaster-cast molds of the hoof tracks in question. They met Mr. Moore at his home. He was told of the fire and of the tracks which they found about the ruins of the Durrer home. They also informed him of their discovery of the tracks of a pigeon-toed barefoot horse from the redbud bushes both to and from the Moore corral. Mr. Nelson testified that Moore denied burning the building. He admitted the existence of enmity between himself and the respondent. He also admitted that he owned a pigeon-toed mare, but asserted that he had shod the horse on July 6th. That would be the morning after the fire occurred. Subsequently Moore claimed to have shod the mare on July 5th. In the conversation with Nelson and the deputy sheriff, Moore said: "That looks pretty bad for Mr. Moore, doesn't it?" To this admission they agreed. In response to a question regarding Mr. Moore's appearance at the time these incriminating circumstances were related to him, Mr. Nelson said that he looked "like anyone would (who is) guilty of anything or (who is) being accused. He became very nervous in his facial and neck muscles, twitched very badly. Q. Did he appear to be guilty to you at the time, from his actions? A. Yes." This evidence was corroborated by Mr. Williams.

The foregoing facts were related to the respondent during the progress of the investigation. He twice visited the office of the district attorney, Fred C. Pugh, demanding a warrant for the arrest of Moore on a charge of arson. The district attorney refused to permit the issuing of a warrant, saying that the facts were insufficient to assure a conviction of the alleged crime. Mr. Durrer then consulted two lawyers, relating to each of them the foregoing facts. Both lawyers advised him that he had a good cause of action against the appellant for damages for burning the building. The respondent then returned to the district attorney and told him what his lawyers had said regarding the merits of a civil suit for damages. The district attorney did not advise him there was an absence of probable cause to believe that Moore was guilty of the crime. He rather encouraged him to begin the civil suit for damages. He told Durrer that his attorney, "Mr. Matlock was a very capable lawyer and ought to know what he was doing, and to follow Mr. Matlock's advice." The respondent subsequently instituted the suit for damages against the appellant. The material allegations of that complaint were denied. The suit was tried with a jury, and a verdict was rendered in favor of Moore. The following May this suit for damages for malicious prosecution was commenced. At the close of the case, a motion for a directed verdict was granted. From the judgment which was accordingly entered this appeal was perfected.

The appellant contends the record discloses a conflict of evidence regarding the existence of probable cause for the respondent to have believed that Moore was guilty of the alleged crime of arson, and that the cause should therefore have been submitted to the jury on its merits.

[1] We are of the opinion there is an abundance of evidence, without substantial conflict to justify a reasonable person in assuming there was probable cause to believe the appellant burned the respondent's building. The appellant admitted his enmity toward the respondent. He said that he had offered to "shoot it out with him." The property was located in a sparsely settled district. The cottage was unoccupied. It was burned in the nighttime. Tracks of a man's feet covered with burlap to disguise his identity were found about the ruins of the house. These tracks led to a bunch of bushes some distance away, where a barefoot, pigeon-toed horse had been recently tied. The fresh tracks of this horse led along a trail both to and from the very house of the appellant. Shreds from burlap were found clinging to the thorns of bushes adjacent to the trail.

The appellant owned a pigeon-toed mare which he took the precaution to shoe just about the time of the fire. Two witnesses testified that Moore admitted he shod the horse on July 6th, which was the day after the fire. He later insisted that he shod the mare on the 5th day of July. It was the evening of that very day when the fire occurred. Officers and disinterested persons made a thorough investigation of the circumstances, and assured the respondent of their belief in Moore's guilt. When he was confronted with these incriminating facts, the appellant denied his guilt, but admitted that it looked pretty bad for him. These circumstances were related to two lawyers, each of whom advised the respondent that he had a meritorious cause of action for damages against the appellant for burning the building. Certainly these facts furnish strong evidence of probable cause to believe that the appellant committed the crime. Moreover, the burden was on the appellant to prove, not only that the respondent prosecuted the action with malice toward him, but also that the respondent did so without probable cause to believe in the guilt of the appellant.

[2, 3] In a suit for malicious prosecution, the burden is on the plaintiff to prove both lack of probable cause and malice. Lee v. Levison, 173 Cal. 166, 159 P. 438; Randleman v. Boeres, 93 Cal. App. 745, 752, 270 P. 374. While malice may be inferred from a lack of probable cause, the want of probable cause may not be inferred from the mere existence of malice. McKenna v. Heinlen, 128 Cal. 97, 60 P. 668; Vernon v. Plumas Lumber Co., 71 Cal. App. 112, 126, 234 P. 869; Burke v. Watts, 188 Cal. 118, 204 P. 578; Randleman v. Boeres, supra. Assuming that the respondent's enmity against the appellant in the present case furnishes some evidence of malice on his part, that fact alone does not entitle the cause to be submitted to the jury, because the burden was also on the appellant to further prove that the previous action was commenced without probable cause. Potter v. Seale, 8 Cal. 217. Both of these essential elements must be established by the appellant to entitle the cause to be submitted to the jury. One may have malice toward another and still possess facts or information sufficient to justify him in assuming there is probable cause to believe the object of his enmity is guilty of a crime.

[4] The fact that the respondent failed in his original action to recover judgment against the appellant does not create a conflict of evidence regarding the existence of probable cause. In the case of McKenna v. Heinlen, 128 Cal. 97, 60 P. 668, 669, it is said in that regard:

"The testimony is slight, and is substantially without conflict. Plaintiff introduced the pleadings and final judgment in the original action brought by defendant John Heinlen. These documents established the fact of final judgment only, and no inference is to be drawn from the failure of defendant in that action that he had not probable cause to bring it."

[5] Probable cause does not depend upon the possession of facts which satisfactorily prove the guilt of an accused person. It is adequate proof of the existence of probable cause that one is possessed of information or facts which are sufficient to cause a reasonable person to honestly believe the charge is true. Smith v. Liverpool & London & Globe Ins. Co., 107 Cal. 432, 40 P. 540; Booraem v. Potter Hotel Co., 154 Cal. 99, 97 P. 65. In the case of McAfee v. Los Angeles Gas & Elec. Corp. (Cal. Sup.) 9 P.(2d) 212, 214, it is said: "'Where the circumstances are admitted, or clearly proved by uncontradicted testimony, it is the province of the court to determine the question of probable cause and the Court may order a nonsuit.' Potter v. Seale, 8 Cal. 217, 220. See, also, Redgate v. Southern Pacific Co., 24 Cal. App. 573, 141 P. 1191, and cases therein cited. Probable cause has reference to the common standard of human judgment and conduct. Griswold v. Griswold, 143 Cal. 617, 620, 77 P. 672. It is defined as 'a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.' Potter v. Seale, supra; Burke v. Watts, 188 Cal. 118, 204 P. 578; 16 Cal. Jur. p. 738."

In the present case there is but a single circumstance which even tends to create a conflict regarding the existence of a lack of probable cause on the part of the respondent. That circumstance does not furnish substantial evidence which creates a conflict. It is the fact that the appellant finally contended that he shod his horse on the 5th day of July, which is the very day the fire occurred. If this were true, the horse might still have been shod on the night of July 5th after the fire was started. Moreover, there is no evidence the appellant's claim that he shod his horse on July 5th was conveyed to the respondent. Both Williams and Nelson told the respondent that Moore admitted to them that he shod his horse on July 6th. It would not be unreasonable to assume that the appellant shod his horse immediately after setting the fire as a deliberate effort to manufacture a defense in the event that he should be charged with the crime. This circumstance upon which the appellant relies is too remote and unconnected to furnish a conflict of evidence which required the cause to be submitted to the jury on its merits.

The appellant insists that a colloquy which occurred between the respondent and Brophy regarding the arrest of Moore furnishes some evidence of a lack of probable cause. We think not. Brophy, who was called as a witness for the appellant, testified that Dur-

rer told him he thought Moore burned his building and that he proposed to have him arrested. Brophy says that he told Durrer: "I would hardly believe Moore burned the house. * * * I would knock it out with him." To this suggestion the respondent replied, "Moore won't fight." Brophy further testified that he met Durrer after the civil suit was commenced, and told him, "He (Moore) will beat you, I think," to which the respondent replied, "Well, the lawyers have got to have a little money anyhow." This furnishes no evidence of a lack of probable cause. It indicates no lack of good faith. Brophy was not a lawyer. He was a mere layman. He admits that Durrer told him he believed Moore burned his house and that he was going to prosecute him. This is a positive statement of an absolute conviction of Moore's guilt. A reasonable construction of Brophy's suggestion to "knock it out with him" carries the inference that Brophy must have also thought he was guilty. One would not be likely to advise a man to commit bodily violence upon an innocent person. The answers of Durrer to the effect that Moore would not fight, and that the lawyers must have some money anyhow, are mere facetious replies which do not detract from his former positive assertion that he believed Moore burned his building. The replies above quoted merely indicate that Durrer rejected the suggestions of Brophy as unworthy of consideration.

[6, 7] The appellant contends that the advice of respondent's attorney to the effect that Durrer had a meritorious cause of action against Moore furnishes no evidence of probable cause because respondent failed to inform his lawyer that the district attorney had previously refused to permit the issuance of a warrant of arrest on the charge of arson. The refusal to prosecute a criminal action against Moore is immaterial in determining the merits of a civil suit for damages arising from the charge of arson. To create a valid defense to a suit for malicious prosecution on the ground of reliance upon the advice of counsel, it is necessary to fairly and fully relate to the lawyer all the facts affecting the guilt or innocence of the accused person. The mere opinion of some other attorney, regarding the guilt of the accused, is not material. It is not a question of the actual guilt of the accused person, but merely an inquiry as to whether there was reasonable cause to believe him to be guilty. Certainly it is not necessary to include in the statement of facts the refusal of a district attorney to prosecute a criminal action. The conviction of a crime requires proof of guilt beyond a reasonable doubt. A district attorney may be convinced of the guilt of an accused person and yet refuse to prosecute him because he fears that he would be unable to supply evidence which would satisfy the jury of his guilt beyond a reasonable doubt. A civil suit for damages for burning a building depends upon a mere preponderance of evidence. The district attorney advised the respondent in this case to rely upon the advice of his lawyer. This indicates that he thought the facts furnished sufficient evidence to support a judgment in a civil suit for damages. At least this failure to inform his attorney of the refusal to prosecute the criminal action furnishes no evidence of a lack of probable cause. It was not necessary that Durrer should believe that he could prove Moore's guilt beyond a reasonable doubt. It is only necessary that he honestly believed that he maliciously burned the building.

[8, 9] Where there is a substantial conflict of evidence regarding the necessary element of probable cause, the facts should be submitted to the jury for its determination. It is the sole province of the trial court, however, to determine as a matter of law, when the record is substantially uncontradicted, whether the facts do or do not establish a lack of probable cause. Booraem v. Potter Hotel Co., 154 Cal. 99, 97 P. 65. If the plaintiff, in a suit for malicious prosecution, fails to sustain the burden of proving that the former action was commenced without probable cause to believe the truth of the charge therein contained, a motion for a directed verdict may properly be granted. In the present case there is an utter failure to prove a lack of probable cause. Upon the contrary, the record is convincing that the respondent did have probable cause to believe, and honestly thought, the appellant had maliciously burned his dwelling house.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

[27 Cal.App. 669]

LA LIBERTY v. LA LIBERTY.

Civ. 997.

District Court of Appeal, Fourth District, California.

Nov. 23, 1932.

1. Husband and wife ⇐34.

Evidence *held* to sustain finding that wife was not in need of independent legal advice at time contract was executed transferring her property to herself and husband as joint tenants in accordance with prenuptial agreement.

2. Husband and wife ⇐29(4).

Promise to marry which is subsequently kept is sufficient consideration for marriage settlement.

3. Husband and wife ⇐272(4).

In action for partition by husband against wife, evidence of attack made upon wife three days after she met husband and two years before they were married *held* inadmissible.

4. Trial ⇐382.

It is duty of trial court to pass upon weight and sufficiency of evidence, and credibility of witnesses.

5. Appeal and error ⇐1011(1).

District Court of Appeal cannot disturb trial court's findings because of conflicts in evidence.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by George A. La Liberty against Bertha C. La Liberty. From an adverse judgment, defendant appeals.

Affirmed.

Porter C. Blackburn and John L. Bland, both of Los Angeles, for appellant.

Dockweiler & Dockweiler & Finch, of Los Angeles, for respondent.

MARKS, J.

This is an action brought by respondent for the partition of four lots in the city of Los Angeles, in which he alleges he and appellant each owned a one-half interest. The parties are husband and wife and both are of mature age. They became acquainted in February or March, 1921, were married in January, 1923, and separated in 1926. They had both been previously married; respondent once, and appellant twice.

In August, 1922, appellant purchased two of the four lots in question here and had them conveyed to herself. During the same month she arranged to acquire, under an executory contract of purchase and sale, the two additional lots which are the subject of this action. This was about five months before her marriage with respondent. The purchasers named in the contract were "George A. La Liberty and Bertha C. La Liberty, his wife, as joint tenants with right of survivorship." The purchase price of the lots was fully paid before this action was instituted.

Shortly after her marriage to respondent, appellant deeded the two lots which had been granted to her in August, 1922, to S. A. Durfee, who immediately reconveyed them to "Geo. A. La Liberty and Bertha C. La Liberty, his wife, as joint tenants." Appellant alleged in her answer that the joint tenancy deed was executed by Durfee pursuant to her instructions. She also alleged that this transaction was consummated "so as to constitute plaintiff an owner" of the property in joint tenancy with her.

By an instrument dated December 1, 1923, the parties hereto leased the property in question to the Julian Petroleum Corporation for a term of five years commencing January 1, 1924, and received from it a substantial monthly rental. All parties signed this lease.

By a deed dated November 20, 1928, respondent conveyed a one-half interest in the four lots to Elizabeth M. La Liberty, his sister, who reconveyed to him on the following day.

Respondent instituted this action seeking a partition of the four lots, and the money in a joint bank account in which the rental from them had been deposited. Appellant in her answer asserted title in the real property and the money in herself and sought to escape the legal effect of the contract of purchase of the two lots, and the deeds to the two others, because of the alleged fraud and undue influence on the part of respondent. The trial court with great particularity found all issues in favor of respondent and against appellant and ordered a partition of the property and a division of the bank account.

The findings clearly show that the trial court was of the opinion that appellant desired to marry respondent, and to secure his consent, and prior to their marriage, agreed to convey to him a one-half interest in the real property in question, and that she carried out her part of this contract in the manner already indicated.

Appellant attacks the findings and interlocutory judgment as not supported by the evidence and as contrary to the evidence. She bases this contention chiefly upon the confidential relations that exist between husband and wife and the care which the courts will scrutinize transactions between them.

The reporter's transcript contains more than one thousand pages, but no good purpose could be served in detailing here the voluminous evidence on this question. It is sharply

conflicting on this as well as on almost every other issue presented. However, there is ample evidence in the record to support the findings.

Appellant was left about $15,000 by her second husband. By careful and shrewd investments she had largely increased this amount during the six years that intervened between his death and her marriage to respondent. She had bought and sold real estate, showed a keen judgment of present values and sound estimates of future increases in values. At the time of her marriage to respondent, though her health was not the best, she apparently possessed good business judgment in most matters and in making investments in various properties and in managing them.

It must be borne in mind that the contract which appellant now attacks was not one made between husband and wife, but was a prenuptial agreement made in contemplation of marriage. The executory contract for the purchase of the two lots was made more than five months prior to the marriage and was signed by appellant, not with her then name, but with the name which she expected to acquire with her future husband. It described the purchasers as then married. The conveyance of the other two lots by appellant to Durfee and his reconveyance of them to the parties to this action was done to carry out part of the prenuptial agreement. The undenied allegation in appellant's answer that the reconveyance by Durfee was executed "pursuant to instructions from defendant" was undoubtedly an important factor in leading the trial judge to the conclusion that the entire transaction was free from fraud and was a voluntary act on the part of appellant, done in the performance of her prenuptial agreement.

The inferences of fraud and undue influence which require the courts to carefully examine a contract between a husband and wife, where one has gained an advantage over the other, do not necessarily apply to prenuptial contracts made when the marriage relation did not exist. The rules governing the interpretation of such marriage settlements are set forth in 13 California Jurisprudence, p. 809, as follows: "Contracts or conveyances in contemplation of marriage, whereby property is promised to or settled on either or both of the parties, by either or both of the parties, or by a third party, and contracts whereby either or each of the parties releases or modifies, or agrees to release or modify, his or her property rights are called marriage settlements or contracts. Under the code and Practice Act, parties contemplating marriage have an unlimited right, in the absence of fraud or undue influence, to make before the marriage whatever stipulations in respect to property in esse or to be acquired they may agree upon. An agreement changing the character of property from separate to community or from community to separate may be made prior to and in anticipation of marriage, as well as afterwards. Marriage or a promise to marry is a sufficient consideration for a marriage settlement, unless the marriage is one prohibited by law. But as a promise of the grantee to live with the grantor during their joint lives is included in the marriage contract itself, it is of no consequence, and a violation thereof does not entitle the grantor to reconveyance of the property. * * * 'Marriage settlements made after marriage, unless in pursuance of ante-nuptial articles or agreements, are simply contracts between husband and wife.'"

[1] Appellant devotes much space in her brief to arguing that she "was entitled to have the benefit of independent legal advice at the time she made the transfer of her property to her husband without which the transaction was void" and that "the conduct of respondent clearly indicates a desire on his part to acquire appellant's property without consideration." What we have already said concerning the agreement to convey the property being a prenuptial agreement entered into between the parties freely and without any fraud or undue influence on the part of respondent should be considered a sufficient answer to both these contentions. However, she urges that respondent was an attorney at law and as such did not advise her of the legal effect of her deed to Durfee and his deed of reconveyance. It is true that respondent was admitted to practice law in Michigan in 1903, but abandoned it after a few years, and has not been admitted to the bar in California. Appellant had signed and received numerous deeds and had held property in joint tenancy with another. There is ample evidence to support the trial court's conclusion that she knew what she was doing when the conveyance was made by her and the reconveyance was later made by Durfee, and was not in need of independent legal advice at that time.

[2] The trial court found against appellant's second contention that the conduct of respondent indicated a desire to acquire her property without consideration. While the record would have supported a contrary finding, there is ample evidence to support the one made. There are letters in the record written by appellant to respondent between September 9, 1924, and March 26, 1926, which was during their marriage, indicating that a reasonable affection existed between them and that they were enjoying an ordinarily happy married life. Appellant did not leave respondent until sometime in 1926. A promise to marry which is subsequently kept is sufficient consideration for a marriage settlement. Barnes v. Barnes, 110 Cal. 418, 42 P. 904.

Appellant complains of a number of the rulings of the trial court on the admissibility of certain evidence. There is no prejudicial

error in any of these rulings. The lack of substantiality in appellant's position may be illustrated by a discussion of two of them.

Respondent kept a diary more than ten years prior to and during the time of his marriage with appellant. Appellant offered the entire diary in evidence. Respondent objected to its introduction as too inclusive and as covering times and matters not material to the issues of the case. However, it clearly appears that counsel for respondent was willing to have any material portion of the diary introduced, had it been offered. Further, appellant had free use of the diary in her cross-examination of respondent.

[3] Appellant desired to testify to an alleged attack made upon her about three days after she met respondent and almost two years before they were married. She complains because the trial court excluded this evidence. If such an attack took place, it should have had the effect of putting her on her guard in her future dealings with respondent. We cannot see how this evidence could be admissible under any theory.

[4, 5] The remaining grounds which appellant urges for a reversal of the judgment all question the sufficiency of the evidence to support the findings. The evidence is sharply conflicting, but there is competent evidence in the record to support the findings. It is the duty of the trial court to pass upon the weight and sufficiency of the evidence and the credibility of the witnesses. We cannot disturb its findings simply because of conflicts in the evidence.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

127 Cal.App. 681

ALVERNAZ v. H. P. GARIN CO.

Civ. 8381.

District Court of Appeal, First District, Division 1, California.

Nov. 26, 1932.

Rehearing Denied Dec. 24, 1932.

1. Sales ⇐81(5).

In contract to buy grower's tomatoes, provision that time of harvesting crop, both commencing and ending, should be entirely up to buyer, did not entitle buyer to determine beginning or end of season (Civ. Code, § 1643).

Provision in question, when read in connection with remainder of clause and succeeding paragraph of contract, showed that intention was to allow buyer to advise grower when, as a matter of good husbandry, crop should be picked and delivered, but not to give buyer right arbitrarily to refuse deliveries which met requirements of contract.

2. Sales ⇐81(5).

In contract to buy grower's tomatoes, provision entitling buyer to determine time of harvesting crop should be read with remainder of clause and succeeding paragraph (Civ. Code, § 1643).

3. Sales ⇐383.

Respecting damages for breach of contract to buy grower's tomatoes, where buyer refused to accept further deliveries, merely reasonable certainty was required as regards quantity of tomatoes remaining unpicked.

4. Sales ⇐381.

In action for breach of contract to buy grower's tomatoes, grower need not prove that undelivered ripe tomatoes conformed to statutory standards; statute not preventing grower from selling and delivering vegetables unpacked and unmarked to packers as part of crop in bulk (St. 1927, p. 1880, § 36; p. 1851, § 13, as amended by St. 1929, p. 108, § 7).

5. Sales ⇐437(1).

Warranties not pleaded cannot be relied on to support either action or defense.

6. Sales ⇐439.

Person relying on warranty has burden of proving breach.

7. Trial ⇐140(1), 143.

Witnesses' credibility and weight to be given conflicting testimony *held* for jury (Code Civ. Proc. § 1847).

8. Appeal and error ⇐1002.

Jury's finding on conflicting testimony, being supported by sufficient evidence, cannot be disturbed on appeal (Code Civ. Proc. § 1847).

9. Trial ⇐349(2).

Submission of special issues to jury is discretionary with court.

10. Trial ⇐121(2).

In action against corporation for breaching contract to buy grower's tomatoes, argument accusing corporation of unfairness because of noncompliance with contract *held* justified under evidence.

11. Appeal and error ⇐1060(1).

In action against corporation for breaching contract to buy grower's tomatoes, unsupported argument asserting necessity of compelling buyers and canners of produce to deal fairly with producers *held* harmless.

Appeal from Superior Court, Santa Clara County; Robert R. Syer, Judge.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Action by Frank P. Alvernaz against the H. P. Garin Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

David M. Burnett and John M. Burnett, both of San Jose, and Vincent H. O'Donnell, of San Francisco, for appellant.

Owen D. Richardson and Thomas R. Dougherty, both of San Jose, for respondent.

PER CURIAM.

The above action was brought to recover for the alleged breach of a contract to purchase all the green and ripe tomatoes grown by plaintiff on thirty acres of land.

The plaintiff was referred to in the contract as the grower, and defendant corporation as the buyer and shipper.

The action was tried before a jury, which returned a verdict for the plaintiff in the sum of $1,600.50, and defendant has appealed from the judgment entered thereon. As grounds therefor it is claimed that there was no evidence of a breach of contract and that the verdict for damages is unsupported. Appellant also complains of certain rulings and instructions by the trial court and alleges that plaintiff's counsel were guilty of prejudicial misconduct.

Under the contract—which was executed on January 30, 1930—plaintiff agreed to plant the land mentioned with tomatoes during that year, and the instrument, among other provisions, contained the following:

"All green tomatoes delivered under this contract shall be of first class merchantable condition, free of frost and rain damage and fit for eastern markets, and passed as grade U. S. No. 1 by the inspector of the State of California, Department of Agriculture.

"The grower shall deliver all ripe tomatoes under this contract to buyer and shipper, and he shall sell at the going price set by the canners of ——— per ton f.o.b. roadside. All ripe tomatoes shall be picked and delivered to cannery in accordance with their contract.

"The time of harvesting said crop, both commencing and ending, shall be entirely up to the shipper, and he will at all times have his agents and representatives keep in close touch with the grower so as to post him as to growing * * * packing and delivery of the same.

"The grower shall receive under this contract the price of 40 cents per pack-out lug from commencement of season to October 1st of same season guaranteed, and 50 cents per pack-out lug after October 1st guaranteed to the finish of the season. Should the eastern markets warrant the payment of more the shipper will advance price in accordance with going f.o.b. sales but never less than the above mentioned prices."

"All cull tomatoes not fit to ship either green or ripe shall be disposed of by the buyer and shipper to the best of his ability, and shall pay grower in accordance with the prices paid for same."

The complaint alleged that during the months of August, September, and October, 1930, defendant refused to accept of the crop 140 tons of ripe tomatoes, the growing price for which set by the canners was $15 per ton, and that plaintiff in an effort to minimize his damage in this respect sold a portion of the same for $1,492.36; further, that defendant refused to accept or dispose of the culls, and in November, 1930, refused to accept further deliveries under the contract, by reason of which refusal approximately 100 tons of tomatoes rotted in the field.

The testimony shows that plaintiff was notified by defendant early in August that no more ripe tomatoes would be received. During the season the latter received and paid for about 87½ tons of green tomatoes, but between November 10 and 15, 1930, ceased to accept deliveries, and on November 17, 1930, by letter gave notice in substance that no more tomatoes would be received. On these dates, according to plaintiff and his witnesses, there remained between 75 and 100 tons unpicked. It appears that there was some frost in the neighborhood previously, but the testimony sufficiently shows that the tomatoes received no injury therefrom. It was also shown that the amount of ripe tomatoes sold by plaintiff in his effort to reduce his damage and the sum received therefor were substantially as alleged in the complaint.

In this connection, as shown by the contract, defendant agreed to pay for ripe tomatoes "the going price set by the canners * * * f.o.b. roadside." Defendant claims that no price was fixed for the variety grown by plaintiff, namely, Stone tomatoes; that the price actually fixed at the commencement of the season, which was $15 per ton, was for canning tomatoes, a different variety, and that the prices received by plaintiff for those portions of the crop which he sold to the canners (and which prices were less than $15 per ton) were the going prices for Stone tomatoes; and that in this particular plaintiff suffered no damage.

[1, 2] While the record contains testimony by its witnesses tending to support defendant's contention, nevertheless the contract contemplated a sale of the ripe tomatoes for canning, and the evidence shows that portions were sold and used for that purpose. Whether the variety of tomatoes raised by plaintiff was included in the price of $15 per ton fixed by the canners is by no means clear from the evidence; but the cir-

cumstances shown, together with the testimony, were sufficient to support that inference. According to defendant's interpretation of the contract, the provision therein that "the time of harvesting said crop, both commencing and ending, shall be entirely up to the shipper * * *," gave the right to the shipper to determine when the season should begin and end. We cannot agree with this view. The provision should be read in connection with the remainder of the clause and the succeeding paragraph, the clear intention being to allow the shipper to advise the grower when as a matter of good husbandry the crop should be picked and delivered, but not to give the shipper the right to arbitrarily refuse deliveries which met the requirements of the contract.

A contract must receive such interpretation as will make it reasonable. Civ. Code, § 1643; 6 Cal. Jur., Contracts, § 169, p. 271. Here the interpretation urged by defendant would render the contract unreasonable and unfair, and its language does not require such interpretation.

Appellant further claims that the evidence was insufficient to show the quantity, if any, of the unpicked tomatoes which were of the grade required by the contract.

[3] There was testimony showing that no damage was done to the tomatoes by frost until near the 1st of December. While, as testified, there were one or two light frosts about November 1st, these did no more than injure the leaves on the vines. According to the contract green tomatoes were to be in first-class merchantable condition, free from worms, frost, and rain damage, fit for eastern markets and passed as grade United States No. 1 by the inspector of the department of agriculture. The evidence, as stated, sufficiently shows that no material damage was caused by frost, and no damage by worms or rain is claimed. According to the testimony the term "grade U. S. No. 1," used in the contract, meant a tomato which was solid and smooth, without blemishes and properly matured, maturity meaning about to ripen. The quantity of such tomatoes was testified to, the estimates being in excess of the amount impliedly found by the jury. The detriment in cases of this character cannot always be measured with mathematical accuracy; but, as has been frequently held, reasonable certainty only is required (Holt Mfg. Co. v. Thornton, 136 Cal. 232, 68 P. 708; McConnell v. Corona City Water Co., 149 Cal. 60, 85 P. 929, 8 L. R. A. (N. S.) 1171; Sobelman v. Maier, 203 Cal. 1, 262 P. 1087), and we are satisfied that the conclusions of the jury were fairly sustained by the evidence.

With respect to the culls, which defendant agreed to dispose of to the best of his ability, the record discloses that these were returned to plaintiff, who sold a portion to the canneries. Whether the defendant had the ability to dispose of the same is not clear; but regardless of this the quantity of green and ripe tomatoes which complied with the contract and which defendant refused to accept was sufficient without this item to justify the damages allowed by the jury.

It is suggested that no effort was made by plaintiff to minimize his loss with respect to the green tomatoes which remained unpicked, but the evidence sufficiently shows that there was no market for these after defendant's refusal to accept further deliveries.

[4] Defendant complains of the court's refusal to instruct the jury that plaintiff must prove that the ripe tomatoes which it failed to receive conformed to the standard provided by section 36 of the California Fruit, Nut and Vegetable Standardization Act of 1927; but, as provided by section 13 of the act, its provisions are not to be construed to prevent a grower of vegetables from selling and delivering the same unpacked and unmarked as a part of his crop in bulk to a packer; and said section 36 only requires tomatoes to conform to the standard therein provided when the same are sold in any container or subcontainer (Stats. 1927, p. 1845; Stats. 1929, pp. 102, 108). In view of these provisions the refusal of the instruction was proper.

[5, 6] Another instruction offered by defendant stated that plaintiff must prove that the tomatoes not received were sound and merchantable, this being the warranty implied under the provisions of section 1768 of the Civil Code (before its repeal in 1931 [St. 1931, p. 2234]). A breach of warranty was not alleged by defendant. It is the rule that warranties not pleaded cannot be relied upon either in support of an action or as a defense (Kullman, Salz & Co. v. Sugar, etc., Mfg. Co., 153 Cal. 725, 96 P. 369; American Steel Pipe, etc., Co. v. Hubbard, 42 Cal. App. 520, 183 P. 830), and the burden of proving a breach rests upon the party relying upon a warranty. 55 Cor. Jur. p. 837; Waltz v. Silveria, 25 Cal. App. 717, 145 P. 169; Edson v. Mancebo, 37 Cal. App. 22, 173 P. 484. For these reasons the instruction was properly refused.

[7, 8] As stated, there was sufficient evidence to support the conclusion that the tomatoes were in accordance with the contract; and while there was conflicting testimony the weight to be given thereto and the credibility of the witnesses were questions for the jury (Code Civ. Proc. § 1847), and their implied finding against appellant's contention cannot be disturbed.

A third instruction offered was modified. As modified it stated the substance of the

instruction offered, and the same is true of a fourth instruction, which was also modified. Neither as given was erroneous or prejudicial and both fairly stated the law.

[9] Defendant also requested that special findings be made by the jury, and a refusal is assigned as error. The submission of special issues is discretionary, and no abuse of discretion has been shown. In re Estate of Witt, 198 Cal. 407, 245 P. 197.

[10, 11] Plaintiff's counsel in the course of his argument to the jury accused defendant of unfairness by reason of its failure to comply with its contract. There was further reference to the necessity of compelling buyers and canners of produce to deal fairly with producers. The remarks were assigned as misconduct.

In view of the evidence the first part of the argument was fairly justified, and the reference to buyers and canners generally, while not supported by the evidence, cannot reasonably be said to have been prejudicial to a degree which requires a reversal of the judgment.

The verdict finds reasonable support in the evidence, and no error has been shown which can fairly be said to have resulted in a miscarriage of justice.

The judgment is affirmed.

127 Cal.App. 623

PEOPLE v. TOWELL.

Cr. No. 2239.

District Court of Appeal, Second District, Division 2, California.

Nov. 22, 1932.

1. Rape ⇐51(4).

Evidence *held* to show requisite degree of resistance to sustain conviction for rape (Pen. Code, § 261, subd. 3).

2. Criminal law ⇐741(1), 742(1).

It was trial court's exclusive province to determine credibility of witnesses, weight of their testimony, and facts proved (Const. art. 6, § 4).

3. Criminal law ⇐1134(2).

Propriety of conviction on evidence before jury becomes question of law within competence of appellate court only when there is clear failure of proof (Const. art. 6, § 4).

4. Courts ⇐95(1).

Decisions from other jurisdictions, while persuasive when they follow, in all essentials, case under consideration, are not controlling when law in state is well settled.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Haskell Towell was convicted of rape, and he appeals.

Affirmed.

Earl D. Killion, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

CRAIG, J.

[1-4] The appellant was charged by information with the crime of rape as defined by subdivision 3, § 261, of the Penal Code. The sole grounds assigned for reversal of the judgment are that the testimony of the prosecutrix, corroborated by that of a physician, a peace officer, and admissions of the defendant and three of his witnesses, was inherently improbable and insufficient to establish that degree of resistance requisite to conviction for the alleged offense. There was much substantial evidence of continuous outcries and struggles in efforts to escape from the defendant prior to the commission of the offense and of the flight of the prosecutrix thereafter, which, together with uncontradicted physical facts, cannot be considered as raising merely such a conflict with the defendant's testimony as might be held as a matter of law to have left a reasonable doubt of guilt. Argument on behalf of the appellant is devoted principally to interpretations of the testimony in the light of asserted inconsistencies, and to casting doubt upon its truth in numerous instances. But it lay exclusively with the trial court to determine as to the credibility of the witnesses, the weight to be given to their testimony, and of the facts proved. "This court has appellate jurisdiction in criminal cases on questions of law alone (Const. art. 6, § 4); and the propriety of conviction on the evidence before a jury becomes a question of law, within the competence of this court, only when there is a clear failure of proof (People v. Smallman, 55 Cal. 185)." People v. Kuches, 120 Cal. 566, 52 P. 1002, 1003. Decisions from other jurisdictions cited by the appellant, while persuasive when they follow in all essential features the case under consideration, are not controlling when the law in this state is well settled. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513. The appellant has not directed attention to error requiring a reversal upon the record presented.

The judgment and order denying a new trial are affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

GENERAL PETROLEUM CORPORATION OF CALIFORNIA v. LOUGHEAD et al.*

Civ. 8589.

District Court of Appeal, First District, Division 1, California.

Dec. 2, 1932.

Rehearing Denied Dec. 31, 1932.

Hearing Granted by Supreme Court Jan. 30, 1933.

1. Injunction ⇐16.

Equity court will not exercise extraordinary power of injunction where plain, speedy, and adequate remedy at law exists.

2. Injunction ⇐59(1).

Where employment of petroleum corporation's employees allegedly terminated on any violation of agency agreement for operating service station, corporation *held* not entitled to enjoin employees from selling competitor's products and maintaining competitor's signs and colors on premises.

3. Specific performance ⇐73.

Equity court will not specifically enforce contract to render personal services.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by the General Petroleum Corporation of California against S. W. Loughead and another, doing business as Baer & Loughead as proprietors of the Cupertino Service Station. Judgment for defendants, and plaintiff appeals.

Affirmed.

A. L. Weil and Glikbarg & Wolf, all of San Francisco (Paul T. Wolf and Martin J. Weil, both of San Francisco, of counsel), for appellant.

Louis Oneal, of San Jose, and H. D. Durst, of Long Beach, for respondents.

STROTHER, Justice pro tem.

Plaintiff was operating a "service station" in the town of Cupertino in Santa Clara county, for the sale of its products. The buildings and equipment on the premises were painted in the distinctive colors used by it in advertising those products. Plaintiff entered into a contract with defendants by which the latter were employed by it as its agents for the storage and sale of such products in the Cupertino service station for a term of years, or "so long as defendants complied with the terms of said agency agreement."

Shortly before the commencement of this action, in violation of their employment, defendants quit selling plaintiff's products, and began storing and selling the products of another concern, and repainted the buildings, etc., on the service station premises with colors and advertising of such products.

This in brief is a statement of all the material facts set out in the complaint. The prayer of the complaint was for an injunction restraining the defendants from storing or selling on the premises any other than plaintiff's products, and from placing or maintaining any other than plaintiff's signs and colors on the premises, and requiring them to restore the premises to their original condition. A demurrer of defendants to the complaint was sustained, plaintiff refused to amend, and judgment was rendered against it, from which it appeals.

It may be further stated that it appears from the complaint that plaintiff is holding as lessee of the premises, from the defendants. Appellant's argument in this case is founded entirely on the case of General Petroleum Corp. v. Beilby, 213 Cal. 601, 2 P.(2d) 797, 798, a parallel case to the present one except that there were two parties defendant, not the agents of plaintiff, but contracting to sell competing products to the agent defendants. In the opinion in the Beilby Case the court used the following language, which appellant conceives to be conclusive in this case: "A meritorious prima facie case for injunctive relief was pleaded."

The merits of the Beilby appeal were never presented to nor considered by the Supreme Court, and the quoted statement was an obiter dictum. The case came before the court on a motion to dismiss the appeal upon a showing that the plaintiff and the appellants who were actually affected by the injunction granted by the trial court, being the agents in physical possession of the premises, had composed their differences, and the questions raised had become moot. The dismissal was opposed by the other defendants, who were merely aiding and abetting the principal defendants in the violation of their employment.

[1, 2] A court of equity will not exercise the extraordinary power of injunction where the party has a plain, speedy, and adequate remedy at law. The defendants in this case were mere employees of the plaintiff, and by the express terms of their employment, according to the allegations of the complaint, their employment was terminated. If they refused, upon demand, to give up possession of the premises, plaintiff could avail itself of the extraordinarily speedy remedy of an action for unlawful detainer.

[3] This action has the appearance of having been instituted for the purpose of enforcing, by indirection, the specific performance of a contract to render personal services, to which a court of equity will not lend its aid.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

*For subsequent opinion see 24 P.2d 457.

128 Cal.App. 44

PEOPLE v. HARRIS.

Cr. 1233.

District Court of Appeal, Third District, California.

Dec. 5, 1932.

Rehearing Denied Dec. 20, 1932.

1. Embezzlement ⇐44(6).

In prosecution for grand theft, evidence disclosing that money placed in defendant's hands constituted trust fund and that defendant embezzled such money by converting same *held* to support conviction under three counts.

2. Embezzlement ⇐44(6).

In prosecution for grand theft, evidence *held* insufficient to support conviction under one count in information.

3. Criminal law ⇐829(1).

Instructions requested by accused were properly refused where substantially covered by instructions given.

4. Criminal law ⇐786(2).

In prosecution for grand theft, instruction in substance that jury should not disregard testimony of defendant because he stands charged with crime *held* improper.

Instruction to effect that jury had no right to disregard testimony of defendant on the ground that he stands charged with the commission of a crime was improper, because jury should fairly and impartially consider his testimony, together with all other evidence in the case, and because trial court should not single out the testimony of the defendant and instruct with particular reference thereto.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

G. H. Harris was convicted of grand theft upon an information in four counts, and he appeals.

Affirmed in part, and reversed in part.

Fontaine Johnson and George E. Foote, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant was convicted of grand theft upon an information in four counts charging that on the 14th day of August, 1931, he took the property of O. G. Gould, consisting of $250. Second count is to the effect that the defendant, on the 22d day of September, 1931, took the property of R. J. Reilly, consisting of the sum of $250. The third count charges that on the 25th day of August, 1931, the defendant took $200, the property of one Dave Ogilvie. The fourth count charges that on the 14th day of August, 1931, the defendant took the sum of $250, the property of L. A. Hallstron. The defendant's motion for a new trial being denied, an appeal is prosecuted therefrom, and from the judgment of conviction.

The record shows that the defendant was conducting gasoline filling stations in the city of Sacramento; that in the conduct of said business he required the above-named persons as employees to deposit with him the sums of money mentioned in the information. The defense is that the money so deposited with the defendant was a loan, and not placed in his hands as security for honest actions on the part of the employees in accounting for sales of gasoline and oil.

Upon this appeal the appellant contends that the evidence is insufficient to support the verdict, in that it does not prove that the appellant was acting as an agent of the prosecuting witness, or that he obtained and held the money in a trust capacity, or that the money did not belong to the defendant; and, further, it does not show that he converted it to his own use in violation of the trust.

In order to determine whether there is any merit in the appellant's contention, it has been necessary to read the entire testimony set forth in the transcript, which, of course, cannot be incorporated into this opinion. There is nothing in the transcript which shows that the appellant was seeking a loan of money, nor does it appear that any of the prosecuting witnesses who became his employees after advancing the sums of money mentioned, were in the business of loaning money, though one of the employees did subsequently loan the defendant some money.

The method adopted by the defendant, upon the employee advancing the money required by him to be advanced, was to execute and deliver to the employee a promissory note, one of which is in the following words and figures, and is a sample of all of them, save that the words "to be held as a security bond" appeared on the face thereof with a line drawn through those words, to wit:

"September 27, 1931.

"Six months after date, without grace, I promise to pay to the order of R. J. Reilly Two hundred and Fifty ($250.00) Dollars, for value received, with interest from date at the rate of 8 per cent. per annum until paid, principal and interest payable in lawful money of the United States, at Ali Service Station, and in case suit is instituted to collect this note, or any portion thereof, I promise to pay such additional sum as the court may adjudge reasonable as attorneys' fees in said suit.

"[Signed] G. H. Harris."

The testimony of Mr. Reilly is substantially the same as that of the other witnesses, save in the particulars which we will later indicate: "R. J. Reilly, being sworn, testified as follows: Q. Just explain to the court and jury the nature of the business transaction? A. Well, I went out to see Mr. Harris about a job and he said 'I have to have $250.00 as security for this job.' I said, 'Well, what is that for?' He said, 'That is for the money in the cash register.' He said, 'That is to protect me and to protect you.' So I thought it over a little while. * * * I told him I would take the job. I had American Express Traveler's checks and gave him $260.00 in Traveler's checks, and he made out a slip of paper for $250.00; said he had no change and would send the other $10.00 over to me. I got my $10.00 back; in the meantime, on the 14th, I went over there, the 14th of October, and told him I was going to quit and I wanted all my money and wages, too. 'Well,' he says, 'I will have some money for you tonight.' So I went back over there, and that night he went over and gave me $68.00; that was part of the wages and money that I invested out of my own pocket for gasoline. I made a demand for my $250.00. I never got it back."

The promissory note above set forth was identified by the witness as the one given to him by Harris.

Dave Ogilvie, being duly sworn, testified as follows: "Well, I went over to Mr. Harris, and the transaction was agreeable to Mr. Harris and myself. He said I would have to put up $250.00. I asked him what for and he made the statement that it was a protection for him because he had had a man skip out before with money from other service stations. Well, I made the statement to Mr. Harris that I did not have $250.00; all I had was $200.00, and Mr. Harris said to me, "Well, the way to get around that, you assign me your first two weeks' salary, $50.00, and that will make it $250.00.' I went to work at the Spanishtown Service Station on Franklin Boulevard, and was there two weeks, when Mr. Wilson brought a note over for $250.00 and gave it to me. It was on the 13th of September when I went over to Mr. Harris. I was not satisfied with it and tried to get my money out of it. I paid Harris $200.00 in cash. The money has never been returned to me." The note given by Harris to this witness is similar to the note hereinbefore set forth, differing slightly only in its wording.

L. A. Hallstron, being duly sworn as a witness in behalf of the people, testified as follows: "I went out to see Mr. Harris in regard to a job, and Mr. Harris told me that he wanted $250.00 as a security bond, as a man had just left with $300.00 about a week previous to that time, and he was not going to take any chances of anybody running off with the cash register and the receipts, and I asked Mr. Harris if it would not be all right to do it with a Bonding Company or put the money in escrow with a bank, or some similar manner, and he told me no; he said, 'The reason I want this cash security bond is, it is your own money and you will work harder for me, and you know if anything—you won't dare to touch any of my receipts. You know if anything goes wrong, I have that security bond of yours to hold.'" This witness had demanded the return of the money, but had never received it.

It appears that the appellant, subsequent to the employment of this witness, signed the following instrument which was drawn up by the witness: "Sacramento, California, August 14, 1931. Agreement by and between L. A. Hallstron and G. H. Harris & Sons. To whom it may concern: Received of L. A. Hallstron $250.00 in cash as per advertisement in the Sacramento Bee, dated August 13, 1931, the aforementioned amount, $250.00 to be held as a security bond (with a line drawn through the words 'to be held as a security bond'), and to be paid back in full to L. A. Hallstron, or beneficiaries, with 8 per cent. interest per annum at the expiration of 6 months from date, or at the time L. A. Hallstron severs connection with G. H. Harris & Sons as service station operators, payable on sight. [Signed] G. H. Harris & Sons, by G. H. Harris; L. A. Hallstron. Witness: Sam W. Lytle."

It appears that in the transaction a note signed by G. H. Harris & Sons, by G. H. Harris, was given this witness, reading as follows: "To whom it may concern: Received from L. A. Hallstron $250.00 in cash, as per advertisement in the Sacramento Bee dated August 13, 1931. The aforementioned amount, $250.00, to be held as security bond (with a line drawn through the words 'to be held as security bond'), and to be paid back in full to L. A. Hallstron, or beneficiaries, with 8 per cent. interest per annum, at the expiration of 6 months from date, or at the time L. A. Hallstron severs connection with G. H. Harris & Sons as a service station operator. Q. I see 'to be held as a security bond' is crossed out? A. Yes. Well, he said he was having his attorney draw up a regular security bond for the protection of us all, and that he would bring me out one in a few days, and would take this back instead of that, but he said he would sign that; he didn't want to sign it but he finally conceded, provided he could draw a line through 'security bond.' He said he wanted a security bond all right, but he said he didn't want it worded just like that."

O. G. Gould, a witness called on behalf of the people, testified as follows: "I read an ad in the paper for a service station man so I went out and asked for Mr. Harris. I met Mr. Richards, who told me Mr. Harris was not there, but that he wanted to get out; he wanted to leave the job; said he had some

buildings to put up and he would like to sell out. In about a half hour Mr. Harris came in. We went into the office with Mr. Harris and talked the proposition over and I decided to take the job. Mr. Harris took in Mr. Richards' note and made out a new one and handed it to Mr. Richards. Mr. Richards went with me to the bank, and I paid the money to Mr. Richards, and Mr. Richards handed me the paper (which was a note similar in wording to the one first set out herein)."

[1, 2] On the part of the appellant, it is contended that the transactions referred to constituted only a loan, and therefore the converting of the money to his own use did not constitute embezzlement on his part. The testimony which we have set forth, however, justified the jury in looking through the form to the real substance of the transaction and to conclude therefrom that the money placed in the hands of the appellant constituted trust funds, and immediately upon his converting it to his own uses and purposes, he became guilty of embezzlement. The testimony, however, does fail to show that the appellant converted to his own use any money belonging to O. G. Gould, and therefore that the first count in the complaint upon which the defendant was convicted is not supported. The testimony shows that Gould paid his $250 to Richards, took up the note which had been issued to Richards, and surrendered it to Harris for one in favor of himself. That the appellant may have embezzled the money belonging to Richards did not make him guilty of embezzling any money belonging to Gould. All the other counts appear to be sufficiently supported.

It is further insisted on the part of the appellant that misconduct on the part of the district attorney in asking certain questions necessitates the granting of a new trial. An examination of the transcript shows that the court sustained the appellant's objections to all of the questions asked by the district attorney, and in all excepting one instance, admonished the jury to disregard the same. These questions related to the placing of claims by the prosecuting witnesses in the hands of the labor commissioner. There is no pretense that the claims were paid, and we do not very well see how the jury was influenced thereby. The fact that the claims were placed with the labor commissioner appears to have been brought out by a question asked by counsel for the appellant. The court subsequently struck out all the testimony relating thereto.

[3] It is further objected that the court erred in refusing the following instruction requested by the appellant: "The court instructs you that if you find that the complaining witnesses parted with their money upon the faith of the note, and not upon any representations made by the defendant, if he did make any, you should find the defendant not guilty." Also, in refusing to give the following instruction: "The court instructs you that if at the time the complaining witness mentioned in counts 1, 2, 3 and 4, gave the defendant the money, the defendant promised to repay it at some future date, but failed for some reason to repay, there is no crime committed and you must return a verdict of not guilty." Likewise, in refusing to give the following instruction: "The court instructs you that the note given in this case is a promissory note, payable at some future date. It is a promise to pay in the future, and you are instructed that a promissory note is not a false token, and not within the statute."

An examination of the instructions given by the court shows that they are very full and clear, and covered every question involved in this action. Among others, the court instructed the jury as follows: "The court instructs you that the defendant has been charged with grand theft on the theory of the embezzlement of certain funds belonging to the complaining witnesses. The four essential elements of the crime of embezzlement are: 1. That the defendant was acting in the capacity of an agent; 2. That he obtained and held the money in his trust capacity; 3. That the money belonged to his principal; and 4. That he converted it to his own use in violation of his trust. If you believe from the evidence that the money was loaned to the defendant, and that he used it in his business, you are to return a verdict of not guilty."

Also, the court instructed the jury as follows: "In order to constitute the crime of grand theft on the theory that the defendant was guilty of embezzlement, it is necessary that the People show that the defendant was the agent of the complaining witnesses; that the complaining witnesses were the owners of the property embezzled; that the defendant was in lawful possession of the property alleged to be embezzled at the time the embezzlement took place; that there was a conversion by the defendant with an intent to divert and deprive the complaining witnesses of their property, unlawfully. Therefore, if you believe from the evidence that the complaining witnesses loaned the money to the defendant and took his promissory note therefor, you should return a verdict of not guilty."

The court also instructed the jury that if the defendant entertained an honest belief by him at the time of the taking that he had a legal right to use the money in his business, it was the duty of the jury to find the defendant not guilty.

The court further instructed the jury that if they believed from the evidence that the complaining witnesses loaned the money mentioned in the respective counts, to the defendant, and that it was his intention to use the money in his business, and to return it in the usual course of business, the defendant was not guilty of the crime charged.

The court also instructed the jury that the fact of the defendant having failed in business did not make him guilty of grand theft.

[4] The court also gave to the jury an instruction to which the defendant was not entitled, to wit: "The jury has no right to disregard the testimony of the defendant on the ground that he is the defendant and stands charged with the commission of a crime. * * * The jury should fairly and impartially consider his testimony, together with all the other evidence in the case." It has been frequently decided that the trial court should not single out the testimony of the defendant and instruct with particular reference thereto. People v. Miller, 68 Cal. App. 758, 230 P. 191; People v. Langlois, 68 Cal. App. 610, 230 P. 13; People v. Brown, 62 Cal. App. 96, 216 P. 411; People v. Jeans, 79 Cal. App. 464, 249 P. 1089.

It follows from what has been said that the judgment and order of the trial court as to counts 2, 3, and 4 should be affirmed. And it is so ordered. As to count 1, the order and judgment are reversed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

127 Cal.App. 725

WELCH v. WIRSCHING.

Civ. 7201.

District Court of Appeal, Second District, Division 2, California.

Nov. 29, 1932.

1. Trial ⇐178.

Verdict may be instructed only when, giving plaintiff's evidence all value to which it is legally entitled, there is no evidence sufficient to support verdict for plaintiff.

2. Automobiles ⇐245(6, 72).

Negligence of motorist and contributory negligence of pedestrian struck at street intersection during rain *held* for jury (Code Civ. Proc. § 2061).

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Mary A. Welch against Robert A. Wirsching. From a judgment for defendant, plaintiff appeals.

Reversed.

Roy H. Smith, P. V. Davis, and A. C. Brydonjack, all of Los Angeles, for appellant.

Hiram T. Kellogg, of Los Angeles, for respondent.

CRAIG, J.

In an action arising from injuries received by the appellant, a pedestrian, through an accident resulting from the respondent's automobile having collided with appellant while crossing at an intersection of public streets, judgment was entered upon an instructed verdict in favor of the respondent.

[1, 2] The only question presented as a ground for reversal is as to whether or not the evidence adduced upon the trial was sufficient to require its submission to the jury. It has been held that the rule is precisely the same as that applied where a motion for a judgment of nonsuit is under consideration. Kohn v. National Film Corporation of America, 60 Cal. App. 112, 212 P. 207. A judgment of nonsuit may be entered when upon the trial the plaintiff fails to prove a sufficient case for the jury. Code Civ. Proc., § 581, subd. 5. "The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive." Code Civ. Proc., § 2061.

It appeared that the streets were lighted, that it was raining, that the defendant's windshield was dimmed, and that his curtain was so drawn that he was unable to see the direction in which he was driving; that he drove westerly to the corner, was unaware of any person walking upon the street, and failed to stop until about 40 feet from the point of impact. The principal grounds urged below for an instructed verdict were that it was negligence as a matter of law for the plaintiff to look and not see an approaching automobile "in plain sight," and that she was negligent to a degree barring recovery "in leaving the sidewalk before the ringing of the second bell." Evidence introduced on behalf of the plaintiff was, in part, from her own testimony that she waited at the corner "until the signal was right, until the bell rang and the arm went up with the 'go' on it, and then proceeded to cross the street." A witness who escorted her across testified: "I watched every way * * * there was not anything coming from that direction"; that they progressed to a point four or five feet past the center line when the defendant's car hit them from the rear. The defendant swore that he sounded no horn, and that he was traveling about six miles an hour.

From the foregoing it at once appears that there was at least a substantial conflict of evidence upon the two vital questions between the parties. An instructed verdict may be granted "only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given." In re Caspar's Estate, 172 Cal. 147, 155 P. 631, 632; Burr v. United Railroads of San Francisco, 163 Cal. 663, 126 P. 873; Jones v. Southern Pacific Co., 74 Cal. App. 10, 239 P. 429; McFeely v. Industrial Accident Com., 65 Cal. App. 45, 223 P. 413; Langdon v. Superior Court, 65 Cal. App. 41, 223 P. 72.

We conclude that it was error on the part of the trial court to have given the instruction directing the jury to find for the defendant.

The judgment is reversed.

We concur: WORKS, P. J.; STEPHENS, Justice pro tem.

128 Cal.App. 53

ARMBRUST v. SOUTH et al.

Civ. 613.

District Court of Appeal, Fourth District, California.

Dec. 5, 1932.

Hearing Denied by Supreme Court Feb. 2, 1933.

1. Partnership ⇐236.

Notes executed by partner for part of partnership indebtedness cannot be considered as payment, except under express agreement.

2. Partnership ⇐242(5).

Where partner executed notes covering part of partnership indebtedness, presumption is against absolute payment of pre-existing indebtedness.

3. Partnership ⇐242(5).

In action against former partners on notes executed by one for part of partnership indebtedness, evidence *held* to support finding that notes were not accepted as absolute payment.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by H. H. Armbrust against Nicholas South and another. From a judgment in favor of the plaintiff and against both of the defendants, the defendant named appeals.

Affirmed.

Harold J. Cashin, of Los Angeles, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondent.

BARNARD, P. J.

This is an action to recover for goods sold by the plaintiff to the defendants upon an open book account. The defendants had been copartners, and on May 1, 1930, the partnership was indebted to the plaintiff in the sum of approximately $4,000. On that day the defendant Franzen executed and delivered to the plaintiff two promissory notes totaling the sum of $2,500. On June 7, 1930, the defendant South paid to the plaintiff the sum of $950. The two notes not having been paid, and no other payments having been made, this action followed. The defendant Franzen defaulted, and the defendant South defended the action on the ground that the notes referred to had been given and accepted upon the agreement of the parties that they should be taken as the personal obligation of Franzen, and that the partnership would be to that extent released. The trial resulted in a judgment in favor of the plaintiff against both defendants, from which judgment the defendant South has appealed.

Appellant's principal contention, and the only one that need be considered, is that a finding to the effect that the notes were not accepted by the respondent as a payment of that proportion of the indebtedness, and that the respondent did not agree to look to Franzen alone for payment of that amount, is not sustained by the evidence.

While the appellant relies upon certain portions of the evidence and on inferences that might be drawn therefrom, the record contains other evidence which supports the finding complained of. It is conceded that any agreement in reference to the taking of these notes was consummated between the respondent and Franzen at a time when no one else was present. In reference to what was done at that time, the respondent testified that Franzen came to him on that day and said they were about to settle the affairs of the partnership and discontinue business, and it would be a great convenience to him if the respondent would accept his notes for the amount owed by the partnership; that he told Franzen it was impossible for him to do this for the reason that he had notes due at the bank and must get some money with which to pay them; that they finally came to an agreement that he would accept $2,500 in notes from Franzen with the stipulation that the balance should be paid in cash immediately; and that this was agreed to by Franzen. In other portions of his testimony, in reference to the time within which the balance of the account should be paid in cash, he testified that it was to be paid "within a reasonable length of time, the next week or so"; that he told Franzen he would take his notes if the balance was paid in cash "within a week"; and that he told him something like "within a week."

The respondent's version of the agreement is corroborated by a part of the testimony of Franzen, the other party thereto. On direct

examination Franzen testified that the notes represented the firm's obligation, and "I *practically* took that." When asked whether anything was said about the respondent's looking personally to him for the payment of the $2,500, he replied: "Yes, *naturally*, that's the reason I signed the notes." (Italics ours.)

However, on cross-examination, he testified as follows:

"Q. Now, Mr. Franzen, isn't it a fact that when you talked to Mr. Armbrust relative to taking notes, that this was the conversation, 'That you said that you and Mr. South wanted him to take twenty-five hundred dollars from you, and if he would do that, the balance of his account would immediately be paid in cash'? A. Yes, I believe it was.

"Q. And it was said at that time, Mr. Armbrust told you at that time that he had to have the balance in cash because he had notes coming due; isn't that correct? A. Yes, he told me that. * * *

"Q. Well, Mr. Armbrust said he would only take the notes if the rest of that was paid, didn't he? That was what he said, isn't that correct? A. Yes, he made the statement that he wanted to get all of it before then."

This last answer may be reasonably interpreted as an admission that the respondent had stated that he would accept the notes only in the event the balance of the debt was paid. Franzen further testified: "Q. And you said he would get all of it if he took the notes? A. Yes, sir; under the stipulation that I just made."

This last answer evidently referred to a statement the witness had made shortly before, to the effect that the respondent had asked him how soon the balance of the debt could be paid and that he replied: "I told him we had some obligations which we were trying to collect in, and just as soon as we got it we would pay that part of it over."

[1-3] It is well settled that such notes as those involved here are not to be considered as payment of a pre-existing indebtedness, unless received by the creditor under an express agreement that they shall be accepted as an absolute payment, and that the presumption is not in favor of such full payment. Messner v. Mason's Dairy, 117 Cal. App. 486, 4 P.(2d) 207, and cases there cited. While this record contains some evidence that would have supported a contrary finding, including a portion of the testimony of Franzen, the evidence to which we have referred justifies the inference that there was no absolute agreement to accept the notes in payment of that portion of the debt, but that, at most, any agreement in that regard was conditional and dependent upon conditions which were never fulfilled. It follows that the finding attacked has some support in the evidence, and is therefore conclusive here.

Some claim is made by the appellant that the respondent waived his requirement of an immediate payment of the balance of the indebtedness by accepting the $950 paid by the appellant on June 7, 1930. It is conceded that, irrespective of any agreement in connection with the $2,500 notes, both partners remained liable for the remaining $1,500 of the debt. Under such circumstances, the receipt of a part thereof from one of the debtors could not be considered as a waiver of the conditions of the other agreement, or an admission that such an agreement was still in effect.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

128 Cal.App. 35

HOWSON v. BOARD OF MEDICAL EXAMINERS et al.

Civ. 8522.

District Court of Appeal, First District, Division 1, California.

Dec. 5, 1932.

Hearing Denied by Supreme Court Feb. 2, 1933.

1. Physicians and surgeons ⇨2.

Section of Medical Practice Act defining unprofessional conduct as aiding or abetting unlicensed person to practice system or mode of treating sick or afflicted *held* constitutional (St. 1913, p. 733, § 14, seventh (a), as amended by St. 1929, p. 626).

St. 1913, p. 733, § 14, seventh (a), as amended by St. 1929, p. 626, is constitutional as against contention that it is an attempt to unlawfully delegate to a judicial body the legislative power to create and define crimes, since the definition in the act is so all-embracing that there is no need for construction in order to bring any particular set of facts within its terms.

2. Physicians and surgeons ⇨11(3).

Accusation for unprofessional conduct following language of Medical Practice Act was sufficient to state offense (St. 1913, p. 733, § 14, seventh (a), as amended by St. 1929, p. 626).

3. Physicians and surgeons ⇨11(3).

Evidence showed that physician was guilty of unprofessional conduct by aiding and abetting unlicensed person to practice system and mode of treating sick and afflicted (St. 1913, p. 733, § 14, seventh (a), as amended by St. 1929, p. 626).

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Petition by Christopher Howson against the Board of Medical Examiners of California and others. From a judgment affirming an order of the Board suspending petitioner from practice as a physician and surgeon, he appeals.

Affirmed.

Harry G. Henderson, of San Francisco, for appellant.

C. M. Fickert, of Los Angeles, for respondents.

STROTHER, Justice pro tem.

This is an appeal from a judgment affirming on review an order of the board of medical examiners by which the petitioner was suspended from practice in this state as a physician and surgeon for "unprofessional conduct."

The accusation presented to the board was in two counts, the first alleging the violation of subdivision seventh (a) of section 14 of the Medical Practice Act (as amended by St. 1929, p. 626), and the second charging a violation of subdivision eighth of the same section.

The act specifies minutely the training which a person shall have in various systems of treating human infirmities in order to entitle him to a license to practice. Section 14 provides the procedure for the trial of licensees on charges of "unprofessional conduct," and defines with particularity what acts shall constitute such conduct. One such act is described in subdivision seventh (a) as "employing directly or indirectly any suspended or unlicensed practitioner in the practice of any system or mode of treating the sick or afflicted or the aiding or abetting any unlicensed person to practice any system or mode of treating the sick or afflicted." Subdivision eighth denounces the use by the licensee of any other name than his own in his practice.

[1] The first question appellant raises is of the constitutionality of the act. He contends that it is an attempt to unlawfully delegate to a judicial body the legislative power to create and define crimes, and cites decisions of the courts of this state as authority for his contention. The decisions referred to were not in construction of this act, and have no application to its provisions. The definition in the act is so all-embracing that there is no need for construction in order to bring any particular set of facts within its terms. Every person of common knowledge knows what "treating the sick or afflicted" means. The doing of any act, in accordance with "any system or mode" of treatment, would be within the terms of the definition.

[2] It is claimed by the appellant that the charges in form, as set out in the accusation, were not sufficient to state an offense. The statement of the charges was in the language of the statute, which has been held to be sufficient in the recent case of Anderson v. Board of Medical Examiners, 117 Cal. App. 113, 3 P.(2d) 344. A specific objection made to the first count is that it does not charge that appellant knew that the party whom he was alleged to have aided and abetted was not a licensed practitioner. The objection was not made before the board, nor, so far as appears, to the trial court. The appellant testified at the hearing before the board that he employed the party, Wiedenmann, a resident of another state, knowing that he was not licensed to practice in this state, and put him in charge of patients of appellant, for medical attention and treatment.

[3] It is contended that the evidence was not sufficient to support the finding of the board. So far as the first count is concerned, appellant's testimony fully supported it. We think the objection is well taken, however, as to the second count. The names of hospitalization institutions were used in connection with, but not as substitutes for, appellant's name and professional title. The finding of the board that appellant had been guilty of "unprofessional conduct" being supported by the evidence, the order of suspension was properly confirmed by the trial court.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

128 Cal.App. 27

Ex parte KING.

Cr. No. 2294.

District Court of Appeal, Second District, Division 2, California.

Dec. 2, 1932.

Health ⇐24.

To sustain quarantine of person allegedly having venereal disease, law requires only probable cause to believe that person has communicable infectious disease.

Person so held may be legally detained until there is sufficient showing that probable cause no longer exists.

Proceeding on the application of June King for a writ of habeas corpus to be directed to the Chief of Police of the City of Los Angeles.

Petitioner remanded, and writ dismissed.

Leigh H. Hill, of Los Angeles, for petitioner.

Charles P. Johnson, City Prosecutor, and John L. Bland and Joe W. Matherly, Deputy City Prosecutors, all of Los Angeles, for respondent.

CRAIG, Acting P. J.

The petitioner asks to be released through habeas corpus from detention by the chief of police of the city of Los Angeles. She was arrested on a morals charge, examined physically in the usual course by employees of the health department, and it appears that such examination indicated that she was afflicted with a venereal disease. This fact, however, she disputes, has demanded another examination, which has been denied, and refuses to undergo medical treatment. The health department has required her detention in quarantine until such time as she may safely be released. We are of the opinion that the law only requires that there be probable cause to believe that a person so held has an infectious disease which is communicable in order to justify the authorities in retaining such person in quarantine. The person so held may be detained legally until there is sufficient showing that the probable cause no longer exists.

An order has heretofore been made remanding the petitioner and dismissing the writ.

We concur: IRA F. THOMPSON, J.; STEPHENS, Justice pro tem.

128 Cal.App. 1

ROBBINS et ux. v. ROQUES et ux.

Civ. 482.

District Court of Appeal, Fourth District, California.

Nov. 30, 1932.

Rehearing Denied Dec. 23, 1932.

Hearing Denied by Supreme Court Jan. 27, 1933.

1. Automobiles ⇐246(23).

Instruction authorizing recovery by motorcyclists notwithstanding their negligence if such negligence was not a proximate cause of collision *held* erroneous.

2. Automobiles ⇐226(2).

If motorcyclists' negligence contributed in any degree to happening of collision, they could not recover.

3. Appeal and error ⇐1064(1).

Where, among numerous correct instructions on contributory negligence, several incorrect instructions were interspersed, error *held* prejudicial.

4. Damages ⇐37.

Loss of wife's services *held* proper element of damages to be awarded husband for wife's personal injuries.

5. Damages ⇐37.

In spouses' action for wife's personal injuries, damages for loss of wife's earnings may be awarded.

6. Husband and wife ⇐209(3).

Compensating husband for loss of services of wife incapacitated by personal injuries, and compensating wife for loss of earning capacity *held* improper as compensating doubly for same loss.

7. Damages ⇐91(3).

In personal injury action, compensatory, but not exemplary, damages are recoverable.

8. Appeal and error ⇐1045(1).

Court's question on voir dire whether juror would render verdict against insurance corporation as readily as if it were defendant himself *held* prejudicially erroneous, although withdrawn, as unduly stressing insurance feature already brought out by counsel, where case was closely balanced.

Appeal from Superior Court, San Diego County; Percy S. King, Judge.

Action by S. Y. Robbins and wife against George E. Roques and wife. From a judgment in favor of plaintiffs, defendants appeal.

Reversed.

Edward J. Kelly, of San Diego, for appellants.

Whelan & Whelan, of San Diego, for respondents.

JENNINGS, J.

This action was instituted by plaintiffs, husband and wife, to recover from defendants, husband and wife, damages for personal injuries sustained by said plaintiffs, as a result of a collision that occurred between an automobile which was being driven by defendant George E. Roques, and a motorcycle upon which both plaintiffs were riding and which was being operated by the male plaintiff, S. Y. Robbins. The evidence which was presented during the trial of the action showed that the plaintiff Phyllis Robbins sat on the seat of the motorcycle and that her husband, S. Y. Robbins, sat immediately in front of her, partly on the seat and partly on the gas tank of the vehicle, and that Phyllis Robbins had her arms around her husband's waist and was clinging to him. The collision occurred on a road which was stipulated to be a mountain road and in the vicinity of a curve in said road. Plaintiffs were traveling down grade and defendants were proceeding up grade in the opposite direction. Plaintiffs had passed around a curve approximately 200 feet in length immediately prior to the happening of the accident. No signal by horn or otherwise was given by them as they rounded

the curve. Plaintiff S. Y. Robbins testified that the motorcycle was driven around the curve at a speed of from 20 to 25 miles per hour. The view of a driver approaching the curve from the direction in which plaintiffs were proceeding is obstructed within a distance of 200 feet. The collision occurred approximately 35 feet below the elbow of the curve and at a point where the road is comparatively straight. The evidence with respect to the speed of defendants' automobile immediately preceding the collision is conflicting as is also the evidence with respect to the exact place in the road where the collision took place with reference to the center line of the road. It was the contention of plaintiffs that the automobile of defendants was being operated at a rate of speed in excess of that permitted by law at the time of the accident and that, at said time, the automobile was partly on its left-hand side of the road. Upon the conclusion of the trial of the various issues of fact presented to the jury selected for the purpose, a verdict was returned in favor of said plaintiffs in the amount of $30,066. From the judgment for such amount rendered in conformity with the verdict, defendants have appealed.

It is conceded that as the evidence with respect to the negligence of defendants in driving the automobile on the wrong side of the highway was conflicting and this issue of fact was resolved in favor of plaintiffs, it may not be disturbed on appeal. The same concession might properly have been made with respect to the speed at which the automobile of defendants was being operated. Complaint is, however, made of numerous errors alleged to have been committed during the course of the trial.

Among the errors of which complaint is made, the giving by the court of contradictory instructions on the issue of contributory negligence of respondents is cited as being highly prejudicial to the rights of appellants. This issue was directly raised by the pleadings and the evidence relating to it which was produced during the trial indicates that it was one of the principal features of the case. The testimony of respondents themselves shows that in two respects they were guilty of negligence. The two acts of negligence committed by them consisted in the failure to give any signal as they proceeded around the curve and in rounding the curve at a speed in excess of 15 miles per hour, the speed permitted by law on a curve of the character portrayed by the evidence. When it is remembered that the collision between the vehicles occurred within a short distance from the elbow of this curve, the importance of the issue is at once evident. Upon this issue the court apparently gave a number of instructions. The record herein is presented in the form of a bill of exceptions. All instructions of the court are thereby presented in a single group which renders it impossible to distinguish which were separate instructions. Upon the feature of contributory negligence the court instructed the jury that the burden rested upon respondents to prove by a preponderance of the evidence that appellants were negligent and that such negligence was a proximate cause of the collision and the injuries suffered therefrom by respondents. In the same paragraph of the instructions in which the above-mentioned advice is given, the jury was instructed that, if respondents had proven by a preponderance of the evidence that appellants were negligent and that such negligence was a proximate cause of the collision, respondents were entitled to a verdict unless it had also been established by a preponderance of the evidence that respondents were guilty of negligence which contributed directly or proximately in some manner or degree to the collision. In a number of other paragraphs the jury was properly advised that, if it was found from a preponderance of the evidence that respondents were guilty of negligence and that such negligence proximately contributed, in any degree, to their injuries, they were not entitled to recover. However, in three different paragraphs of the court's instructions the jury was advised that contributory negligence of the respondents, if it should be found to have been established by a preponderance of the evidence, must, to prevent recovery by respondents, have been shown by a preponderance of the evidence to have been a proximate cause of the collision. It must be observed that two of the last-mentioned paragraphs contain what may properly be called general instructions. The third paragraph is more specific and is in the following language:

"If you find from the evidence that the injuries of which the plaintiffs complain were suffered in a collision between the automobile of the defendants and the motorcycle of the plaintiffs at the time and place set forth in plaintiffs' complaint; and if a preponderance of the evidence shows that the defendants were guilty of negligence in the operation of their car and that the collision in controversy was the direct and proximate result of said negligence on the part of the defendants, and if you should also find that the plaintiffs were guilty of negligence in the operation of their motorcycle, *but that the negligence of plaintiffs was not a proximate cause of the collision and did not concur with the negligence of the defendants to cause said collision*, then your verdict should be for the plaintiffs, and you should award damages to the plaintiffs, using rules which I will, in these instructions, lay down for your guidance in order to ascertain the amount of said damages." (Italics ours.)

[1-3] In this paragraph the jury was plainly instructed that respondents were entitled to recover if they had shown by a preponderance of the evidence that appellants were

negligent and the collision was the proximate result of such negligence, although it also appeared that respondents were negligent, but that their negligence was not a proximate cause of the collision. This is not, therefore, a case of a single incorrect instruction general in character whose effect may fairly be said to be overcome by numerous other instructions more specific, wherein the correct rule is announced. Alloggi v. Southern Pac. Co., 37 Cal. App. 72, 173 P. 1117; Harvey v. Aceves, 115 Cal. App. 333, 1 P.(2d) 1043. It is rather a case where numerous instructions correctly stating the rule with respect to contributory negligence were given but interspersed among these correct instructions are several which incorrectly advised the jury that contributory negligence must be shown to have been a proximate cause of the collision in order to bar recovery. As heretofore noted, the true rule is that, if respondents were negligent and their negligence contributed in any degree to the happening of the accident, respondents may not recover. It is, therefore, impossible to determine which of the conflicting rules presented to the jury was followed and the error must be deemed to have been prejudicial. Rathbun v. White, 157 Cal. 248, 107 P. 309; Ogilvie v. Ætna Life Ins. Co., 189 Cal. 406, 209 P. 26, 26 A. L. R. 116.

[4-7] Another error which it is contended warrants a reversal of the judgment relates to the verdict of the jury. By the verdict certain sums of money were specified as compensation for certain stated damages suffered by respondents. Among the various items of damages the jury awarded respondent S. Y. Robbins the sum of $5,000 because of the loss of the comfort, society, and *services* of his wife, Phyllis Robbins, and to respondent Phyllis Robbins the sum of $20,000 because of her bodily injuries, pain, anxiety, mental anguish, grief, mortification, physical suffering, *loss of earning capacity*, and general damages which she will probably suffer and which can be ascertained with reasonable certainty It thus appears that one of the elements for which the husband was awarded the sum of $5,000 was the loss of his wife's services. By the court's instructions the jury was advised that, in fixing the amount of damage suffered by the husband, consideration should be given to the detriment occasioned to him by reason of his wife's injuries in the loss of comfort, society, and service of his wife during all the time she was incapacitated after the collision and during all the time that she will be incapacitated in the future. Passing for the present the question raised by appellants that loss of the comfort and society of the wife is not a proper element of damage to be considered by the jury in arriving at a determination of what amount may justly compensate the husband, it must be conceded that loss of the wife's services is a proper element to be taken into consideration by the jury in arriving at such determination, and that the wife's services are a part of the earning power of the community, for loss of which damages may be recovered. Martin v. Southern Pacific Co., 130 Cal. 285, 62 P. 515. Likewise, it is well recognized that damages may properly be awarded for loss of earnings. But loss of earnings of the wife and loss of her services, in the final analysis, amount to the same thing. Service is the constant quantity in the equation. If, therefore, the husband is awarded damages because of the loss of his wife's services in maintaining the home during the time she is rendered incapable of performing such services and she is awarded damages to compensate her for loss of earnings during the same period, it requires no unusual discernment to arrive at the conclusion that thereby the community property receives double compensation for the same identical loss. It cannot be discovered in this case what amount of the wife's award was allowed for loss of her earnings nor is it possible to determine what amount of the sum awarded to the husband for loss of comfort, society, and service of the wife represents the jury's estimate of proper compensation to be allowed for loss of the wife's services. All that can be known is that compensation to some extent was twice allowed for the same detriment. It is fundamental that, in a case of this character, such damages are allowable as will justly compensate respondents for injuries sustained by them and no more. It is not a case where exemplary damages may be recovered.

It is further contended by appellants that the court erred in advising the jury that, in arriving at a determination of the damages to be awarded to the husband, it could take into consideration the loss of his wife's society during the time she was incapacitated by reason of her injuries. We have been cited to but one California case in which any mention is made of this element. In Meek v. Pacific Ry. Co., 175 Cal. 53, at page 56, 164 P. 1117, 1118, there is plain dictum to the effect that damages are not recoverable by the husband in this state for loss of consortium. The dictum is contained in the following passage from the opinion of the court: "The services rendered by a wife, aside from the consideration of her society, or what is termed the consortium, *damages for which are not recoverable in this state*, may be and often are of such character that no witness can say what they are worth." (Italics ours.) In the note in 21 A. L. R. 1519, it is said that the great weight of authority sustains the husband's right to recover for loss or impairment of his right to the conjugal society and assistance of the wife. However, no California case is cited as sustaining the text. It may fairly be said that it is at least doubtful

whether, in an action of the character here considered, damages for loss of consortium of the wife are recoverable by the husband in this state. However, since we entertain the opinion that the judgment must be reversed for reasons other than the claimed error in advising the jury that it might consider loss of the wife's society as an element of the husband's damage, we deem it unnecessary to give further consideration to the last-mentioned question.

[8] One further contention of appellants deserves consideration. During the examination of prospective jurors on the voir dire counsel for respondents propounded to one of such jurors the following interrogation: "Are you interested as a stockholder or otherwise in the Standard Accident Indemnity Insurance Company or any protective, indemnity or accident insurance?" The court permitted the question to be answered over appellants' objection that it was incompetent, irrelevant, and immaterial. Practically the same question was then asked of the jurors collectively and over appellants' objection was permitted to be answered. Shortly thereafter a member of the jury panel was called to the jury box, presumably to take the place of another who had been examined and excused, and to this prospective juror the court propounded the following interrogation: "Would you render a verdict as readily and no more readily against a corporation insuring in such cases as this, as you would if it were the defendant himself?" Prompt objection on the ground of immateriality was offered by appellants, whereupon the court said: "I will withdraw the question. Consider it has not been asked." It is obvious that the court made the inquiry in the interest of expediting the trial of the action. Nevertheless, the asking of the question was inopportune. The attention of prospective jurors had been directed to the fact that, notwithstanding the suit had been brought against appellants alone, a certain insurance company was interested in the outcome of it. The effect of the court's inquiry was to stress unduly this fact. It is difficult to arrive at the conclusion that the effect produced by the court's inquiry was obviated by his immediate withdrawal of the question and his admonition to consider that it had not been asked or by the fact that the particular juror to whom the inquiry was propounded was peremptorily challenged by respondents and excused. The asking of questions of a nature similar to those hereinabove indicated by counsel for plaintiffs in actions for damages for personal injuries has been often considered by our courts. In Arnold v. California Portland C. Co., 41 Cal. App. 420, 425, 183 P. 171, 172, the rule is thus stated:

"Notwithstanding the apparent diversity of the decisions, we think that a correct statement of the rule, supported by reason and the weight of authority, is substantially as follows: It is entirely proper for counsel to ask the jurors such questions as may reasonably be necessary to ascertain whether they are free from a bias or interest that may affect their verdict. To this end it is proper for counsel, in good faith, to ask of each juror whether he is interested as an agent or stockholder or otherwise in a specified casualty company. Or he may be asked the broad question whether he is interested in any insurance company insuring against liability for negligence. Rinklin v. Acker, 125 App. Div. 244, 109 N. Y. S. 125; Grant v. National, etc., Co., 100 App. Div. 234, 91 N. Y. S. 805. But counsel must take pains to propound such questions in such a manner as not unnecessarily to convey the impression that the defendant is in fact so insured. It is misconduct on the part of counsel for plaintiff in such actions so to frame his question that it goes beyond what is reasonably necessary to serve the legitimate purpose of eliciting the facts he is entitled to adduce in order to secure a jury free from bias or prejudice, if it is also apparent that the question may fairly be said to have the effect of serving the illegitimate purpose of prejudicing the jury by fixing in their minds the idea that the defendant is protected by insurance against liability for negligence. And if the amount of the verdict is large as compared with the nature of the injuries sustained, or the defendant's liability is a close question, such misconduct is prejudicial and ground for reversal."

In Squires v. Riffe, 211 Cal. 370, 295 P. 517, 519, it is said: "The natural tendency of a line of examination that suggests to the jury that the defendant is indemnified against any judgment for damages against him is highly prejudicial to his rights, especially in a closely balanced case where the evidence otherwise would be easily sufficient on appeal to support a verdict either for the plaintiff or for the defendant." This last-quoted language is peculiarly applicable to the situation presented in the instant case. The record shows that the case is closely balanced and that the evidence, without considering the various errors of which appellants complain, would easily support a verdict either for respondents or for appellants. Under these circumstances, it is difficult to escape the conclusion that the court's inquiry of a prospective juror on the voir dire, as hereinabove set forth, added to the error committed in the giving of contradictory instructions relative to the issue of contributory negligence and the double compensation awarded by the verdict for loss of the wife's services and of her earnings during the time she was incapacitated justifies a new trial of the action.

The judgment is therefore reversed.

We concur: BARNARD, P. J.; MARKS, J.

216 Cal. 715

McCARTNEY et al. v. CAMPBELL et al.

L. A. 11047.

Supreme Court of California.

Nov. 29, 1932.

Rehearing Denied Dec. 29, 1932.

1. Brokers ⇐94.

Agency contract authorized broker to enter binding contracts of sale on owner's behalf.

Agency contract authorized broker to make actual sales, notwithstanding provision that owner would on demand deed property to trustee and enter into trust agreement authorizing broker to sell the lots, and that trustee thus appointed should have power to execute contracts and deeds, and notwithstanding provision that broker should in no way contract any obligation of any nature against the property, which referred to liens or other incumbrances, in view of provision that broker or his assigns should have exclusive selling agency with right to fix prices and sell property as he might deem best, subdivide it, if necessary, at his own expense, and other provisions of similar purport.

2. Brokers ⇐106.

Evidence of principal's receipt of payments on land sale contracts *held* relevant on question whether broker's agency contract authorized broker to execute sale contracts.

3. Contracts ⇐170(1).

Acts of parties subsequent to execution of contract may be looked to in ascertaining its meaning.

4. Vendor and purchaser ⇐59.

Land contracts made by broker *held* to disclose execution on behalf of principal.

Contracts recited that the agreement was between broker, "duly authorized agents of" named owner, and purchaser, and broker's signature was followed by the word "agents."

5. Vendor and purchaser ⇐78, 299(2).

Continual acceptance of delayed payments waived provision making time of essence of land contract, and demand for strict performance or tender of deed was condition precedent to forfeiture.

6. Vendor and purchaser ⇐299(4).

Where vendor, after waiving time as essence of land contracts, sued to quiet title and forfeit purchasers' interests, without demanding strict performance or tendering deed, court properly granted purchaser's right to receive deeds on paying purchase price.

In Bank.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action by Alice G. McCartney and another against A. P. Campbell and others. From an adverse judgment, plaintiffs appeal.

Affirmed in part.

For prior opinion, see 9 P.(2d) 252.

Harry L. Cohn, of Long Beach, and William J. Clark, of Los Angeles, for appellants.

C. E. McDowell, of Los Angeles, for respondent E. E. McCalla & Co.

W. C. Shelton and George Burch, both of Los Angeles, for respondent Bachman.

Leet W. Bissell and F. Walton Brown, both of Los Angeles, for respondent Peter Kunce.

Tanner, Odell & Taft, of Los Angeles, and H. O. Harrawood, of Redlands, for respondent Emma Timm.

Louis F. Laberere and John A. Cronin, both of Los Angeles, for respondents Harry B. Jilson and Elida S. Jilson.

C. E. McDowell, of Los Angeles, in pro. per.

PER CURIAM.

This is an appeal by plaintiff from a judgment of the superior court of Los Angeles county in favor of defendants in an action to quiet title. Since the appeal was taken certain parties have dropped out of the litigation as will hereinafter appear.

On April 17, 1918, plaintiff was the owner of certain land in Los Angeles county, valued at about $10,000. On said date she entered into a contract with A. P. Campbell, by the terms of which she gave him the exclusive selling agency for the land, under certain conditions. With her consent the contract was assigned the next day to Campbell-Bentley Company. The term was specified to be six months, with a right to renew the same for an additional period of one year, upon making certain payments to plaintiff. During the six-month period Campbell-Bentley Company solicited prospects, and entered into a number of contracts of sale with purchasers for various lots in the tract. The only ones which are involved in this appeal are the contracts with defendants Timm, Jilson, and Bachman. These defendants made a number of payments on their contracts, although they were frequently in default on the installments. Prior to the commencement of this action, on September 22, 1923, defendant Timm had made all payments, and defendant Jilson had tendered the balance due and thereafter deposited the same in court.

The agency contract was extended after six months for the additional one-year period, which expired without the tract being disposed of. Thereafter, on February 1, 1929, plaintiff entered into an agreement with A. P. Campbell and E. E. McCalla, by the terms of which the latter parties were given an ex-

clusive option for two years to purchase the land for $11,263.51. Certain payments were made by them. The period expired without the payment of the entire sum, and thereafter, on August 10, 1921, plaintiff gave notice of rescission of the option for failure to perform its terms. The rights of Campbell-Bentley Company, and Campbell and McCalla, have all succeeded to McCalla. Plaintiff subsequently brought this action, naming as defendants Campbell, Campbell-Bentley Company, McCalla, and various purchasers.

The lower court held that by virtue of the option contract, McCalla owed a balance of $7,796.60 to plaintiff, and that upon payment of such sum was entitled to receive a deed to the same, with the exception of certain parcels, particularly the lots sold to defendant purchasers. With respect to these defendants, the court held that upon payment of their balances, they were entitled to deeds, provided that McCalla first paid his balance of $7,796.60.

Plaintiff appealed, and, pending the determination thereof, certain of the defendants stipulated with plaintiff that the judgment should be reversed, and an order was made by this court on January 10, 1930, reversing the same as to such parties. There remain as defendants only Timm, Bachman, and Jilson. It also appears that plaintiff has compromised certain claims, and that her interest in the litigation has succeeded to C. E. McDowell.

It is contended by plaintiff and appellant that the agency contract of April 17, 1918, did not authorize actual sales to be made, and that any rights which the purchasers might have acquired, if such authority did exist, were nevertheless terminated by their default in prompt payments under a contract in which time was of the essence.

[1] The first question before us is therefore whether the agency contract of April 17, 1918, authorized Campbell-Bentley Company to enter into binding contracts of sale on behalf of plaintiff. The trial court found that it did, and we think the evidence supports the finding. The instrument is entitled "Exclusive Selling Agency Contract," and recites that for valuable consideration, plaintiff grants to Campbell or his assigns "the exclusive selling agency" of the property, with "the right to fix the prices" and to "sell his property as he may deem best, subdivide it, if necessary at his own expense." It is provided that Campbell or his assigns shall pay the interest on the deed of trust on the land, taxes, and "shall bear all of the expenses and responsibility of his selling operations." It further provides that he is given the right to "sell the same for not less than 10% of the purchase price down and $10.00 per month per lot providing that the selling price shall be greater than the proportionate amount of said lot to the $5,000 owed to the Bank and the $5,000 additional, which is to be my net equity from the said sales, it being my intention to allow the said A. P. Campbell, or his assigns, all the money received over and above $10,000 and interest at the rate of 7% per annum, as his commission for making said sales." She further agrees "to allow a discount of 5% when a lot, or lots, has been sold for all cash."

In the face of this language it cannot reasonably be said that Campbell's authority was merely to find a purchaser. He is in express terms given authority to sell and to control all the details of the sales. He is, moreover, obligated to bear all expenses. The plain purport of the instrument is that plaintiff desired to receive the $10,000 as her "net equity" and gave Campbell full authority to market the tract and to get that equity for her. No extensive review of the cases is necessary to establish this point, but as the court said in Bacon v. Davis, 9 Cal. App. 83, 96, 98 P. 71, 76: "It does seem * * * that if the plaintiff had intended to authorize the defendant simply to find a purchaser for the property, and not to bind himself to convey to such purchaser, he would have used simpler terms than those found in the instrument before us. Knowing, as it is presumed he did, the meaning which usage has given to the phrase 'to sell' when contained in a broker's contract, it is reasonable to suppose that he would have gone no further, except to describe the property, provide, probably, in a general way for the terms of the sale, and to specify the broker's commission." See, also, McNeil v. Shirley, 33 Cal. 202; Rutenberg v. Main, 47 Cal. 213.

It is contended, however, that other provisions of the instrument negative this broad grant of authority. The first is that by which plaintiff agrees on demand to deed the property to a trustee, and enter into a trust agreement authorizing Campbell to sell the lots at any price he may elect, above $10,000, plus interest, and further agrees that the trustee may execute contracts and deeds. The theory is advanced that this method is the only one provided in the contract by which title may be passed by any one other than the plaintiff. We think, however, that the trust method of having deeds executed does not exclude the power of the agent to enter into binding contracts of sale, which power is clearly indicated in the rest of the instrument. The second provision upon which plaintiff lays stress is that providing that Campbell "shall in no way contract any obligation of any nature whatsoever against said property." Bearing in mind the other provisions of the agreement, it would seem that this one refers to the creation of liens or other incumbrances, and does not operate to defeat the main purpose of the contract, which is to negotiate sales of lots. The necessity of such a provision is obvious, in view of the duty of the agent to incur expenses in preparing the tract for sale, as e. g., in subdividing it.

[2, 3] An additional factor tending to show that Campbell-Bentley Company had authority to sell is the evidence of receipt of payments on these contracts by plaintiff. These payments, made to the agents, ultimately found their way to plaintiff. The evidence shows also that she was informed of the sales, that the contracts were recorded, and that she made no objection thereto. Whether this amounts to a ratification or estoppel it is unnecessary to decide; but the evidence is relevant and material as an indication of the proper meaning to be placed upon the agreement. It is well settled that the acts of the parties subsequent to the execution of a contract may be looked to in ascertaining its meaning, since they are in effect a practical construction thereof. Tennant v. Wilde, 98 Cal. App. 437, 277 P. 137; Retsloff v. Smith, 79 Cal. App. 443, 249 P. 886; Luckie v. Diamond Coal Co., 41 Cal. App. 468, 183 P. 178; Carlson v. Ind. Acc. Com., 213 Cal. 287, 2 P.(2d) 151.

[4] Appellant makes the further contention that the contracts made by Campbell-Bentley Company with the purchasers did not purport to bind her; i. e., they were not expressed in such a manner as to disclose clearly that they were executed by an agent on behalf of a principal. The contracts recite that the agreement is between "Campbell-Bentley Company, duly authorized agents of Alice G. McCartney, owner," and the purchaser. They are signed by "Campbell-Bentley Company, Agents, By A. P. Campbell." The testimony was also clear to the effect that the purchasers understood that they were dealing with plaintiff. There is no merit in this point.

[5, 6] The next question is whether plaintiff had the right to commence this action to quiet title, and thereby to forfeit the interests of the defendants, without a prior demand of performance or tender of a deed. On this point the evidence is clear that, notwithstanding the provision in the purchasers' contracts that time was of the essence, they were frequently in default, and delayed payments were continually accepted until just prior to the suit. Under these circumstances the rule is settled that the provision making time of the essence is waived, and a demand for strict performance or a tender of a deed is necessary before a forfeiture can be enforced. Boone v. Templeman, 158 Cal. 290, 110 P. 947, 139 Am. St. Rep. 126. No such demand or tender was made in the instant case, and it follows that the interests of defendant purchasers were not forfeited. The equitable relief granted by the lower court, a right to receive deeds upon full payment of the purchase price, was therefore proper.

The judgment is affirmed, except as to those parties who previously consented to a reversal thereof.

216 Cal. 782

J. O. DOWNING, Plaintiff and Appellant, v. T. A. SHOFNER, Defendant and Respondent.

L. A. 13816.

Supreme Court of California.

Dec. 14, 1932.

In Bank.

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

J. O. Downing and Jesse A. Gyger, both of Los Angeles, for appellant.

Raphael Dechter, of Los Angeles, for respondent.

PER CURIAM.

Plaintiff, an attorney at law, brought this action in equity for a decree permitting him to redeem a certain city lot in Los Angeles from a street assessment lien which has been foreclosed, and a certificate of sale issued. The period of redemption expired, and deed to the purchaser was made. There is no merit in the appeal, and respondent's motion to affirm must be granted.

The question is really one as to the state of the evidence. After foreclosure had been had, certificate of sale issued, and about eight months of the period of redemption had expired, plaintiff claimed certain more or less nebulous negotiations took place with the attorney for respondent, who told him that leaving a check with the attorney for redemption would be satisfactory unless he (the attorney) notified appellant to the contrary. Appellant claims that he was then about to leave for a voyage for his health which would cause his absence beyond the period in which redemption was to take place. At the close of appellant's evidence, the court gave judgment for defendant. We are in no position to say that this action was not justified. The evidence of appellant was unsatisfactory and weak, and, moreover, upon cross-examination, it was still further weakened.

The judgment is affirmed.

216 Cal. 776

MINES v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

S. F. 14791.

Supreme Court of California.

Dec. 9, 1932.

1. Prohibition ⇐10(2).

If vacating receivership was beyond court's powers, prohibition *held* proper remedy, where receiver was receiver in many similar proceedings and vacating orders would cause great loss to bondholders and subject receiver to many damage suits.

2. Courts ⇐23.

Consent of parties cannot confer jurisdiction to appoint receiver (Code Civ. Proc. § 564, subd. 7).

3. Specific performance ⇐109.

Plaintiff's allegations in action under deed of trust *held* to show action was for specific performance of covenants, not merely in ejectment; hence court had jurisdiction to appoint receiver (Code Civ. Proc. § 564, subd. 7).

Complaint showed that action was brought to obtain specific performance of certain covenants in deed of trust, such deed of trust providing that, on default by trustor, trustee might enter and take possession, and that trustee had power to use, operate, manage, and control trust estate and conduct business of trustor to best advantage of holders of notes; to maintain, restore, and insure trust estate and make all necessary repairs and improvements; and to collect all income, rents, issues, and profits of trust estate.

4. Judgment ⇐564(1).

In proceeding for prohibition against order vacating receivership, where order of appointment was within court's jurisdiction and time for appeal had expired, error in making appointment could not be urged by respondent.

Order appointing receiver could not be attacked in such case, since, time for appeal having passed, contemplated action of court in vacating receivership must be tested by principles governing collateral attack, and, order of appointment not being totally void, collateral attack was not permissible.

In Bank.

Proceeding on the petition of William W. Mines, as receiver in a certain action by the Title Guarantee & Trust Company against J. L. Altman and others, for a writ of prohibition and a writ of mandate to be directed to the Superior Court in and for Los Angeles County, and Emmet H. Wilson, Judge thereof. Alternative writ of prohibition made peremptory.

Edward A. Adams and Overton, Lyman & Plumb, all of Los Angeles (William R. James, of Los Angeles, of counsel), for petitioner.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondents.

Ben M. Goldman, of Los Angeles, amicus curiæ, for respondents.

PER CURIAM.

This is a petition for a writ of prohibition and a writ of mandate.

In October, 1931, Title Guarantee & Trust Company commenced an action as trustee under a deed of trust against J. L. Altman. This was one of some fifty similar actions brought by said plaintiff. The said deed of trust provided that, in the event of a default, the trustee should have the right to take possession, manage and care for the property, and collect the rents, issues, and profits thereof. The complaint prayed for the appointment of a receiver pending the trial. On November 7, 1931, after due notice and hearing, Judge Willis made an order appointing A. J. Showalter and L. C. Busby receivers. These parties qualified and acted until March 16, 1932, when they were discharged by the court upon its own motion, and petitioner was appointed in their place. Petitioner qualified, and has continued to act as such receiver. No appeal was taken from any of these orders, which are now final.

On May 2, 1932, after the trial, Judge Gates gave judgment in favor of Title Guarantee & Trust Company, ordering petitioner to deliver the property to said trustee and to file his final account and report. Petitioner complied with the judgment, but was not discharged. Instead, it is alleged that Judge Wilson now threatens to vacate the orders appointing the receivers on the ground that the court which made them acted beyond its jurisdiction. This petition is brought to prevent such action and to compel the court to pass upon petitioner's account.

[1] It is alleged that the remedy at law—appeal from such threatened order—would be inadequate, because, as a result of many similar proceedings in which petitioner is receiver, there are numerous unsettled claims, and the vacating of the orders would cause great loss to the bondholders and subject petitioner to many damage suits. No objection is raised by respondents to the remedy sought, and we are satisfied that, if the threatened action is beyond the court's powers, prohibition should issue.

[2, 3] The theory upon which respondent proposed to act is that the action brought by the trustee against the defaulting owner was

not an equitable suit for specific performance, but a legal action of ejectment to secure possession of the property; and that, under our statute and decisions, the court had no jurisdiction to appoint a receiver in a purely legal action. It is conceded by petitioner that, unless the action is equitable in its nature, receivership is improper. See Bateman v. Superior Court, 54 Cal. 285; Miller v. Oliver, 174 Cal. 407, 163 P. 355; Bennallack v. Richards, 125 Cal. 427, 58 P. 65. Consent of the parties cannot confer such jurisdiction. Baker v. Varney, 129 Cal. 564, 62 P. 100, 79 Am. St. Rep. 140. However, an analysis of the complaint shows that the contention that the proceeding was merely one in ejectment is unfounded. The action was brought to obtain specific performance of certain covenants in the deed of trust. The said deed of trust provided that, upon default by the trustor, the trustee might enter and take possession, but it also provided for additional rights. The trustee was given power to "use, operate, manage and control the trust estate, and conduct the business of the trustor to the best advantage of the holders of the notes"; to "maintain and restore and insure and keep insured the trust estate and make all necessary repairs, renewals, replacements, alterations, additions, betterments and improvements"; to "collect, take over and receive all tolls, earnings, income, rents, issues and profits of the trust estate." It is obvious that none of these rights would be in issue in a mere action in ejectment to obtain possession of the premises, and that, to secure these other rights, allegations based upon the terms of the contract and seeking specific enforcement thereof would be necessary. Specific performance being a proceeding within the cognizance of a court of equity, the court had jurisdiction in such a proceeding to appoint a receiver, under section 564, subdivision 7, of the Code of Civil Procedure.

Two decisions of this court definitely support the position of petitioner. In Sacramento & Placerville R. Co. v. Superior Court, 55 Cal. 453, 456, it is said: "We find in the mortgage, or deed of trust *(it is immaterial whether it is a deed of trust or simply a mortgage)* a power expressly conferred on the parties of the second part, in case default is made in the payment of the principal or interest of said bonds, to enter upon and take possession of the mortgaged property. * * * Section 564 of the Code of Civil Procedure provides that a receiver may be appointed by the Court in which the action is pending, in all cases where receivers have heretofore been appointed by the usages of Courts of Equity. This is not a proceeding to foreclose a mortgage, and to subject the mortgaged property to sale under the decree of the Court, but it is in the nature of a proceeding *to enforce specific performance* of the terms and conditions of a mortgage; and we find numerous cases in the books in which Courts of Equity have exercised the jurisdiction complained of in this case." (Italics ours.) And in McLane v. Placerville & Sacramento Valley R. Co., 66 Cal. 606, 615, 6 P. 748, 754, similar language appears: "* * * this action is not one to foreclose a mortgage. It is a suit brought to enforce the specific execution of the terms and stipulations of a mortgage, by which, on the happening of a specific event, the trustees, or the survivor of them, are entitled to take possession of the property mortgaged, hold it, receive and collect the income and profits arising from it, and apply such income and profits as are stated above. The casus fœderis, upon which the surviving trustee was to take possession, having occurred, on his application the court made the order. This is so clearly within the province of a court of equity that we can see no reason to doubt its power or the regularity of the proceeding. It comes within the provisions of section 564, subd. 6, of the Code of Civil Procedure, authorizing such appointments where receivers have heretofore been appointed by the usages of courts of equity."

[4] If, as appears from the foregoing discussion, the court had jurisdiction to appoint a receiver, it is not now possible to argue that it was in error in making the order. Since the time for appeal has passed, the contemplated action of the court below must be tested by the principles governing collateral attack, and it is only where the orders are totally void that collateral attack is permissible. Woodward v. Superior Court, 95 Cal. 272, 30 P. 535; Painter v. Painter, 138 Cal. 231, 71 P. 90, 94 Am. St. Rep. 47; Mesnager v. De Leonis, 140 Cal. 402, 73 P. 1052. It follows that the appointment of petitioner cannot now be questioned, and that he is entitled to have the court pass upon his account and all other matters connected with his receivership, and, if the same are found in proper form and compliance with his legal duties, to be discharged as such receiver.

The alternative writ of prohibition heretofore granted is hereby made peremptory.

VANDEGRIFT, Director of State Department of Finance, v. RILEY, State Controller.

S. F. 14710.

Supreme Court of California.

Nov. 30, 1932.

Rehearing Granted Dec. 29, 1932.

1. States ⇐115.

Word "create," in constitutional provision limiting liability to be created by Legislature, *held* synonymous with "incur" (Const. art. 16, § 1).

[Ed. Note.—For other definitions of "Create," see Words and Phrases.]

2. States ⇐115.

"Liability," in constitutional provision limiting liability to be created by Legislature, means fixed liability, a duty which must at least eventually be performed (Const. art. 16, § 1).

[Ed. Note.—For other definitions of "Liability," see Words and Phrases.]

3. States ⇐117.

Lease to state providing for monthly rental and giving state option to purchase property did not create "liability" within constitutional provision limiting liabilities to be created (Const. art. 16, § 1).

Lease was for term of 25 years and provided for erection of building on property at expense of lessor to be occupied by the state, and lease also contained option to purchase, and provided that if exercised before December 31, 1936, purchase price should be $550,000, and that if exercised thereafter and before certain other dates purchase price should be as specified, and the only covenant on part of lessee other than payment of rent was to keep up general repairs.

4. Mandamus ⇐102(1).

Director of state finance department could sue to compel state controller to pay rent for premises which director had leased (Pol. Code, § 675, par. 2, as amended by St. 1929, p. 894, § 9; § 655, re-enacted by St. 1927, p. 449).

5. Mandamus ⇐163.

If petition did not sufficiently allege existence of funds available to pay claim involved, respondent should have controverted issue by answer and proof, not by demurrer.

In Bank.

Proceeding in mandate by Rolland A. Vandegrift as Director of the State Department of Finance of the State of California, against Ray L. Riley, as Controller of the State of California, in which defendant demurred to the petition.

Demurrer overruled.

Webb Shadle, of Sacramento, and Bacigalupi, Elkus & Salinger, of San Francisco, for petitioner.

T. H. Christiansen, of Sacramento, and Thomas W. Hickey and James P. Sweeney, both of San Francisco, for respondent.

Hilary H. Crawford, of San Francisco, for intervener.

PRESTON, J.

Proceeding in mandate to compel respondent, as controller of the state of California, to audit and approve a certain claim, and issue his warrant in payment thereof.

Section 675, paragraph 2, of the Political Code (as amended by St. 1929, p. 894, § 9) provides that the director of finance of this state shall have power "* * * To hire or lease, upon the written request of the state department, board, commission or officer concerned, any property, real or personal, if in the judgment of the director such hiring or leasing will be for the best interests of the state." Petitioner here, the director of the state department of finance of the state of California, alleges that pursuant to the power granted by the above statute, and at the request of the director of industrial relations, he entered into an agreement of lease with one Harry S. Burke and Florence V. Burke, his wife, of certain particularly described property situate on the northerly side of McAllister street, 137 feet 7 inches westerly from the westerly line of Polk street in San Francisco, Cal.; that the term of the lease was to be twenty-five years; that the agreement provided for the erection of a building on the property at the expense of the lessor to be occupied by the state of California, with rentals to commence upon occupancy thereof; that the agreement also contained an option extended to the state to purchase the land and building for specified amounts, varying according to the time of exercise of the option. Petitioner further alleges that at the request of the said director of industrial relations, said agreement of lease was modified by petitioner, and that under the terms thereof the rental provided for is $5,068.04 per month. Petitioner also states that the building was completed on April 1, 1932, and the state of California took possession of it; that the owner of the lease thereupon presented to petitioner its claim for rental for the period commencing April 1, 1932, and ending May 31, 1932, in the sum of $10,136.08; that petitioner thereupon presented it for payment, but respondent, as controller of the state of California, refused to audit or approve it upon the ground that he questioned its legality. Petitioner thereupon asked for a writ of mandate to compel respond-

ent to audit and approve the claim as aforesaid. Petitioner urges that if said rentals are not paid, the departments and agencies of the state occupying said building may be ejected; that there is no other place available for them; that actions against the state by the owner of the lease may result, and the state may otherwise suffer great harm and damage. The respondent appears solely by demurrer to the petition.

The option to purchase contained in the lease provides that if it is exercised prior to December 31, 1936, the purchase price shall be $550,000; if exercised thereafter and prior to December 31, 1941, it shall be $475,000; if exercised thereafter and prior to December 31, 1946, $400,000; if exercised thereafter and prior to December 31, 1951, $325,000; if exercised thereafter and prior to December 31, 1955, $250,000; and if exercised thereafter and to and including December 31, 1956, the purchase price shall be $175,000.

There is nothing about the transaction that would characterize it as a disguised contract of sale and purchase. On the contrary, it appears to be regular in all respects, and to constitute a bona fide lease, duly executed and approved by the Attorney General, or a hiring of the property with option to purchase. The only covenant on the part of the lessee, other than payment of rent, is to keep up general repairs.

The court allowed Irene Bryan, a taxpayer, to intervene, and she cast her lot with respondent and resists the petition on the same grounds urged by respondent. It will not be necessary, however, to dispose of the question made as to her right to a hearing in a proceeding of this character.

The only question of importance is that made by respondent, invoking the provisions of article 16, § 1, of the State Constitution, which section, so far as here material, declares: "The legislature shall not, in any manner, create any debt or debts, liability or liabilities, which shall, singly or in the aggregate with any previous debts or liabilities, exceed the sum of three hundred thousand dollars [except under certain circumstances not here shown to exist]." Petitioner correctly presents the issue in the following language: "Therefore, the question here presented is whether under this agreement there is created a debt or liability in excess of $300,000 in violation of the constitutional provision. This question in turn depends upon whether the obligation assumed by the state by the agreement is a present obligation commensurate in amount with the aggregate of the monthly rentals payable thereunder, or whether the debt or liability created on behalf of the State by this agreement is confined to that amount which at any time in the period of performance thereunder will be outstanding and which the state will be under obligation to pay."

It will be noted that the above-mentioned section of the Constitution is a reproduction of article 8 of the Constitution of 1849, and that it is also akin to article 11, § 18, of the present Constitution, which forbids cities, counties, and other governmental agencies to "incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof. * * *" These provisions have furnished litigation resulting in numerous cases of various types. But in our view of the instant case, a lengthy review of all the reported cases on this subject is not required.

As early as People v. Arguello, 37 Cal. 524, it was held that under the revenue laws of the state "a sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt, or does not become a debt until the contingency has happened." This authority quotes from the early case of Wood v. Partridge, 11 Mass. 488, 493, where may be found the following language: "A covenant to pay rent quarterly creates no debt or legal demand for the rent, until the time stipulated for payment arrives. [a] The rent may never become due. The lessee may quit the premises, with the consent of the lessor; or he may assign over his term with such consent, so as to discharge himself from rent; [b] or he may be evicted by a title paramount to that of his lessor: in either of which cases he will be discharged from the operation of his covenants. It is not the case of debitum in præsenti solvendum in futuro, which is subject to attachment by the statute: but is a contingency, which cannot be attached; as was decided in the cases of Davis & al. v. Ham, 3 Mass. 33, and Wentworth v. Whittemore & Trustee, 1 Mass. 471."

The above holding was approved by this court in the case of In re City and County of San Francisco, 191 Cal. 172, 183, 215 P. 549, 555, which involved a controversy between the city and county of San Francisco on one side and Thomas F. Boyle as auditor on the other, respecting the hospitalization of the tubercular patients of the city by Alameda county at a fixed charge per day extending over a period of time, and the periodical advancement of sums necessary to build proper structures, and the court expressly approved the language of People v. Arguello, supra, as follows: "A sum payable upon a contingency is not a debt, or does not become a debt until the contingency has happened."

These holdings seem to be in accord with the great weight of authority. See Hively v. School City of Nappanee, 202 Ind. 28, 169 N. E. 51, 171 N. E. 381, 71 A. L. R. 1311; see note to above case, 71 A. L. R. page 1318; 19 R. C.

L. 983, 984. As we understand it, respondent really concedes that if the constitutional provision above quoted used only the words "debt" or "debts," there would be no liability on the lease in question beyond the amounts accruing monthly as rentals thereunder. This conclusion is fortified by the case of State v. McCauley, 15 Cal. 429, 454–455, which construes in a similar manner article 8 of the Constitution of 1849 and in which Chief Justice Field says: "The contract provides for the payment of ten thousand dollars a month, and the act appropriates this sum per month. The appropriations are to take effect, and the services are to be rendered in future. Until the services are rendered, there can be no debt on the part of the State. The lessee could not have claimed, at any time after the making of the contract, the aggregate of all the monthly instalments—because the State never owed him that amount. The State only became indebted as the services were each month performed." See to the same effect Koppikus v. State Capitol, etc., 16 Cal. 248.

Under these constitutional provisions it may be observed that there have arisen two lines of cases; each class having its distinguishing features. The one line is illustrated by the following cases: State v. McCauley, supra, 15 Cal. 429, 454; McBean v. Fresno, 112 Cal. 159, 44 P. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191; Smilie v. Fresno County, 112 Cal. 311, 44 P. 556; Doland v. Clark, 143 Cal. 176, 76 P. 958; The other by the following cases: Chester v. Carmichael, 187 Cal. 287, 201 P. 925; In re City and County of San Francisco v. Boyle, 195 Cal. 426, 233 P. 965; Mahoney v. City and County of San Francisco, 201 Cal. 248, 257 P. 49. In the first class are found contracts where mutual executory covenants exist, such as furnishing of materials or performance of labor, or both, before the duty to pay the stipulated sums arises. Under this class it is uniformly held that the indebtedness is not created until the consideration therefor is rendered. In the second class may be found completed contracts such as contracts of sale, masquerading as leases, or installment contracts in which the whole consideration has been rendered and the liability in toto fixed and the transaction is simply a disguise to circumvent the inhibitions of the Constitution. This distinction is aptly stated in Chester v. Carmichael, supra, following City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 20, 19 S. Ct. 77, 43 L. Ed. 341.

[1-3] We understand that respondent does not contest this distinction, nor does he seriously contend that, if the words "debt or debts" alone appeared in the provision, petitioner would be correct in his contention that he falls within the first class. The real controversy arises over the words "create" in the one provision and "incur" in the other and "liability" in the one and "liability and liabilities" in the other provision of the Constitution. We think for all practical purposes the words "create" and "incur" are synonymous in this connection. We concede, however, the word "liability" to be broader in its import than the word "debt," and to embrace the latter. Liability is defined by Bouvier to be "'responsibility; the state of one who is bound in law and justice to do something which may be enforced by action. This liability may arise from contracts, either express or implied, or in consequence of torts committed,'" approved in Lattin v. Gillette, 95 Cal. 317, 319, 30 P. 545, 29 Am. St. Rep. 115. See, also, Wood v. Currey, 57 Cal. 208. But liability means a fixed, enforceable obligation to be performed in præsenti or at some determinable future date. Here the performance of the covenant to pay rent and the supplementary covenant to keep the building in general repair will prevent the arising of a liability of any kind. Of course, it must be admitted that there is a remotely contingent liability for the total rental payments based on the theory that the lessee might default for twenty-five years and the lessor might refuse to re-enter or to relet and thus sit and collect his rentals monthly for the whole period. This is theoretically possible under the doctrine of such cases as Treff v. Gulko (Cal. Sup.) 7 P.(2d) 697; Phillips-Hollman, Inc., v. Peerless Stages, Inc., 210 Cal. 253, 291 P. 178. But we must give the words "liability or liabilities," as so used in the Constitution, a more practical construction as above indicated, and hold that the liability referred to in said provisions is a fixed one, a duty which must at least eventually be performed; a contingent liability of the character here found does not meet this test.

[4] We think it too clear for serious dispute that under sections 655 (re-enacted by St. 1927, p. 449) and 675 (as amended by St. 1929, p. 894, § 9) of the Political Code, the powers committed to petitioner are ample to confer upon him a beneficial interest in the subject-matter of this litigation. Acting in the public interest, we have frequently entertained similar proceedings where petitioner has had no direct pecuniary interest, for not to do so might impair the function of some governmental agency with respect to which petitioner has had a duty to perform. Heron v. Riley, 209 Cal. 507, 289 P. 160; McClure v. Riley, 198 Cal. 23, 243 P. 429; Hecke v. Riley, 209 Cal. 767, 290 P. 451; Veterans' Welfare Board v. Riley, 188 Cal. 607, 206 P. 631; City of Santa Barbara v. Davis, 142 Cal. 669, 76 P. 495; Daggett v. Colgan, 92 Cal. 53, 28 P. 51, 14 L. R. A. 474, 27 Am. St. Rep. 95; City of Long Beach v. Lisenby, 180 Cal. 52, 179 P. 198.

[5] We also think the petition is sufficient in alleging the existence of funds available for payment of this claim. Were this not so, respondent should have controverted the is-

sue by answer and proof, and not merely by demurrer. Kennedy v. City of Gustine, 199 Cal. 251, 256, 248 P. 910; Marin Water & Power Co. v. Town of Sausalito, 168 Cal. 587, 604, 143 P. 767; Johnson v. County of Yuba, 103 Cal. 538, 540, 37 P. 528.

The demurrer of the respondent is therefore overruled, and, reservation of such right having been heretofore granted by the court, respondent is directed to file an answer to the petition within 10 days from this date.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; TYLER, Justice pro tem.

216 Cal. 742

CALIFORNIA SAVINGS & COMMERCIAL BANK v. WHEELER et al.

L. A. 11369.

Supreme Court of California.

Nov. 30, 1932.

Rehearing Denied Dec. 29, 1932.

1. Alteration of Instruments ⇐5(1), 17.

Unauthorized alteration of mortgage, placing property for first time under mortgage lien, *held* "material alteration," relieving mortgagor of all liability (Civ. Code, § 1700).

Original mortgage expressly excluded from its operation a 12-foot strip along the side of one lot, which strip had been deeded to a city for a public purpose. Subsequently, this strip was deeded back to the mortgagors, and the mortgagee crossed out the excluding clause, thus attempting to include the strip within the mortgage. Mortgagor had not consented to the inclusion of such strip in the mortgage. "Material alteration" is one that works some change in the rights, interests, or obligations of the parties to the writing.

[Ed. Note.—For other definitions of "Material Alteration," see Words and Phrases.]

2. Alteration of Instruments ⇐5(1).

Material alteration of mortgage, by adding property thereto, was not rendered harmless because not in furtherance of fraudulent purpose (Civ. Code, § 1700).

3. Alteration of Instruments ⇐29.

Authority to make or consent to alteration of executed contract must plainly appear from evidence, and will not be presumed from relation of principal and agent.

4. Husband and wife ⇐138(3).

Where husband did not have written authority to represent wife, husband could not, as her agent, lawfully authorize material alteration in executed mortgage (Civ. Code, §§ 172a, 1700, 2309).

5. Alteration of Instruments ⇐17.

Material alteration in mortgage without mortgagor's consent renders instrument absolutely null and void, and prevents recovery on it (Civ. Code, § 1700).

In Bank.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by the California Savings & Commercial Bank against Harriette E. Wheeler and others. From part of judgment in favor of the defendant named, the plaintiff appeals. Pending the appeal, the defendant named died, and Frazier McIntosh, the executor of her will, was substituted as respondent.

Affirmed.

For prior opinion, see 10 P.(2d) 66.

Rehearing denied; PRESTON, J., dissenting.

Edgar K. Brown and Leo B. George, both of Los Angeles, for appellant.

Frazier McIntosh, in pro. per.

Chandler, Wright & Ward, of Los Angeles, amici curiæ.

WASTE, C. J.

A rehearing was granted in this case in order to give further consideration to the contention of appellant that the alteration in the mortgage was made by the husband of defendant Wheeler as her lawful agent. Upon such further consideration, we are of the opinion that such was not the fact. For that reason, and for the other reasons hereinafter expressed, we adopt our former opinion, with additional comment, viz.:

Plaintiff appeals from a judgment in favor of defendant Wheeler in an action brought by plaintiff to foreclose a mortgage.

The original complaint named Harriette E. Wheeler as sole defendant. The complaint was in the usual form for a foreclosure action, alleging that defendant Wheeler and others had executed a note in favor of plaintiff in the sum of $24,500, bearing interest at the rate of 7 per cent. (7%) per annum; that certain payments had been made; that the balance was unpaid; that to secure this note defendant Wheeler and others executed a mortgage on certain lots in Venice, Cal. Plaintiff prayed that the mortgage be foreclosed; that the lots be sold; and that plaintiff be given a personal judgment against defendant Wheeler for the difference between

the amount received on such sale and the amount owed, if any be found to exist. Defendant Wheeler admitted the execution of the note and mortgage alleged in the complaint, and, by way of affirmative defense, alleged that at the time of the execution of the note and mortgage one Edgar K. Brown was the attorney and business associate of defendant's deceased husband; that at such time Brown was the vice president and liquidating agent of plaintiff corporation; that said Brown is now one of the attorneys for plaintiff; that defendant's signature to the note and mortgage was secured by certain alleged representations of Brown; that defendant's husband was to be credited with all expenditures made by him for improvements on the property; that such credit has not been given; that plaintiff has erroneously applied all payments on the note to the release of lots owned by Brown.

At the trial it developed that the note and mortgage relied on differed in several important respects from those pleaded, and that Brown and his wife were parties to the note and mortgage. Plaintiff contended that the note and mortgage pleaded had been altered by the consent of the parties thereto. The trial court permitted plaintiff to amend to set up the alterations and to join the Browns as parties defendant. The amended complaint joins the Browns and alleges the alterations. The Browns answered, admitting all of the allegations of the amended complaint. Wheeler answered, denying that any of the alterations had been made with her knowledge or consent. During the trial on the issues thus formed, it developed that the note and mortgage had been altered in three material respects:

(1) The interest rate on the note had been changed from 7 to 6 per cent.

(2) Eleven lots were eliminated from those described in the mortgage, because it was discovered that said lots were not owned by the mortgagors.

(3) The original mortgage had expressly excluded from its operation a 12-foot strip along the side of one lot. This strip had been excluded because if had been deeded to a city for a public purpose. Subsequently, this strip was deeded back to the mortgagors, and the plaintiff bank crossed out the excluding clause, thus attempting to include within the mortgage this strip. This was undoubtedly done with intent to include the strip within the mortgage.

The trial developed into a controversy as to whether these alterations had been made prior to the execution of the note and mortgage, or subsequent thereto, and whether such alterations had been made with the knowledge and consent of defendant Wheeler. The court found, on evidence which appellant admits is substantially in conflict, that the alterations were intentionally made by the plaintiff subsequent to the execution of the note and mortgage, with the knowledge and consent of the Browns, but without the knowledge or consent of defendant Wheeler, and that each of said alterations was a material one. Based on these findings, the trial court entered judgment against the Browns and in favor of defendant Wheeler, extinguishing in her favor all executory obligations on her part under the mortgage. Plaintiff appealed from the judgment in favor of defendant Wheeler. The Browns did not appeal and, as to them, the judgment has long since become final. Pending appeal, defendant Wheeler died, and the executor of her estate has been substituted as respondent.

The District Court of Appeal, Second Appellate District, Division 1, in an opinion prepared by Bishop, Justice pro tem., and concurred in by Conrey, P. J., and Houser, J., 1 P. (2d) 1080, affirmed the judgment of the trial court. We are of the opinion that the decision of that court correctly and properly disposes of the questions involved on this appeal. We, therefore, adopt as part of the opinion of this court the opinion of the District Court of Appeal, which is as follows:

Plaintiff was denied all relief against defendant Wheeler in this action to foreclose a mortgage, because her (Wheeler's) consent was not given to a post execution alteration of a mortgage by which some of her property was added to its embrace. We are of the opinion that the unapproved alteration was properly found to have relieved her of all liability under the mortgage.

[1, 2] The lot involved was one of a number deeded to defendant Wheeler's husband and to her codefendant Brown in September, 1923. At the time of the execution of the mortgage, which followed soon after the deed, the northwesterly twelve feet of this one lot had been deeded to a city for some public purpose, so that portion of the lot was omitted from the property included in the mortgage by employing the words, immediately following the reference to the lot, "excepting the northwesterly twelve feet thereof." Some time later, after March 26 of the succeeding year, probably, when the city reconveyed the strip, the mortgagee, plaintiff here, made several changes on the face of the mortgage, among others being the elimination of the words last quoted, which resulted in the mortgage reading as though the whole of the lot were included. This tinkering was done with the approval of defendant Brown, who was potent in plaintiff's councils, and for the purpose of this opinion we are assuming it was done with the consent of defendant Wheeler's husband. It was not done with her consent.

The effect of the unauthorized alteration of an executed contract is declared in section 1700, Civil Code, in these words: "Extinction by unauthorized alteration. The intentional destruction, cancellation, or material alteration of a written contract, by a

party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act." That an alteration which results in placing property for the first time under a mortgage lien is a material one is obvious. Appellant would escape the paralyzing effect of the section by securing a finding that there was no fraud involved here, and the alterations were made to correct a mutual mistake. So far as concerns the change in the mortgage whereby eleven lots were eliminated from its burdens, because included in the mistaken belief that they belonged to the mortgagors, such a finding might be made, but there is no serious contention advanced that the trial court could have found, and it did not find, that the northwesterly twelve feet was originally omitted through error or subsequently included to correct a mistake. The absence of a fraudulent purpose in making the alteration does not cure it of its deadening influence. Section 1700, Civil Code, does not recognize any such limitations, and the cases cited by appellant do not support the conclusion that a material alteration, i. e., "one that works some change in the rights, interests, or obligations of the parties to the writing" (Lasky v. Bew [1913] 22 Cal. App. 393, 134 P. 358, 360), is harmless if not in furtherance of a fraudulent purpose.

[3, 4] The finding that defendant Wheeler did not consent is challenged on the ground that her husband consented and he as her agent thus bound her. The twelve-foot strip in question was community property. Appellant so contends, and the evidence, so far as brought to us, is in harmony with this conclusion. Defendant Wheeler's signature to the mortgage, then, was not an idle act, but was required. Section 172a, Civ. Code. Her husband's agency did not, apparently, include the right to sign for her. At least he did not. Furthermore, authority to make or consent to an alteration in an executed contract must plainly appear from the evidence; it will not be presumed from the relation of principal and agent. Langenberger v. Kroeger (1874) 48 Cal. 147, 17 Am. Rep. 418; Walsh v. Hunt (1898) 120 Cal. 46, 52 P. 115, 39 L. R. A. 697; Dozier v. National Borax Co. (1917) 35 Cal. App. 612, 170 P. 638; Hengehold v. National Creamery & Produce Co. (1922) 60 Cal. App. 79, 212 P. 239. We assume that a finding that defendant's husband was her agent would be supported by the evidence. This does not better appellant's position, however, for there is no evidence that within the scope of the agency he had authority to add property to the mortgage she had executed.

Even if appellant is correct in the other points it presents, the result will not be changed. There may be no evidence supporting the finding that certain representations were made, but a contrary finding would not remove the obstacle to its recovery already discussed. It may be that the evidence does not support the finding that lot 22 was released, but, as the appeal is not from the judgment as it affects defendants Brown, this is an error which, if corrected, would still leave defendant Wheeler entitled to judgment. Appellant argues that the reduction in the interest rate in the note, which the mortgage secured, was not a material alteration. We do not need to determine whether it was or not, for a deficiency judgment against defendant Wheeler was waived, and there can be no recovery on the note in any event.

[5] Supplementing what has already been said on the material alteration point, we desire to add that obviously any unauthorized change in a material respect destroys the integrity of the instrument as the contract which the maker has executed. After the alteration, it ceases to be the maker's contract, and, as far as he is concerned, becomes void and of no legal effect. This court said in Commercial & Savings Bank of Stockton v. Foster, 210 Cal. 76, 81, 290 P. 583, 585: "Appellant contends that she signed the mortgage in the office of respondent's attorney, and that the clause in question was added by respondent later without her knowledge or consent. If this were so, it would be clear that the respondent bank forfeited all rights under the mortgage, because it is the well-settled law in this state that the material alteration of an instrument after its execution by one party without the consent of the other renders it utterly void and of no legal effect as far as the altering party is concerned. Civ. Code, § 1700; 1 Cal. Jur. 1073 et seq." In other words, a material alteration renders the instrument absolutely null and void, and prevents recovery upon it to any extent. Walsh v. Hunt, 120 Cal. 46, 50, 52 P. 115, 39 L. R. A. 697.

As to the agency point, the following comments are pertinent, in addition to what has already been said: Inasmuch as the contract here involved dealt with real property, the only way an agency relation could have been created would have been by a written authorization. Section 2309 of the Civil Code provides: "An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing." The evidence is clear that at no time did Mr. Wheeler have written authority to represent Mrs. Wheeler. It is obvious, therefore, that he could not, as her agent, have lawfully authorized the alteration.

The judgment appealed from is affirmed.

We concur: TYLER, Justice pro tem.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

216 Cal. 773

CORDER v. McDOUGALL.

Sac. 4581.

Supreme Court of California.

Dec. 5, 1932.

1. Life estates ⇐19.

Personal representative of deceased life tenant had exclusive right to proceeds of fire insurance policy taken out by life tenant as against remainderman.

2. Life estates ⇐19.

Life tenant is under no obligation to insure property against fire (Civ. Code, §§ 818, 840).

In Bank.

Appeal from Superior Court, Sacramento County; J. R. Hughes, Judge.

Action by Fred Corder against Donald McDougall, administrator of the estate of William C. Grant, deceased. From a judgment for defendant, plaintiff appeals.

Affirmed.

Charles H. Crocker, of Sacramento, for appellant.

White, Miller, Needham, Harber & Mering, of Sacramento (Dinkelspiel & Dinkelspiel, of San Francisco, of counsel), for respondent.

WASTE, C. J.

Appeal on judgment roll alone from judgment for defendant in an action brought to determine whether the personal representative of a deceased life tenant had exclusive right to the proceeds of a $2,000 fire insurance policy taken out by the life tenant and the insurance thereafter paid to him and deposited in bank with his other funds. The appellant remainderman opposed the claim of the personal representative, and brings this appeal.

The deceased was the life tenant of a small piece of property and improvements. The appellant remainderman is the owner of the fee, subject and subordinate to the life estate of the deceased. The deceased insured the dwelling and improvements and paid the premiums. The insured property was destroyed by fire, and the amount of the policy was paid to the deceased and deposited by him in a bank. The identity of the insurance money was not lost, and, as so identified, passed into his estate. The appellant remainderman demanded of the personal representative the payment of all moneys paid to the deceased by the insurance company, contending that the insurance fund was substituted for the destroyed property, and, after the death of the life tenant, was payable to the remainderman, inasmuch as the status of the two estates had not been changed by the conversion, and that the life tenant was a trustee for the remainderman.

[1, 2] While the exact question presented is novel in California, respondent's position that the life tenant had the exclusive right to the benefit of insurance taken out by him, and that there had been no transmutation of the destroyed buildings into money as a substitute, must be sustained. There are facts in Thompson v. Gearheart, 137 Va. 427, 119 S. E. 67, 68, 35 A. L. R. 36, sufficiently analogous to those here under review to render the decision in that case an authority here. The court said: "The life tenant was under no obligation to insure the property for the benefit of the remaindermen. Each of them had an insurable interest in the property, but a policy in the name of one could not cover the interest of the other. The nature and effect of an insurance contract is to indemnify the insured against loss or damage, and not some one else who is not a party to the contract; nor has such other party any lawful claim upon the amount realized by the assured under the policy."

A similar holding is found in Addis v. Addis, 60 Hun, 581, 14 N. Y. S. 657, 658, where the court held that under like circumstances the life tenant "is in no sense a trustee for the remainder-man." In Bennett v. Featherstone, 110 Tenn. 27, 71 S. W. 589, 590, the court said: "There is no legal obligation on the part of the life tenant to take out insurance on the interest of the remainderman, an insurance taken out by the life tenant must be shown to have been stipulated or intended to cover the interest of the remainderman, and, unless such fact appears, it will be treated as a contract for personal indemnity to the life tenant, and he will be entitled to the proceeds to the exclusion of the remainderman." See, also, Harrison v. Pepper, 166 Mass. 288, 44 N. E. 222, 33 L. R. A. 239, 55 Am. St. Rep. 404; Sanders v. Armstrong, 22 Ky. Law Rep. 1789, 61 S. W. 700, and other cases cited and discussed in the note to Thompson v. Gearheart, 35 A. L. R. 36, supra.

The language of this court in Anderson v. Quick, 163 Cal. 658, 126 P. 871, while addressed to a somewhat different set of facts, is quite persuasive when applied to the case now before us. In that case an owner took out insurance covering a building in the course of erection by a contractor. The plaintiff Anderson was the contractor who, with the defendant Quick, as owner, had agreed to erect a seven-story brick building upon a lot in San Francisco. The building was destroyed by fire prior to its completion. The court held that the contractor had no interest in the proceeds of the policy which Quick, as owner, had carried for his protection. We quote from the opinion as follows (page 662 of 163 Cal., 126 P. 871, 872): "What we have said disposes of all the points made by appel-

lant, with the exception of the suggestion that the result of the judgment appealed from is to make the defendant an actual gainer by reason of the partial destruction of the work. In so far as this conclusion rests upon the fact that the defendant collected insurance money, it may be said that this is a matter wholly between the defendant and the insurers, and in no way a concern of the plaintiff. The plaintiff could have protected his interest by insurance. Not having done so, he is not entitled to share in the proceeds of the insurance taken out by the owner."

The inevitable conclusion to be drawn from these authorities is that the plaintiff, Corder, as a stranger to the contract between the deceased and the fire insurance company, had no interest in the proceeds paid to him by reason of that policy. The duty of a life tenant to insure must precede the right of the remainderman to participate in such proceeds. No such obligation is imposed upon a life tenant of California lands. His duty is as prescribed in sections 818 and 840 of the Civil Code. An arrangement obligating the life tenant so to protect the interest of the remainderman might be entered into, but such arrangement is no part of the instant case.

The judgment is affirmed.

We concur: PRESTON, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; TYLER, Justice pro tem.

216 Cal. 707

MURREY v. MURREY.

L. A. 13488, 13589.

Supreme Court of California.

Nov. 28, 1932.

1. Process ⇐119, 120.

California, as matter of public policy, recognizes exemption from service of process of parties and witnesses to judicial proceeding.

2. Process ⇐126.

Exemption from service of process, where dependent on public policy, must be determined on particular facts of each case.

3. Process ⇐114.

Nonresident reserve officer of United States Army, temporarily within state in time of peace, *held* not as matter of public policy exempt from service of process.

Such officer was not exempt from service of process, since the efficiency of the United States military forces during time of peace would not be materially impaired by subjecting reserve officers to service of civil process in jurisdiction where they may be stationed temporarily, since action being one by a destitute minor child to compel his father to contribute to his support, the highest considerations of public policy require that parents support their children, and since defendant was not forced to come within the state against his will, but voluntarily requested to be assigned to active duty, from which he could have been excused even after his assignment.

In Bank.

Appeal from Superior Court, Los Angeles County; Harry W. Falk, Dudley S. Valentine, and Lester William Roth, Judges.

Action by Winston Murrey, an infant, by Carol Hathaway, his guardian ad litem, against Charles T. Murrey. From an adverse order and judgment, defendant appeals.

Affirmed.

Gerald Bridges, of Los Angeles, for appellant.

William Ray Schirmer, James S. Jarrott, and Jarrott & Schirmer, all of Los Angeles, for respondent.

WASTE, C. J.

Defendant appeals from an order granting temporary support and maintenance pendente lite (L. A. No. 13488) and from a final judgment granting such support and maintenance to plaintiff, minor child of the defendant (L. A. No. 13589). By stipulation of the parties the appeals have been consolidated.

The facts upon which the appeals are based are as follows:

Defendant is admittedly a resident of Utah. While temporarily present in San Francisco, Cal., for the purpose of training as a reserve officer of the Fifty-Seventh Coast Artillery, Regular Army Inactive, defendant was served with the summons and order to show cause in the present action, which had been commenced by plaintiff in the county of Los Angeles. The action is one by a minor child to compel the defendant, his father, to contribute to his support. The complaint alleges that defendant and plaintiff's mother were married in Los Angeles in 1918; that defendant deserted his wife in Oregon in January, 1919; that plaintiff was born as the lawful issue of that marriage in March, 1919; that plaintiff's mother secured a divorce from defendant in Oregon in 1920 and, by that decree, was awarded custody of plaintiff; that no provision was made in the decree for the support of plaintiff, because personal service could not be secured on defendant, he then being absent from the state; that, after the divorce had been secured, plaintiff and his mother returned to Los Angeles; that at the present

time plaintiff's mother is without means to support, maintain, and educate the plaintiff; that heretofore the mother has supported plaintiff on funds borrowed for that purpose, but plaintiff's mother can no longer secure funds in that fashion; that defendant has never contributed toward the support of plaintiff, who is now thirteen years of age, although defendant is employed at a salary of $250 a month and has other sources of income.

The summons and order to show cause were served on defendant in San Francisco, August 16, 1931. On September 2, 1931, defendant appeared specially and objected to the jurisdiction of the court and moved to quash service of summons, on the ground that he was exempt from service of civil process. No affidavits were filed by defendant and the motion was denied without prejudice. At the same time the court granted the application of plaintiff for maintenance pendente lite and for costs. On September 8, 1931, defendant again filed a special appearance and again moved to quash the service of the summons and order to show cause. On this occasion defendant filed an affidavit in support of his motion. The affidavit recites that defendant is a resident of Ogden, Utah; that on July 10, 1931, defendant received a special order from his superior officers of the United States Army, requiring him to report for active military duty at Fort Winfield Scott, Cal.; that in obedience to said order he left Ogden, Utah, and went into the active service of the United States government; that while he was engaged in such service he was served with the summons and order to show cause; that but for the order requiring him to report for active duty he would not have been within this state. The material allegations of this affidavit were not controverted, except that plaintiff submitted a certified copy of an application, signed by defendant, requesting active duty as a reserve officer. This request was certified to by R. F. Woods, colonel, Coast Artillery Corps, executive of organized reserves, who likewise certified that "existing regulations require this or a similar form to be made by the officer before he can be ordered to active duty training." This second motion by defendant was likewise denied, and, defendant failing to answer, the lower court entered his default and then duly entered judgment against defendant for $50 a month for support and maintenance, and for costs and attorney's fees.

The sole question presented on these appeals is whether, as a matter of public policy, under the particular facts of this case, defendant, as a nonresident reserve officer of the United States Army, being temporarily within this state on active duty in time of peace, is to be held exempt from service of process.

Defendant admits that if the exemption exists in his favor, it exists solely as a matter of public policy. There is neither a federal nor a local statute conferring the exemption.

Under the common-law rule as developed in England, there is no doubt that the exemption here claimed did not exist. Under the early common-law rule, the exemption extended only to parties to judicial proceedings and their witnesses, and members of the court, whose duties required their attendance upon the court and whose presence was necessary to the court in the performance of its functions. Originally this privilege of exemption from service was deemed a privilege of the court and not a privilege of the individual. In more recent years, it has come to be recognized as a substantive right of the individual. It has been frequently stated that this "judicial" privilege exists as a matter of established public policy and rests upon sound principles of justice and right. Filer v. McCornick (D. C.) 260 F. 309, 317; Stewart v. Ramsay, 242 U. S. 128, 37 S. Ct. 44, 61 L. Ed. 192.

[1] This exemption from service of process is, of course, in derogation of the right which every creditor has to collect his debt by subjecting his debtor to suit in any jurisdiction where he may find him. Since this is so, the privilege should not be extended beyond the reason of the rule upon which it is founded. Fitzhugh v. Reid (D. C.) 252 F. 234. California, as a matter of public policy, recognizes this "judicial" exemption. Hammons v. Superior Court, 63 Cal. App. 700, 219 P. 1037.

By statutory or constitutional provision, many states have extended the privilege to members of legislative bodies, although in many jurisdictions this exemption extends only to freedom from arrest and does not extend to service of process in a purely civil action. 21 R. C. L. 1303, § 47.

In addition to the above-enumerated situations, in recent years the privilege has, in some instances, as a matter of public policy, been extended to all nonresidents within the jurisdiction engaged in the performance of a public duty, at least during times of emergency. 50 Cor. Jur. 557, § 246. Perhaps the leading case on this subject is Filer v. McCornick, supra. In that case plaintiff was a resident of California and defendant was a resident of Utah. Defendant was the president of a Utah bank, which bank was a member of the federal reserve system. During the year 1918 the federal government was actively engaged, through its financial agencies, in selling its securities for the purpose of raising funds for the carrying on of the war against the central powers of Europe, then in active progress. In this district the banks had failed to sell the quota of such securities assigned to them. The governor of the federal reserve bank called a conference of all bankers in this district to meet in San Francisco on August 9, 1918, to discuss the emergency.

Defendant was specifically requested to attend this conference. He came to California for that purpose and while here was served with process in a civil action. The court held that although defendant, in one sense, had entered the state voluntarily, that fact was immaterial, because he had come to this state to perform a public duty during a time of national emergency. It was, therefore, held that defendant was immune from service as a matter of public policy. The basis of the court's decision is to be found in the following quotation: "It is not, and certainly may not be, claimed that in attending that conference he was not performing a public service of the greatest moment to the government and of interest to the country. One cannot readily conceive of a higher duty to their country—except it be on the battlefront—than was being performed by the members of that conference, when we consider the urgent and absolute necessities of the government for means with which to finance the gigantic struggle in which we were then engaged; money at such a time may be said to be the lifeblood of a nation. But it is said defendant was not 'compelled' to attend; that there was no power in the president of the Reserve Bank to require his presence; that therefore he must be regarded as coming of his own volition, and hence is not in a position to invoke this privilege. As to that, neither is a nonresident witness, nor a party, for that matter, 'required' to attend a trial. If they come they do so of their own volition, and for the furtherance, in any particular instance, of merely private interests. It would be a singularly inconsistent public policy that dictated the protection of such a class, and denied it to those engaged in serving solely the public good. Such a policy would very probably have deprived the country during the critical period through which we have just passed of services of the highest value, gratuitously rendered, by the large number of patriotic citizens who, like the defendant, dropped their private interests, and betook themselves far from their homes to render aid to the administration of a character which could not have been coerced. It is at least doubtful if those citizens would have given the same ready response to the dictates of their patriotic sense of duty had they been advised that the law was powerless to afford them protection against liability to harassing litigation to which they might be subjected by private suitors in strange and remote jurisdictions."

Defendant contends that the theory of the Filer Case, supra, applies in the instant case. He contends that he was in this state solely for the purpose of performing a public duty and that, therefore, on grounds of public policy, he should be held to be exempt from service. As a matter of public policy, it is undoubtedly true that during a time of war, or other national emergency, the exemption discussed in the Filer Case, supra, would be extended to those in the military service. In fact, during the period of the last war the United States government saw fit to pass a general moratorium statute exempting from all civil process those engaged in the military service. Act of March 8, 1918, c. 20, § 100 (40 Stat. 440). This act was subsequently repealed.

It is conceivable, of course, that a rule that applies during a period of great national emergency might not be applicable to a situation where no such emergency exists. No case seems to have been decided by the courts of this state on the question presented. The few authorities from other jurisdictions are in hopeless conflict. Some jurisdictions have statutes conferring the exemption. In some states the statutes provide that one engaged in military service shall be exempt from arrest. In these jurisdictions some courts hold that the exemption should be extended, as a matter of public policy, to civil process. Land Title & Trust Co. v. Rambo, 174 Pa. 566, 34 A. 207. Other jurisdictions refuse to extend the exemption beyond the terms of the statute. Hart & Foster v. Flynn's Executor, 38 Ky. (8 Dana) 190; Kirkpatrick v. Irby (S. C.) 3 McCord, 205. Iowa apparently holds that the exemption from civil process exists independently of statute. Northwestern Cas. & Surety Co. v. Conaway, 210 Iowa, 126, 230 N. W. 548.

[2, 3] It must be conceded that if the exemption exists in favor of defendant, it exists solely as a matter of public policy. Since this is so, each case must be determined on its own particular facts. The convenience of the United States government, and the possible interference with the efficiency of the army; the convenience of the parties and the nature of the action involved; the rights of this state—all these factors are important in determining whether as a matter of policy the exemption should be granted. It is hard to believe that the efficiency of the military forces of the United States during a time of peace will be impaired materially by subjecting reserve officers to service of civil process in any jurisdiction where they may be stationed temporarily. The nature of the present action must likewise be considered. This is an action by a destitute minor child to compel his father to contribute to his support. Highest considerations of public policy require that parents support their children, both in the interests of the child and in the interests of the state. No claim is made by defendant that in the defense of this action it would be necessary to bring witnesses from Utah. No claim is made that the suit is being pressed in this jurisdiction for the purpose of persecuting defendant. The defendant is employed at a salary sufficient to defray partially at least the expenses of the child. Defendant has never contributed to

the support of the child. The child is without funds to go to Utah to enforce its right to support. Moreover, defendant could have been prosecuted criminally in failing to support his child. Section 270, Pen. Code.

Another factor to which some slight weight should be given is that defendant was not forced to come to this state against his will. He voluntarily requested to be assigned to active duty, and without such request, the record shows, he could not have been compelled to serve. Even after his assignment to active duty in this state, he could have been excused from active service by simply filing a written request to be excused. Army Regulations, No. 140–5, as approved April 16, 1931, in section 54, provide: "Reserve officers will be ordered to active duty for 14 days' training in each fiscal year in the numbers permitted by appropriations and at such places as training facilities are available. In order that undue hardship may not be worked on individual officers on account of conflict with business or personal affairs, corps area commanders and chiefs of arms and services will excuse officers from such active duty upon their written request."

Under these circumstances, and considering all of the various factors involved, as we are required to do, and considering the fact that such exemptions should be granted only when highest considerations of policy require it, we are of the opinion that public policy does not require that the privilege of exemption from service in this action should be extended to defendant.

For the foregoing reasons the order and judgment appealed from are, and each is hereby, affirmed.

We concur: LANGDON, J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; TYLER, Justice pro tem.

LEWIS v. SHELL OIL CO.*

Civ. 4601.

District Court of Appeal, Third District, California.

Nov. 30, 1932.

Rehearing Denied Dec. 30, 1932.

Hearing Granted by Supreme Court Jan. 27, 1933.

1. Sales ⇐1(3).

Where contract for sale of gas and oil was executory, no price was fixed, and no basis was set forth in agreement for establishing price, no action for damages would lie where seller refused to deliver gasoline and oil.

Contract provided for lease by oil company of exclusive advertising privileges on signs on top of building at certain monthly rental, and that buyer agreed to purchase petroleum products from oil company for sale and dispensing through certain equipment, and that oil company should secure not less than 100 per cent. of total volume of gasoline business sold and not less than 75 per cent. of total volume of lubricating sold by buyer during life of agreement, and that differential on gasoline should be not less than 3 cents per gallon.

2. Sales ⇐1(3).

Statute respecting reasonable consideration where contract does not determine amount *held* inapplicable to executory contract of sale not fixing price or setting forth basis for establishing price (Civ. Code, § 1611).

3. Sales ⇐1(3).

To constitute "sale," price must be definitely fixed, or agreement must contain such elements, express or implied, that price can be ascertained therefrom.

[Ed. Note.—For other definitions of "Sale," see Words and Phrases.]

4. Sales ⇐1(3).

As respects damages for breach, provisions of dealer's contract for sale of gasoline and oil *held* executory as to both oil and gasoline after date seller refused to deliver goods under contract.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by R. Lewis, doing business under the firm name and style of Yosemite Garage, against the Shell Oil Company. From a judgment for plaintiff, defendant appeals.

Reversed.

F. F. Thomas, Jr., W. E. Wright, and McCutchen, Olney, Mannon & Greene, all of San Francisco, for appellant.

Barcroft & Barcroft and John J. Coghlan, all of Madera, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment against the defendant for the recovery of damages claimed to have been suffered by reason of an alleged breach of contract entered into by the plaintiff and the defendant. From this judgment the defendant appeals.

The writing executed by the plaintiff and the defendant upon which this action is based is set forth as Exhibit A and made a part of

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 29 P.2d 413.

the complaint, and is in words and figures following (omitting signatures), to wit:

"Independent Dealers' Agreement

"This agreement, made and entered into this 22nd day of March, 1927, by and between R. Lewis, of the City of Madera, County of Madera, State of California, and Shell Company of California, a California Corporation.

"That for the term, at the rental and upon the conditions, covenants and agreements hereinafter expressed, and subject thereto, and in consideration of One ($1.00) Dollar, to said R. Lewis in hand paid, receipt of which is hereby acknowledged, said R. Lewis hereby agrees that the Shell Company of California shall lease the exclusive advertising privileges on the signs on top of building, and certain panels on south side of said building of said R. Lewis for the period of five (5) years from completion of said work or during the life of this agreement.

"In consideration of the Shell Company of California leasing the exclusive advertising privileges, for which they agree to pay a sum of Fifty ($50.) Dollars per month for a period of five years from Mar. 22nd, 1927, to Mar. 22, 1932, said R. Lewis hereby agrees to purchase petroleum products from the Shell Company of California for sale and dispensing through the following units of equipment: One Wayne Visible Curb Pump, Cut 711, Serial 72349; one Bowser Buggy, Serial C.17554; 2 Lub-Oil Containers. In event of said R. Lewis' removal from his present location, or sale of lease under which he holds premises, he shall have the right to carry on under this agreement at his new place of business, under the same terms and conditions herein provided, over a period of even and consecutive dates, during which time the advertising privileges are hereby leased.

"It is further agreed that the Shell Company of California are to secure not less than the sum of 100% of the total volume of gasoline business sold and not less than 75% of the total volume of lubricating oil by said R. Lewis during the life of this agreement. Differential, on gasoline, not less than three (3) cents per gallon, during life of this agreement.

"This agreement is subject to the approval of the Shell Company of California Division, headquarters in San Francisco."

To this complaint the defendant demurred, both generally and specifically. The special demurrer contains a number of specifications as to the insufficiency of the complaint to state a cause of action, and raises every question hereinafter considered as to the validity and binding effect of the agreement upon which this action is based. The defendant's demurrer was overruled, and the cause proceeded to trial.

Upon this appeal it is contended that the writing sued upon is invalid in that no sale price is specified for either the gasoline or oil mentioned therein; that no standard is referred to by which such prices were to be fixed or ascertained; that there is no obligation on the part of the defendant to sell or deliver either gasoline or oil; that the contract is executory, and, being executory, no action in quantum meruit or for anticipated profits can be maintained. The complaint in the action does not purport to explain or add to the writing in any particular. All that is therein stated relative to the terms contained in the writing is found in paragraph IV of the complaint, which reads as follows: "That in said contract, among other things, it is provided that the differential on gasoline was to be not less than 3 cents per gallon during the life of the agreement." The complaint does not set forth any facts from which it can or could be ascertained that any agreement was entered into between the parties as to what was meant by the differential of 3 cents per gallon. There is no allegation in the complaint that any standard price or market price or posted tank price or general retail price to service stations should be taken as the standard in allowing the plaintiff a 3-cent differential on the price of gasoline purchased by him. It is also to be observed that the writing contains no agreement on the part of the plaintiff to purchase any particular quantity either of gasoline or of lubricating oil, nor is there anything in the complaint showing that any quantity was agreed upon, nor is there anything in the writing or in the complaint indicating that the defendant agreed to deliver to the plaintiff any quantity of gasoline or any quantity of lubricating oil. While the writing did not purport to obligate the defendant to sell any quantity of either gasoline or oil, it did purport to obligate the plaintiff if he bought any gasoline or oil for subsequent sale he should take 100 per cent. of the gasoline bought by him and 75 per cent. of the lubricating oil from the defendant.

After the execution of the writing which we have set forth herein, the record shows that the plaintiff obtained all of the gasoline but only about 40 per cent. of the lubricating oil sold by him up to the 31st day of July, 1930, from the defendant. A disagreement having arisen between the plaintiff and the defendant as to the basis of calculating the 3-cent differential, no gasoline was delivered by the defendant to the plaintiff after the date just mentioned.

Before considering the validity of the writing set forth herein we may state that the record contains no evidence whatever as to any standard price or basis from which the 3-cent differential was to be deducted. On the part of the plaintiff it appears to have been contended that he was entitled to resell the gasoline at a price fixed by himself, and

that at whatever price he sold, he was entitled to receive the gasoline from the defendant at a figure 3 cents below such selling price.

Some testimony was introduced as to the meaning of the word "differential," but the record is entirely silent, as we have said, as to there being any agreement between the plaintiff and the defendant with regard to how the differential was to be ascertained. All that can be deduced from the testimony is that the plaintiff and the defendant had different ideas in relation thereto, and gave a different construction to the contract.

[1] In so far as the complaint attempts to state a cause of action, it is based upon future and not past transactions; that is to say, it is wholly executory in its nature. The law seems to be well settled that, while under a contract, even though indefinite and invalid and incapable of being enforced, yet if the personal property mentioned therein has been delivered and accepted, an action will lie for the value thereof, even though no price is fixed or no basis set forth in the writing for ascertaining the same, as the law implies a promise to pay the reasonable value in such instances, and the action is really one of quantum meruit. Where the contract is executory, however, and the seller refuses to deliver the property when the price is not fixed and no basis set forth in the agreement for establishing the price, no action for damages will lie.

In the case of Sarina v. Pedrotti, 103 Cal. App. 203, 284 P. 472, 474, this court had before it for consideration circumstances requiring the application of the rule of law which we think pertinent to the instant action. In the Pedrotti Case, supra, speaking through Presiding Justice Finch, this court said: "It is well settled that no action will lie to enforce the performance of a contract, or to recover damages for its breach, unless it be complete and certain; and the rule applies as well to price as to subject-matter and parties." Citing Talmadge v. Arrowhead R. Co., 101 Cal. 367, 35 P. 1000. And further: "An agreement that parties will, in the future, make such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action." Citing Dillingham v. Dahlgren, 52 Cal. App. 322, 198 P. 832.

Likewise, in the case of Charles Brown & Sons v. White Lunch Co., 92 Cal. App. 457, 268 P. 490, 491, where no price was fixed and no quantity agreed to be delivered, it was held that a breach thereof furnished no basis for an action. So far as pertinent here, the agreement upon which the last-named action was based reads: "In turn, we will purchase from you such wares that you can supply, and which we are in need of; in other words, we intend to give you all of our business that we possibly can." The portion of the agreement relied upon, signed by the plaintiff, reads as follows: "And in consideration of which purchase it has been mutually understood and agreed upon between us that we are to enjoy your future purchases on such of our wares that you may be in need of and which we can supply."

In Jules Levy & Bro. v. A. Mautz & Co., 16 Cal. App. 666, 117 P. 936, 937, it is said: "It is elementary in law that a contract of sale must be certain as to the thing sold, and designate the price to be paid for it (Civ. Code, § 1727); and it is well settled that if an executory contract of sale is uncertain and incapable of being made certain in the essential particular of the price to be paid for the thing sold, neither of the parties can be held to its terms, nor recover damages for its breach." Citing Breckinridge v. Crocker, 78 Cal. 533, 21 P. 179; Los Angeles Immigration & Land Co-op. Association v. Phillips, 56 Cal. 539; Talmadge v. Arrowhead Reservoir Co., 101 Cal. 367, 35 P. 1000; National Bank v. Hall, 101 U. S. 50, 25 L. Ed. 822; Schenectady Stove Co. v. Holbrook, 101 N. Y. 48, 4 N. E. 4; Grafton v. Cummings, 91 U. S. 106, 25 L. Ed. 366.

The rule which we have stated as to an action based upon goods delivered and accepted under such contract is approved in the case of Jules Levy & Bro. v. A. Mautz & Co., supra, as follows: "It is true generally that where no price is fixed in a contract for the sale of a commodity, the law, upon a delivery and acceptance of the thing sold, implies an understanding between the parties that a reasonable price is to be paid, and in such a case the contract will be deemed to be executed. In other words, in the absence of a fixed price or an agreement as to the mode of ascertaining the value of the goods sold and delivered pursuant to the contract of sale, the purchaser will be held liable for the reasonable value of the goods."

In 6 California Jurisprudence, page 215, § 142, the text reads: "An express contract need not be in writing, but whether oral or written, there must be certainty and definiteness as to the language or words used in expressing the terms of the contract and in showing a meeting of the minds of the parties as to the terms. It is settled that no action will lie to enforce the performance of a contract, or to recover damages for its breach unless it be complete and certain, and the rule applies as well to price as to subject matter and parties." (Citing a number of cases.) It may be here stated that there is nothing in the contract nor is there anything in the testimony indicating a meeting of the minds of the parties to this action. In the same volume, on page 218, the text further elucidates and states the rule which we are considering, to wit: "It is elementary in law that a contract of sale must be certain as to the thing sold and designate the price to be paid for it; and it is well settled that if an execu-

tory contract of sale is uncertain and incapable of being made certain in the essential particular of the price to be paid for the thing sold, neither of the parties can be held to its terms nor recover damages for its breach." It is further stated that, if the commodity agreed to be sold has been delivered and accepted, then an action may be maintained for the reasonable value thereof.

[2] Respondent, answering appellant's objection, relies upon section 1611 of the Civil Code. That section, however, refers only to executed and not to executory contracts, and states the general rule of law that the value of the goods delivered and accepted may be determined on the basis of quantum meruit. This question was before the court in Hunter v. Ryan, 109 Cal. App. 736, 293 P. 825, 826. There the contract provided for the payment of $50 a week as a bonus. The bonus was not fixed in the agreement, but the services had been performed and the plaintiff was permitted to maintain an action to recover the reasonable value of the services. The court, in considering the question, used the following language: "The promise to pay the bonus was not a promise to make a gift, but was made in part to induce the promisee to accept the employment and so was a promise to pay additional compensation. [Citing a number of cases.] Hence, where the promise to pay additional compensation does not fix the amount of the wage, recovery is to be based on quantum meruit. [Citing a number of cases.] And we find this principle recognized in our statutes (section 1611, Civ. Code), which declares that when the amount of the consideration is not fixed in the contract it is to be determined on the basis of quantum meruit."

[3] That the sale price must be fixed in the agreement or provisions contained therein, from which the price may be definitely ascertained, is supported by the language found in 23 Ruling Case Law, page 1177: "To constitute a sale the price must be definitely fixed, or the agreement must contain such elements, express or implied, that the price can be ascertained therefrom. The price is one of the essential elements involved in the agreement, and there must be an agreement of the parties as to the price, either express or implied, before there can be a completion of a sale or a binding executory contract therefor. On the other hand, the price need not be definitely fixed at the time of the sale if the agreement contains express or implied provisions by which it may be rendered certain."

A somewhat similar principle was involved in the case of Schimmel v. Martin, 190 Cal. 429, 213 P. 33, 34, where the court was considering a contract relative to the use of water. We take the following from the opinion: "Considered as a contract for the sale of a right to the use of water for the purpose stated in the complaint, all of the elements essential to the creation of such a contract may be said to be clearly expressed, save and except the price to be paid for the water. The contract contemplates payments from time to time at the specified rate of 1½ cents per inch. But whether that is the rate to be paid per hour, per day, per month, per year, or for any other period is uncertain and incapable of ascertainment from the terms of the contract." The agreement was held void.

To the same effect is the case of Van Slyke v. Broadway Insurance Co., 115 Cal. 644, 47 P. 689, 928, where the agreement specified that a 5 per cent. commission should be paid, but nothing stated as to the figures upon which the commission was to be calculated.

In the case of Todd v. Meserve, 93 Cal. App. 370, 269 P. 710, the action was not based upon any executory portion of the contract, but involved only the question of whether the defendant should or should not be held to pay for necessary supplies, as that word was used in the contract. Evidence, of course, was admitted to show what constituted "necessary supplies" in the work of drilling an oil well undertaken by the plaintiff.

A number of cases involving agreements between oil companies and retail dealers have been called to our attention by the respondent, but in all of them the elements lacking in the agreement involved in this case appear to have been sufficiently set forth.

In Texas Company v. Berry Garage, 9 P. (2d) 241, 243, this court had before it only the question as to whether the finding of the trial court that the written agreement had been superseded by an oral one. However, the written agreement relative to the price of gasoline contains the following: "The price per gallon which buyer agrees to pay, and seller agrees to accept for gasoline delivered hereunder shall be a sum equal to the retail price effective on delivery, but as fixed by the California Petroleum Corporation, or its successors, at which Cal-Pet gasoline shall be sold at service stations in Sacramento California, minus 3c and 1c credit memorandum."

The opinion as rendered by this court did not set forth the wording of the contract but in answer to the objection that the trial court did not find as to the validity of the contract, this court said: "In view of the findings which were adopted by the court, a specific determination of the validity of the written contract would have necessarily been adverse to the appellant. Under such circumstances, the omission to specifically find that the written contract is invalid is not reversible error." To understand the language of the court just quoted it is necessary to read in connection therewith the portion of the agreement which we have taken from the transcript in the case.

In Moore v. Shell Oil Co., 139 Or. 72, 6 P. (2d) 216, 218, the lease involved contained pro-

visions for ascertaining the price. Paragraph IV thereof is as follows: "The price of gasoline purchased by the lessor, as hereinabove provided shall be four cents (4¢) less than the Shell Co. of California's full market price in North Powder, Oregon, which full market price is understood to be No cents higher than Shell Co. of California's posted full market price at its [defendant's] bulk depot at Baker, Oregon." Also, the contract in that case obligated the company to fill all orders, or rather to make sale of gasoline to the plaintiff, as this language in the contract demonstrates: "All orders shall be filled with reasonable promptness. * * * Deliveries are to be made in fairly equal monthly quantities at said place of business." The court in its opinion in the case which we are just quoting, further differentiates the provisions of the agreement before it, specifying how the price is to be fixed and the agreement of the company to sell and deliver gasoline, from a number of cases where the price was not fixed and no obligation entered into to make sale or delivery.

In Jones v. Standard Oil Co. of California, 164 Wash. 83, 2 P.(2d) 76, 77, the agreement sued upon contained the following as to price: "For Red Crown Gasoline four (4¢) cents per gallon less than our posted Service Station or posted Plant price therefor, at time and place of delivery; and on the tenth day of each calendar month we will credit your account in a sum equivalent to two (2¢) cents per gallon for all Red Crown Gasoline delivered to you on said premises during the preceding calendar month. For products other than gasoline the price will be as stated in said agency agreement."

In Craig v. Richfield Oil Co. of California, 167 Wash. 664, 10 P.(2d) 216, the agreement contained the following as to price: "The price of gasoline delivered hereunder shall be four (4¢) cents per gallon less than the retail service station price as established and maintained by the seller in Seattle, Washington, on the date of delivery." This agreement was later modified to read: "four (4¢) cents per gallon less than the * * * 'posted tank wagon price of the seller.'" The agreement as modified left only to be determined what was meant by "the posted tank wagon price of the seller," which meant the same as the retail price at which gasoline was being sold to the different service stations and that the keeper of the service station involved in the action was entitled to a rebate of 4¢ (subsequently modified to 3¢), less than the ordinary retail price maintained by the company. In all of the foregoing cases the agreements contained provisions for determining the price, as well as other elements not found in the agreement involved in this action.

What we have said herein relative to the subject of gasoline also applies with equal force to the subject of oil mentioned in the agreement. No price is fixed, nor is there any obligation to deliver.

[4] Meeting the objection of the appellant in so far as it relates to the sale and delivery of oil, the respondent contends that the agreement is severable. However, there is nothing in the agreement nor in the complaint from which it can be concluded that the sale and delivery of lubricating oil was a negligible factor. While the agreement on its face appears to be nonseverable, we do not need to decide this question or to hold further than that after the 31st day of July, 1930, the provisions as to both oil and gasoline were executory. While this appeal must be decided upon issues of law raised by the demurrer affecting the validity of the agreement, reference has been made to some of the testimony as bearing upon the question of the possibility of amending the complaint so as to state a cause of action, and as to whether the cause was tried upon the theory that there were any oral agreements supplementing the written instrument,

The contract appearing upon its face to be fatally defective, as shown by the authorities which we have cited, it follows that the appellant's demurrer to the plaintiff's complaint should have been sustained.

The judgment is reversed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

MATHES v. BANGS et al.

Civ. 1017.

District Court of Appeal, Fourth District, California.

Dec. 12, 1932.

Hearing Denied by Supreme Court Feb. 9, 1933.

1. Bills and notes ⇐293.

Payee's assignment of all interest in note and all rights under trust deed securing it *held* indorsement "without recourse," indicating indorser's intent not to assume responsibility for payment of note on its maturity (Civ. Code, § 3119).

Payee's assignment provided that, for value received, payee assigned all right, title, and interest in the note, together with all right accrued or to accrue under deed of trust securing it, so far as it related to the note.

[Ed. Note.—For other definitions of "Without Recourse," see Words and Phrases.]

2. Evidence ⇐441(11).

Evidence tending to show indorser of note without recourse verbally guaranteed payment *held* inadmissible (Civ. Code, § 3119; Code Civ. Proc. § 1856).

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by James H. Mathes against Adelle M. Bangs and Katheryn Sinnige. From the judgment in favor of last-named defendant, plaintiff appeals.

Affirmed.

S. G. Ingle, of Pacific Beach, and Allen E. Rogers, of San Diego, for appellant.

Wm. H. Wylie, and Geo. A. Malette, both of San Diego, for respondent.

JENNINGS, J.

Plaintiff brought this action to recover a balance due and unpaid on a promissory note executed by defendant Adelle M. Bangs and the indorsement thereon signed by defendant Katheryn Sinnige. The complaint alleged that the note was executed on July 3, 1929; that Katheryn Sinnige was named as payee therein; that payment of the note was secured by a certain deed of trust; that such security had been wholly exhausted prior to the institution of the action; that prior to its maturity the note was indorsed and transferred by the payee to plaintiff; that, at the time the note was transferred to plaintiff, the payee, in addition to indorsing the note and for the purpose of inducing plaintiff to purchase the note, unconditionally guaranteed to plaintiff the payment of all sums mentioned therein; that plaintiff, in consideration of said guaranty and the transfer of said note to him, purchased the note from said payee and paid to said payee the sum demanded by her; that, after the note was thus transferred, it became due and payable; that the real property covered by the deed of trust was duly sold and the proceeds of such sale applied upon the note, leaving due and unpaid the balance for whose recovery the suit was brought. The defendant Adelle M. Bangs made no appearance in the action, and judgment by default was duly entered against her. Defendant Katheryn Sinnige filed an answer to plaintiff's complaint, and, upon the issues raised by the pleadings, the action proceeded to trial. Upon the conclusion of the trial, judgment was rendered in favor of defendant Katheryn Sinnige. From the judgment thus rendered and from the order denying his motion for a new trial plaintiff appeals.

[1] The single question presented by this appeal is whether appellant was entitled to prove by parol evidence that, at the time the note was indorsed and transferred to him, the respondent verbally guaranteed payment of the note. Appellant's offer to make such proof was refused by the court upon objection by respondent that it was inadmissible because it amounted to an attempt to vary the terms of a written contract. Respondent's indorsement which furnished the basis for the court's refusal of the proffered evidence is in the following form: "San Diego, California 7–28–30 For Value Received, I hereby assign to James H. Mathes all my right, title and interest in and to the within note, together with all right accrued or to accrue under Deed of Trust securing same, so far as the same relates to this note. Katheryn Sinnige." It may be taken as settled in California that an indorsement containing the phraseology which appears in the indorsement under consideration is equivalent to an indorsement "without recourse." Hammond Lumber Co. v. Kearsley, 36 Cal. App. 431, 172 P. 404; Kane v. Eastman, 110 Cal. App. 753, 295 P. 63. It is, however, urged that, although the indorsement amounted to a qualified indorsement, the effect produced thereby was to make the indorser responsible to the same extent as in the case of a transfer without indorsement and that appellant should have been permitted to show that, when the note was transferred, respondent verbally agreed to guarantee its payment. Appellant's contention in this regard is not only ingenious, but possesses some merit. Nevertheless, we are constrained to the opinion that its acceptance would do violence to the plain meaning of the phrase "without recourse." By the use of phraseology so restrictive in character an indorser plainly indicates an intent not to assume responsibility for payment of the note upon its maturity. 7 Words and Phras-

es, Third Series, 1068; 3 R. C. L. § 376, p. 1159. As was said in Cameron v. Ham, 23 Ohio App. 359, 155 N. E. 655, 656, such an indorsement constitutes the indorser a mere assignor of title to the paper. Section 3119, Civil Code, is in the following language: "*Qualified indorsement.* A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words 'without recourse' or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument."

[2] Since the indorsement herein which, as we have shown, is equivalent to an indorsement "without recourse" clearly indicates the indorser's intent not to assume responsibility for payment and to become no more than a mere assignor of the title to the instrument, it necessarily follows that evidence tending to show that the indorser verbally guaranteed payment is inadmissible. Code Civ. Proc. § 1856; Payette Bank v. Ingard, 34 Idaho, 295, 200 P. 344; Smith v. Barner, 95 Or. 486, 188 P. 216; Youngberg v. Nelson, 51 Minn. 172, 53 N. W. 629, 38 Am. St. Rep. 497; Bird v. Kay, 40 App. Div. 533, 58 N. Y. S. 170.

The judgment and order from which this appeal is taken are therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

127 Cal.App. 754

GLEASON v. FIRE PROTECTION ENGINEERING CO. et al.

Civ. 8168.

District Court of Appeal, First District, Division 1, California.

Nov. 30, 1932.

Hearing Denied by Supreme Court Jan. 27, 1933.

1. Negligence ⇐2.

To constitute actionable negligence, it must appear that defendant owed plaintiff duty to protect him from injury.

2. Negligence ⇐59.

To constitute actionable negligence, it must appear reasonably prudent person would have foreseen that act or omission complained of would probably cause injury.

3. Negligence ⇐82.

Plaintiff's act or omission, amounting to want of ordinary care and proximately contributing to injury, bars recovery.

4. Negligence ⇐135.

Ordinarily, contributory negligence is matter of defense to be established by preponderance of evidence.

5. Negligence ⇐122(2, 3).

Defendant is relieved of burden of proving contributory negligence, if complaint or evidence thereunder shows plaintiff guilty thereof.

6. Negligence ⇐136(8).

If undisputed facts, in light of common knowledge and experience, show plaintiff failed to exercise ordinary care, contributory negligence is question of law for court.

7. Negligence ⇐66(2).

One employed in dangerous place must exercise his faculties for own protection.

If approaching place he knows or ought to know is dangerous, he must take reasonable precautions to avoid injury.

8. Negligence ⇐3.

Degree of care required of person remains constant, but acts necessary to constitute such care may vary according to circumstances.

9. Negligence ⇐66(2).

Under allegations of complaint, tenant's employee who was sent to roof to prevent water from running through broken skylight and, while endeavoring to cover hole, slipped on wet roof and fell through skylight *held* contributorily negligent, precluding recovery against fire protection contractor allegedly negligently permitting water tank on roof to overflow.

It was alleged that defendant contractor negligently permitted one of tanks to overflow, with result that water ran through broken pane of glass in skylight and damaged certain goods stored below and owned by tenant; that plaintiff was directed to go on roof and take measures to prevent further flow of water into building; and that overflow had caused roof adjoining skylight to become wet and slippery, owing to which fact plaintiff, while endeavoring to cover the hole, slipped and fell through skylight and was injured.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by M. J. Gleason against the Fire Protection Engineering Company, C. T. Clifford, doing business under the name and style of the Fire Protection Engineering Company, and another. A general demurrer filed by named defendants to the complaint was sustained, and from a judgment of dismissal, plaintiff appeals.

Affirmed.

Hearing denied by Supreme Court; PRESTON, J., dissenting.

Sterling Carr and Francis P. Walsh, both of San Francisco, for appellant.

Hadsell, Sweet & Ingalls, of San Francisco, for respondents.

PER CURIAM.

A general demurrer filed by respondents to appellant's second amended complaint was sustained, following which a judgment of dismissal was entered.

According to the complaint, respondent Clifford was doing business under the name of Fire Protection Engineering Company. The Townsend Company, a corporation, which was joined as a defendant, was the owner of a certain building in San Francisco which was leased to Baker, Hamilton & Pacific Company, a corporation. Plaintiff was an employee of the company last named. For some time prior to September 28, 1929, respondents were engaged in repairing a fire protection system in the building, and had constructed on the roof two water tanks. Immediately west of the tanks was a glass skylight which had been constructed and was maintained and controlled by the Townsend Company. It was alleged that on the above date respondents negligently permitted one of the tanks to overflow, with the result that the water ran through a broken pane of glass in the skylight and damaged certain goods stored below which were owned by plaintiff's employer; that on the same date plaintiff was directed by his employer to go upon the roof and take measures to prevent a further flow of water into the building; that the overflow had caused the roof adjoining the skylight to become wet and slippery, owing to which the plaintiff, while endeavoring to cover the hole, slipped and fell through the skylight and was injured. It was further alleged that an ordinance of the city and county of San Francisco then in force and effect required skylights such as this to be inclosed with a substantial railing at least three feet high and protected by wire screens; also to be glazed with wire glass not less than one-quarter inch thick, none of which requirements had been met in this instance.

It may be stated at the outset that none of the facts alleged made it the duty of respondents to place or maintain the skylight in the condition prescribed by the ordinance. Appellant claims, however, that the allegations of the complaint sufficiently show that respondents were negligent and that such negligence was a proximate cause of his injuries.

[1-6] To constitute actionable negligence it must appear that the defendant owed plaintiff the duty to protect him from injury (Means v. Southern Cal. Ry. Co., 144 Cal. 473, 77 P. 1001, 1 Ann. Cas. 206), and that the act or omission complained of was such that a reasonably prudent person would have foreseen that it would probably cause injury (Katz v. Helbing, 205 Cal. 629, 271 P. 1062, 62 A. L. R. 825). Assuming that the complaint states a cause of action within the above rule, still if it appears that an act or omission on the part of plaintiff amounting to a want of ordinary care was a proximate contributing cause of his injury (Civ. Code, § 1714; 19 Cal. Jur., Negligence, § 74, p. 644; Steinberger v. Cal. Elec., etc., Co., 176 Cal. 386, 168 P. 570), he cannot recover. While this is ordinarily a matter of defense, which must be established by a preponderance of evidence (Gett v. Pac. Gas & Elec. Co., 192 Cal. 621, 221 P. 376), still, a defendant is relieved of the burden if the complaint or the evidence introduced in support thereof shows that the plaintiff was guilty of contributory negligence, which proximately contributed to his injury (19 Cal. Jur., Negligence, § 119, p. 699; Nehrbas v. Central Pacific R. R. Co., 62 Cal. 320; Kauffman v. Machin Shirt Co., 167 Cal. 506, 140 P. 15; Young v. Southern Pacific Co., 182 Cal. 369, 190 P. 36); and, if it clearly appears from the undisputed facts judged in the light of common knowledge and experience that a plaintiff has not exercised such care as men of common prudence usually exercise in situations of like danger, the question is one of law to be decided by the court (Nehrbas v. Central Pacific R. R. Co., supra; Kenna v. Central Pacific R. R. Co., 101 Cal. 26, 35 P. 332; Schurman v. Los Angeles Creamery Co., 81 Cal. App. 758, 254 P. 681).

[7-9] One who is employed in a place where he is exposed to danger must exercise his faculties for his own protection; and, if he approaches a place which he knows or ought to know is one of danger, he must take reasonable precautions to avoid being injured. 19 Cal. Jur., Negligence, § 32, p. 592, and cases cited; Brett v. S. H. Frank & Co., 153 Cal. 267, 94 P. 1051; Brown v. Lemon Cove Ditch Co., 36 Cal. App. 94, 171 P. 705; Jackson v. Leonardt etc., 57 Cal. App. 512, 207 P. 500. Here, according to the complaint, the roof was wet and slippery, due to which plaintiff fell. He was sent there for the express purpose of stopping the flow of water through the skylight, and the wet condition of the roof was, of course, obvious. As a matter of common experience he must have known that this condition would probably render the surface slippery and a source of danger. Peterson v. American Ice Co., 83 N. J. Law, 579, 83 A. 872, 47 L. R. A. (N. S.) 144. While the degree of care required remains constant the acts necessary to constitute such care may vary according to circumstances (Henderson v. Los Angeles Traction Co., 150 Cal. 689, 89 P. 976), and a reasonably prudent man under the circumstances alleged would have foreseen the possibility of injury from the condition described and used care in proportion to the danger. By the use of such care, namely, ordinary care, any injury to appellant due to the slippery condition of the roof could have been avoided.

Appellant cites numerous decisions that a servant, in obeying his master's orders, can-

not be guilty of contributory negligence as a matter of law. However this may be, the present action is not against plaintiff's employer, and the cases referred to have no application. The facts alleged bring the case as against respondents within the rule stated, and their demurrer was properly sustained.

No point is made of the fact that the demurrer was sustained without leave to amend, as no application for permission to amend was made. Haddad v. McDowell, 213 Cal. 690, 3 P.(2d) 550.

The judgment is affirmed.

128 Cal.App. 105

PEOPLE v. RALEIGH.

Cr. 1697.

District Court of Appeal, First District, Division 2, California.

Dec. 9, 1932.

Rehearing Denied Dec. 24, 1932.

1. Robbery ⇨11.

Robbery committed while armed with gun, loaded or unloaded, *held* robbery by person armed with "dangerous or deadly weapon," requiring conviction of first degree robbery (Pen. Code, § 211a).

Weapons in the strict sense of the word, such as guns, dirks, and black-jacks, which are "dangerous or deadly" to others in the ordinary use for which they are designed, are as matter of law "dangerous or deadly weapons." Instrumentalities, such as ordinary razors, pocketknives, hatpins, canes, hammers, hatchets, and other sharp or heavy objects, which are not weapons in strict sense of word and are not "dangerous or deadly" to others in ordinary use for which they are designed, are not as matter of law "dangerous or deadly weapons," but character thereof as such must be established at least for purposes of occasion, depending on manner of use and intention of possessor.

[Ed. Note.—For other definitions of "Dangerous Weapon" and "Deadly Weapon," see Words and Phrases.]

2. Robbery ⇨11.

Once character of instrumentality is established as "dangerous or deadly weapon," it is immaterial whether weapon is used or even exposed to view, as respects degree of offense.

3. Robbery ⇨24(5).

Showing "present ability" is not essential where accused was armed with gun at time of attempted robbery (Pen. Code, § 211a).

4. Robbery ⇨11.

Robber armed with instrument which is dangerous weapon as matter of law is guilty of first degree robbery (Pen. Code, § 211a).

In such case, neither the intended use nor the "present ability" of the perpetrator on the particular occasion need be shown, for the character of the instrumentality is established without such showing.

5. Robbery ⇨26.

When robber possesses instrumentality other than one which is dangerous or deadly weapon as matter of law, fact question for jury as to degree of robbery is presented (Pen. Code, § 211a).

In determining degree of the robbery, jury should determine whether the character of the instrumentality as a dangerous or deadly weapon has been established, and, in such case, the intended use of the instrumentality and the present ability of the perpetrator of the robbery are of importance in establishing the character of the instrumentality as a dangerous or deadly weapon for the purposes of the particular occasion.

6. Criminal law ⇨1172(7).

Accused could not complain on appeal that trial court permitted jury to determine degree of robbery under instructions more favorable to accused than he was entitled to have them (Pen. Code, § 211a).

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

William J. Raleigh was convicted of attempting to commit robbery in the first degree, and he appeals.

Affirmed.

Vincent W. Hallinan and C. K. Bonestell, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

SPENCE, J.

The defendant was duly convicted of the crime of the attempt to commit robbery of the first degree, and, from the final judgment of conviction and the order denying his motion for new trial, defendant has appealed.

The defendant entered a haberdashery, approached within one or two feet of the proprietor, pointed a gun at the proprietor, and said, "Stick them up." The proprietor ran out of the door onto the street. The defendant followed and fled without accomplishing his purpose.

[1] Calling our attention to the fact that there is no evidence in the record to show that the gun was loaded, appellant contends that the evidence was insufficient to sustain the verdict of attempt to commit robbery of the first degree. We find no merit in this contention.

Section 211a of the Penal Code defines first and second degree robbery as follows: "All robbery which is perpetrated by torture or by a person being *armed with a dangerous or deadly weapon* is robbery in the first degree. All other kinds of robbery are of the second degree." (Italics ours.) It is therefore clear that all that is required to constitute robbery of the first degree is that the person perpetrating the robbery be "armed with a dangerous or deadly weapon." The question of whether an unloaded gun constitutes a "dangerous or deadly weapon" within the meaning of the section has been frequently considered. People v. Hayes, 118 Cal. App. 341, 5 P.(2d) 439; People v. Seaman, 101 Cal. App. 302, 281 P. 660; People v. Hall, 87 Cal. App. 634, 262 P. 50; People v. Freeman, 86 Cal. App. 374, 260 P. 826; People v. Shaffer, 81 Cal. App. 752, 254 P. 666; People v. Egan, 77 Cal. App. 279, 246 P. 337; People v. Seawright, 72 Cal. App. 414, 237 P. 796, 797. There is some apparent conflict in the language of the decisions, and judgments have been affirmed upon different grounds, but our attention has not been called to any case in this jurisdiction in which a conviction of first degree robbery has been reversed merely because there was no evidence to show that the gun in the possession of the perpetrator was loaded. In fact, it has been indicated in numerous decisions that a person armed with an unloaded gun is a person "armed with a dangerous or deadly weapon" within the meaning of the section. People v. Hayes, supra; People v. Seaman, supra; People v. Hall, supra; People v. Freeman, supra; People v. Shaffer, supra; People v. Egan, supra. This we believe to be the correct view. Appellant cites and relies upon the language used by the learned author of the concurring opinion in People v. Seawright, supra, which indicates that a person armed with an unloaded gun is not a person "armed with a dangerous or deadly weapon" within the meaning of the section under consideration. To the extent that the language of that opinion so indicates we cannot agree with the views there expressed.

From a reading of the decisions on the subject, we are of the opinion that a distinction should be made between two classes of "dangerous or deadly weapons." There are, first, those instrumentalities which are weapons in the strict sense of the word; and, second, those instrumentalities which are not weapons in the strict sense of the word, but which may be used as such. The instrumentalities falling in the first class, such as guns, dirks, and black-jacks, which are weapons in the strict sense of the word and are "dangerous or deadly" to others in the ordinary use for which they are designed, may be said as a matter of law to be "dangerous or deadly weapons." This is true, as the ordinary use for which they are designed establishes their character as such. The instrumentalities falling in the second class, such as ordinary razors, pocket-knives, hat pins, canes, hammers, hatchets, and other sharp or heavy objects, which are not weapons in the strict sense of the word, and are not "dangerous or deadly" to others in the ordinary use for which they are designed, may not be said as a matter of law to be "dangerous or deadly weapons." When it appears, however, that an instrumentality other than one falling within the first class is capable of being used in a "dangerous or deadly" manner, and it may be fairly inferred from the evidence that its possessor intended on a particular occasion to use it as a weapon should the circumstances require, we believe that its character as a "dangerous or deadly weapon" may be thus established, at least for the purposes of that occasion.

[2] Much is said in the decisions regarding the manner of use of the instrumentalities involved, but there is no doubt that, once the character of the instrumentality is established as a "dangerous or deadly weapon," it is immaterial whether such weapon is used or even exposed to view. People v. Hall, 105 Cal. App. 359, 287 P. 533. We believe that the only significance which may be attached to the manner of use of a given instrumentality is that the use or threatened use thereof will often definitely indicate that an instrumentality falling within the second class was intended for use as a weapon on the particular occasion.

[3] Reference is also made in the decisions to the "present ability" of the possessor of the instrumentality. A showing of "present ability" has been deemed essential in cases involving the charge of *assault* with a deadly weapon. People v. Sylva, 143 Cal. 62, 76 P. 814. But such showing is not essential under such section 211a where the accused is armed with a gun. People v. Seaman, supra. On this general subject of "present ability" we quote from People v. Freeman, 86 Cal. App. 374, at page 376, 260 P. 826, 827, where the court said: "It is manifest that a heavy club or a piece of gas pipe in the hands of a child of tender years, and proposed by it to be used as against a large and powerful man of mature years, could scarcely be considered either as a deadly or a dangerous weapon;

but, reversing the situation as to parties, it is clear that the weapon might be not only dangerous, but deadly. Notwithstanding the fact that ordinarily and in and of itself the instrumentality may be in fact comparatively harmless, if, considering the attendant circumstances, together with the present ability of its possessor, the instrument is capable of being used in a deadly or dangerous manner, for the purpose of the particular occasion only, the character of the instrument may be established." But the "present ability of its possessor" there referred to is of importance only for the purpose of determining whether an instrumentality, not falling within the first class above mentioned, and not "dangerous or deadly" to others in ordinary use for which it was designed, could be used in the hands of its possessor in a "dangerous or deadly" manner.

[4, 5] Keeping in mind the above distinction between the two classes of "dangerous or deadly weapons," we believe that, whenever the perpetrator of a robbery is armed with an instrumentality of the first class, he is guilty of robbery of the first degree as a matter of law. In such cases there is no question of fact for the jury to determine in fixing the degree of robbery for the character of the instrumentality, as a "dangerous or deadly weapon" is established by the fact that it is a "weapon" which is "dangerous or deadly" to others in the ordinary use for which it is designed. Neither the intended use nor the "present ability" of the perpetrator on the particular occasion need be shown, for the character of the instrumentality is established without such showing. If, as in the present case, the instrumentality is a gun, it is immaterial whether the gun is loaded or unloaded at the time. On the other hand, when the perpetrator of a robbery has in his immediate possession an instrumentality other than one falling within the first class, there is a question of fact to be determined in fixing the degree of robbery. For this purpose the jury should determine whether the character of the instrumentality as a "dangerous or deadly weapon" has been established. If from all the facts and circumstances the jury is convinced beyond a reasonable doubt that the instrumentality was one which, in the hands of the perpetrator of the robbery, was capable of being used in a "dangerous or deadly" manner, and that the perpetrator of the robbery intended to use it as a "weapon" should the circumstances require, then the character of the particular instrumentality is established as a "dangerous or deadly weapon," and it is robbery of the first degree. In such cases the intended use of the instrumentality and the "present ability" of the perpetrator of the robbery are of importance in establishing the character of the instrumentality as a "dangerous or deadly weapon" for the purposes of the particular occasion.

[6] From what has been said it follows that appellant was properly convicted of attempt to commit robbery of the first degree, and that the evidence was sufficient to sustain the verdict. Appellant makes the further contention that the trial court erred in its instructions defining a "deadly weapon," but, in view of the conclusions we have reached, it is unnecessary to consider this contention. The trial court need not have instructed the jury on this subject, as there was no question of fact to be determined by the jury in fixing the degree of robbery. The trial court did permit the jury to determine the degree of robbery under instructions more favorable to appellant than he was entitled to have them, but appellant may not complain.

The judgment and order denying the motion for a new trial are affirmed.

I concur: STURTEVANT, J.

128 Cal.App. 52

PEOPLE of the State of California, Plaintiff and Respondent, v. Cecil GRIFFIN, Defendant and Appellant.

Cr. 1237.

District Court of Appeal, Third District, California.

Dec. 5, 1932.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

C. I. Bennington, of Oroville, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Sacramento county of a felony, to wit, burglary of the second degree.

The transcript on appeal was filed in this court October 14, 1932. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on December 5, 1932. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment is affirmed.

127 Cal.App. 768

PEOPLE v. FORBRAGD.

Cr. 1221.

District Court of Appeal. Third District, California.

Nov. 30, 1932.

1. Criminal law ⇐741(1), 742(1).

Weighing of evidence in criminal case and determination of where truth lies is within province of jury.

2. Criminal law ⇐1172(1), 1175.

In prosecution for incest, reference in instructions and verdict to act committed in October, 1930, notwithstanding state elected to rely on act committed in August, 1930, *held* not prejudicially misleading (Pen. Code, § 955).

3. Criminal law ⇐1001.

Application for probation by accused after conviction may be heard and determined at any time prior to execution of sentence (Pen. Code, § 1203).

4. Criminal law ⇐1001.

Order relating to defendant's application for probation after conviction, though not made before passing of judgment or sentence, *held* not improper (Pen. Code, § 1203).

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Sigurd Forbragd was convicted of incest, and he appeals.

Order and judgment affirmed.

A. M. Mull, Jr., of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The appellant was charged on information, tried and convicted of the crime of incest, and appeals from the judgment and from the order denying him a new trial.

No good purpose would be accomplished by a recital of the details of the testimony of the prosecutrix. Her testimony was direct and positive, not only as to the act complained of but of the subsequent abortion in which the appellant abetted.

[1] Appellant's counsel, in his cross-examination of appellant, developed certain inconsistencies in the testimony of the prosecuting witness, and asserts it is unreasonable and not in accord with truth or reason, but it was the province of the jury to weigh all of the evidence admitted by the court and determine where the truth lay, and they, after listening to the testimony introduced by the people and the defendant, under proper instructions and before a fair and impartial court, found the defendant guilty of the crime of incest.

Mr. Fred Hauser, a police officer of the city of Sacramento, called as a witness by the people, testified on cross-examination as to a conversation upon the arrest of defendant between himself and appellant:

"Q. What did he say? A. 'What they got against me'—his daughter—'is true.'

"Q. He said that? A. Yes.

"Q. Give us the exact words he said, though. A. What is that?

"Q. Give us the exact words he said though. What was the words he used when he said it? A. 'What she says is true. The quicker I go before a jury, the better off I am.'"

And, later on, in the course of the same cross-examination, the following questions were asked and the answers given:

"Q. And how long a conversation was this? A. Well, I was there about three or four minutes, you see, and I was interrupted, and I had to go on down the stairs again.

"Q. And he didn't deny it? A. No, and he didn't admit nothing.

"Q. Didn't admit anything, and didn't deny anything? A. No."

The appellant, as a witness in his own behalf, was on cross-examination asked the following questions as to statements made to the committing magistrate:

"Q. Do you remember of testifying over in the Police Court? A. I didn't testify in the Police Court.

"Q. Do you remember making a statement to the judge over there? A. I made a statement that I would—

"Q. (interposing): All right. I will read this to you. It might refresh your memory A. All right.

"Mr. O'Neill: This is page 25, of the Police Court: 'Magistrate'—That is the judge—, 'Well, this is a preliminary examination, for me to determine whether or not you are guilty of this charge, or, if not, that you are not guilty, but if there is sufficient cause, probable cause, to warrant my holding you to answer to another court, a higher court, where you would be tried before a jury, to determine your guilt or innocence.' Answer by yourself, the defendant: 'Well, the only thing I can do—all what I can do is to plead guilty and throw myself on the mercy of the court.'"

On redirect examination, in answer to a question by his counsel:

"Q. Well, did you make the statement in the transcript there—as it was read by the

District Attorney? A. That I wasn't guilty, but that I threw myself on the mercy of the jury.

"Mr. Mull: Well, that isn't the question. The question is, did you make the statement that the District Attorney read from the transcript, to the Police Judge? A. Well, if that's the way it is down there, I must have said it, then."

[2] Appellant points out that the verdict in this case follows the allegations in the information, which charge the defendant with having committed the act of incest on the ——— day of October, 1930, as does also the reference in the instructions of the court.

At the opening of the trial, and prior to the introduction of testimony, the attorney for the defendant requested the district attorney to elect upon which act of sexual intercourse he would rely, and thereupon the district attorney announced the prosecution would rely upon the act in August, 1930. We are of the opinion that neither the defendant nor the jury were or could have been misled by the reference to October —, 1930, in the instructions nor the verdict.

In the case of People v. Sheffield, 9 Cal. App. 132, 98 P. 67, 68, the information charged that the offense was committed "on or about the 12th of October, 1907," and it was insisted that the information was defective, because the precise time was not stated. The court there said: "This is not necessary under section 955 of the Penal Code, except where the time is a material ingredient in the offense. That it is not such an ingredient, where rape by means of force is charged, is determined in the case of People v. Dinsmore, 102 Cal. 382, 36 P. 661. No convincing reason is suggested why a different rule should apply where the female is by statute rendered incapable of consent. The information charges that at the time of the commission of the act the female was under the age of consent, and it clearly appears that the offense was committed within the three years immediately preceding the filing of the information. This is sufficient."

So, in the case at bar, time is not a material ingredient; it being alleged that the act complained of was accomplished with his daughter, always an actionable wrong, if within the statute of limitations.

[3, 4] Appellant also complains that the order relative to appellant's application for probation should have been made before the passing of judgment or sentence, but this also is untenable under section 1203 of the Penal Code, which provides that the court may summarily deny probation, or, at a time fixed, may hear and determine, in the presence of the defendant, the matter of probation. Courts have power to hear and determine applications for probation at any time prior to the execution of sentence. Lloyd v. Superior Court, 208 Cal. 622, 283 P. 931.

Appellant also complains that prejudicial error was committed by the asking by the district attorney of a leading question of prosecutrix, but an examination of a previous answer of the witness indicates that she was not led into the response given.

It is apparent from the record that the guilt of the defendant is clearly established, and that there was ample evidence to justify the verdict of the jury, orders and judgment of the court.

The order and the judgment are affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

128 Cal.App. 32

BANK OF AMERICA OF CALIFORNIA v. SLINGERLAND et al.

Civ. 991.

District Court of Appeal, Fourth District, California.

Dec. 2, 1932.

1. Fraudulent conveyances ⇐271(3).

Burden of proving that property belonged to judgment debtor and was conveyed to defraud judgment creditor is on judgment creditor.

2. Appeal and error ⇐954(1).

Temporary injunction restraining foreclosure of trust deed pending trial of action to determine title should not be disturbed on appeal if sufficient grounds appear to support it.

3. Mortgages ⇐338.

Granting temporary injunction against foreclosure of trust deed pending trial of action to determine title *held* proper under circumstances.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by the Bank of America of California against F. W. Slingerland, Alvin Anderson, and others, in which defendant Anderson filed cross-complaint. From an order granting a temporary injunction in favor of defendant Anderson, plaintiff appeals.

Affirmed.

Freston & Files by James A. McLaughlin, all of Los Angeles, for appellant.

J. Edward McCurdy, of Los Angeles, for respondent.

MORTON, Justice pro tem.

Appellant brought this action to subject certain real property to the payment of a judgment of $3,000 against one F. W. Slingerland. It is alleged that the other defendants have no interest in the property; that although vested title appeared in the name of Michal D. Slingerland, he had no real interest or ownership in the property and that the legal title to the property was placed in his name for the purpose of defrauding appellant and preventing an execution upon the property under its judgment against defendant F. W. Slingerland. Respondent claiming ownership of the property through recorded deeds of Michal D. Slingerland and S. W. Irving, filed his answer on April 2, 1930, and a cross-complaint praying damages of $15,000 alleging that the lis pendens recorded by appellant giving notice of this action had prevented him from refinancing or selling his equity in the property. Respondent alleged the value of the property to be $30,000, which was denied by appellant. It was subject to a trust deed of $12,000 and a second trust deed of $1,750. the first trust deed being in favor of appellant. On March 11, 1930, appellant entered a default under its trust deed and on June 13, 1930, pursuant to order of court respondent amended his cross-complaint to include injunctive relief against the trust deed foreclosure. He also sets forth that he and his family resided on the property. Appellant in his answer to the cross-complaint alleges that defendant S. W. Irving is a fictitious character; that the S. W. Irving grant deed to respondent was not executed on the date shown and further that he never owned any interest in the property. The affidavit of one H. C. Lichenberger, a state inheritance tax appraiser of the state of California, gives the reasonable cash market value of the entire property on June 4, 1930, as $18,400.

Appellant appeals from the temporary injunction granted respondent by the trial court enjoining foreclosure of its trust deed pending the trial of this action.

The issues presented by these pleadings place the title to the property in dispute, involve equitable relief, and raise a question as to damages. It is alleged by appellant that Michal D. Slingerland, S. W. Irving, and respondent wrongfully claim an interest in the property, and he asks that it be decreed that F. W. Slingerland is the owner and that his interest be subjected to the judgment.

[1] The burden of proving title rests upon the appellant in actions of this nature. There can be no question but that the recording of the lis pendens clouded respondent's title to the property in such a manner as to seriously affect refinancing the incumbrances and the selling of the property. When this action is tried on its merits, the issue will be decided as to whether or not respondent is entitled to any damages.

Apparently without any act on his part, except the source from which he secured his title, respondent finds his property involved in litigation. The injury is of a continuing nature difficult to estimate and his equity can only be preserved through equitable relief.

"And where title is in dispute, it is the common practice to issue injunctions for the preservation of the property pending proceedings at law for the determination of the rights of the parties. The mere existence of a doubt as to title does not of itself constitute a sufficient ground for refusing the injunction." 14 Cal. Jur., § 48, p. 240.

Further in the case of Kellogg v. King, 114 Cal. 378, at page 385, 46 P. 166, 168, 55 Am. St. Rep. 74, the court held: "The mere fact that one has a right of action at law will not prevent his right to equitable relief by way of injunction against a threatened trespass, if, under the circumstances, the legal remedy would fail of affording adequate relief against the impending wrong. * * * It is the nature of the injury, and not the incapacity of the party to respond in damages, which determines the right. Where the effect of the act complained of is, or may be, to largely impair or destroy the substance of the estate, by taking from it something which cannot be replaced, it may be enjoined, irrespective of the ability of the defendant to respond in damages."

[2] If sufficient grounds appear to support the discretion exercised by the trial court, its order should not be disturbed on appeal.

"The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the rights claimed by him." Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 99 P. 502, 511, 22 L. R. A. (N. S.) 391.

[3] Considering all the circumstances surrounding the issues herein involved, the substantial conflict in the evidence thus far presented, and the advisability of keeping the title to the property in status quo until the matter is heard on its merits, we feel that this action is a proper one in which to issue a preliminary injunction.

The order of the trial court is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

127 Cal.App. 731

BONANZA SYNDICATE et al. v. SUPERIOR COURT IN AND FOR SANTA BARBARA COUNTY.

Civ. 8794.

District Court of Appeal, Second District, Division 2, California.

Nov. 29, 1932.

Justices of the peace ⇐159(6).

Where respondents excepted to sufficiency of sureties on bond on appeal from justice court, appellants tendering other sureties *held* entitled to have them justify before justice before signing bond (Code Civ. Proc. § 978a).

Justice should have proceeded with justification of newly proffered sureties, and, if they stood test of examination into their financial resources, should have permitted them to sign the bond, and, such course not having been followed, appellants had right to cause signatures then to be appended to instrument and undertaking was at once good, as against contention that time for justification of the would-be sureties could not have arrived until after they had actually signed the bonds in place of sureties whose names were originally appended thereto.

Proceeding on the application of the Bonanza Syndicate and others for certiorari to review an order of the Superior Court in and for Santa Barbara County, dismissing an appeal from a justice court for failure of sureties to justify.

Order annulled.

Charles S. Darden and Ernest B. Coil, both of Los Angeles, for petitioners.

Schauer, Ryon & Goux and Leo T. McMahon, all of Santa Barbara, for respondent.

WORKS, P. J.

Petitioners filed with respondent court a notice of appeal from a judgment entered against them by a justice court in an action in which they were defendants. In due time they also filed with respondent court an undertaking on the appeal with two sureties, and the opposing parties thereafter excepted to the sufficiency of the sureties under section 978a of the Code of Civil Procedure, and the other steps prescribed by that section were taken, up to a certain point. At that point we begin. The sureties who had signed the bond did not appear at the time set for their justification, but the appellants tendered two other willing sureties in their stead. The justice court refused to permit these latter two to justify, and the counsel for respondents on the appeal declined to question them as to their financial qualifications and "withdrew from the proceedings." Thereafter and on the same day the would-be sureties swore to and signed, before a notary public, the affidavit which under the law accompanies such bonds and signed the bond itself. The paper was then, and on the same day, filed. Thereafter and upon notice respondent court made its order dismissing the appeal on the ground of a "failure of sureties on appeal to justify." It is this order which is sought to be reviewed in this proceeding.

Respondent in the present proceeding contends that the order of dismissal was proper for the reason that there was no undertaking upon which the two new sureties could justify; in other words, that the time for their justification could not have arrived until after they had actually signed the bond in place of those whose names were originally appended to it. While there is no reported decision upon the point made, the practice in many cases in the superior court has been that adopted by the appealing parties in the present instance, and we are entirely satisfied of its correctness. The justice should have proceeded with a justification of the newly proffered sureties, and, if they stood the test of an examination into their financial resources, should have permitted them to sign the bond. This course not having been followed, the appellants had the right to cause the signatures then to be appended to the instrument, and the undertaking was at once good.

Order annulled.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

MANUFACTURERS' FINANCE CORPORATION v. PACIFIC WHOLESALE RADIO, Inc. (two cases).*

Civ. 8505.

District Court of Appeal, First District, Division 1, California.

Dec. 3, 1932.

Rehearing Granted Dec. 31, 1932.

1. Appeal and error ⇐302(6).

Where order granting new trial does not specify insufficiency of evidence as ground therefor, appellate court cannot consider sufficiency of evidence to sustain verdict unless it be insufficient in law (Code Civ. Proc. § 657).

Code Civ. Proc. § 657, provides that on appeal from order granting new trial it will be presumed that order was not based on insufficiency of evidence to sustain

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 19 P.2d 1013.

verdict, unless order contains statement to the contrary.

2. Appeal and error ⇨533(1).
Trial court's opinion is not part of record on appeal.

3. Appeal and error ⇨717.
Trial court's opinion is aid in discovering processes by which judgment was reached.

4. New trial ⇨58.
Rendition of verdict under misapprehension of instructions, not being mentioned in statute, is not ground for new trial (Code Civ. Proc. § 657).

5. New trial ⇨1.
New trial may be granted only on statutory grounds (Code Civ. Proc. § 657).

6. Appeal and error ⇨933(4).
There being some evidence supporting verdicts, orders granting new trials could not be sustained on ground of insufficiency of evidence as matter of law (Code Civ. Proc. § 657).

7. Set-off and counterclaim ⇨49(1).
In assignee's action on drafts or trade acceptances accepted by defendant, defendant's demands against assignor, asserted by way of set-offs or counterclaims, could not constitute basis of affirmative liability on part of assignee.

8. New trial ⇨58.
Verdict contrary to instructions, and hence against law, may be set aside on motion for new trial (Code Civ. Proc. § 657).

9. Action ⇨59.
Effect of consolidating actions for trial is to unite causes of action so as to constitute one action and one pleading.

10. Action ⇨59.
Where actions are consolidated for trial, there should be only one set of findings and one judgment.

11. Action ⇨59.
Duplicate set of findings and judgment will be treated as one verdict or set of findings and one judgment where actions have been consolidated for trial.

12. New trial ⇨38.
Where court, notwithstanding actions were consolidated for trial, submitted case as one calling for return of special verdicts rather than single verdict, which probably confused jury and materially affected parties' substantial rights, new trial *held* properly granted; error being one of law in course of trial (Code Civ. Proc. § 657).

13. New trial ⇨6.
In granting new trial, trial court has wide discretion (Code Civ. Proc. § 657).

14. Appeal and error ⇨977(3).
Before order granting new trial will be set aside, abuse of discretion must appear (Code Civ. Proc. § 657).

Appeals from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Two separate actions by the Manufacturers' Finance Corporation against Pacific Wholesale Radio, Incorporated, which pleaded set-offs or counterclaims as defenses to each action, were consolidated for trial. After a verdict for plaintiff in the first action and for defendant in the second action, a new trial was granted on motion in each case, and both parties appeal.

Affirmed.

Willard P. Smith and William L. Southwell, both of San Francisco, for Pacific Wholesale Radio, Inc.

Dinkelspiel & Dinkelspiel, of San Francisco, for Manufacturers' Finance Corporation.

PER CURIAM.

Plaintiff, an assignee, filed two separate actions against the defendant. The first was upon two drafts, called trade acceptances, each for $20,000, which defendant had accepted. The second action was for the recovery of $14,363.50, the price of goods, wares, and merchandise alleged to have been sold and delivered to defendant. The latter in its answer to the first action admitted the acceptances but in the second suit denied the allegations of the complaint. As defenses to each action it pleaded identical set-offs or counterclaims as against the assignor aggregating the sum of $34,871.59. It is admitted that the actions arose out of one transaction between the same parties and might have been joined in the first instance. By stipulation they were consolidated for trial. The jury returned a verdict in the first action in favor of plaintiff for $40,000, and in the second a verdict for the defendant and against the plaintiff for $14,363.50. Separate judgments were entered in accordance with the verdicts.

[1] In the first action defendant filed a notice of intention to move for a new trial, and a similar notice by the plaintiff was filed in the second action. Each specified all the grounds provided by statute, and following motions by respective parties a new trial was granted in each case. From these orders appeals were taken. The orders were in general terms and neither contained a specification that the same was granted on the ground of the insufficiency of the evidence. Where the order fails to so specify, it must be presumed on appeal that it was not granted on

that ground (Code Civ. Proc. § 657); and an appellate court is precluded from considering the question whether or not the evidence was sufficient to sustain the verdict unless it be insufficient in law. Yoakam v. Hogan, 198 Cal. 16, 243 P. 21.

[2-8] The trial court, after making the orders, filed a written opinion, stating its belief that the jury intended to deduct from plaintiff's claims defendant's counterclaims against the assignor but became confused, and as a result failed to do so. Although the opinion of the trial court is not part of the record on appeal (2 Cal. Jur., Appeal and Error, § 235, p. 488), it is nevertheless an aid in discovering the processes by which the judgment was reached (Estate of Felton, 176 Cal. 663, 169 P. 392); and it is significant, as pointed out by the trial court, that the verdict in favor of the defendant was in the exact amount claimed by plaintiff in its second action. While the rendition of a verdict under a misapprehension of the instructions of the court was formerly a ground for granting a new trial (Townley v. Adams, 118 Cal. 382, 50 P. 550), the power is now limited to the grounds set forth in section 657 of the Code of Civil Procedure. Diamond v. Superior Ct., 189 Cal. 732, 210 P. 36. There was some evidence supporting the verdicts of the jury, and it follows that the orders cannot be sustained on the ground either of insufficiency of the evidence as a matter of law or misapprehension by the jury. However, defendant's demands against the assignor could not be made the basis of an affirmative liability on the part of the assignee (23 Cal. Jur., Set-off and Counterclaim, § 38, p. 266); and the verdict returned against the latter in the second action was contrary to the instructions of the trial court. Consequently this verdict was against law and might be set aside on motion for a new trial. 20 Cal. Jur., New Trial, § 82, p. 130.

[9-12] As stated, the actions were consolidated, the effect of such an order being to unite the causes of action so as to constitute one action and one pleading. Union Lumber Co. v. Simon, 150 Cal. 751, 89 P. 1077, 1081. In such instances there should be a single set of findings and one judgment (Willamette, etc., Mfg. Co. v. Los Angeles C. Co., 94 Cal. 229, 29 P. 629), and where there is a duplicate set of findings and judgments the same will be treated as one set of findings or verdict, as the case may be, and one judgment. Stanton v. Superior Ct., 202 Cal. 478, 261 P. 1001; East Bay Municipal, etc., District v. Kieffer, 99 Cal. App. 240, 278 P. 476, 279 P. 178. In view of this rule it was the proper practice to submit the case to the jury as one calling for the return of a single verdict rather than for special verdicts as was done here; and while error in this respect would not ordinarily be prejudicial, it is reasonably certain that the course followed confused the jury and materially affected the substantial rights of the parties. The error was one of law in the course of the trial, and consequently was ground for a new trial. 20 Cal. Jur., New Trial, § 92, p. 139.

[13, 14] In granting a new trial much is committed to the discretion of the trial court, and an abuse of discretion must appear before the order will be set aside. Sheets v. Southern Pacific Co., 212 Cal. 509, 299 P. 71. Here the conclusions of the trial court are fully sustained, and its orders corrected a probable miscarriage of justice.

The orders are affirmed.

128 Cal.App. 10

INDEMNITY INS. CO. OF NORTH AMERICA v. WATSON et al.

Civ. 921.

District Court of Appeal, Fourth District, California.

Nov. 30, 1932.

Hearing Denied by Supreme Court Jan. 27, 1933.

1. Pleading ⇐376.

Overcharges for premiums *held* properly deducted, as against insurer's contention that insured offered to confess judgment; insurer not having accepted offer.

Action was brought by insurer to recover from insured amount alleged to be due for premiums on certain policies and for charges for executing certain bonds. Insured offered to confess judgment for particular amount, which was equal to amount found to be due by jury, plus certain overcharges disclosed by evidence. Insurer did not accept insured's offer to confess judgment, and case was tried on final issue presented by pleadings under which insurer claimed that certain sum was due, and insured denied that this sum was due.

2. Evidence ⇐91.

Where plaintiff claimed and defendant denied that certain sum was due, plaintiff had burden of proof.

3. Insurance ⇐188(2).

In insurer's action for premiums and other charges, evidence justified jury in crediting insured with amount of stock subscription in corporation whose assets were subsequently transferred to insurer's agent.

It appeared that insured subscribed for stock in proposed corporation, that no stock was ever issued, and one of promoters subsequently became member of partnership which, as insurer's agent, main-

tained open account with insured, and that corporation's assets, including amount paid by insured for stock, were transferred to insurer's agent, which credited insured with such amount.

4. Insurance ⇐186(3).

Where insured had given note to insurer's agent, which immediately obtained money or bank credit thereon, insured *held* entitled to credit therefor as against insurer.

It appeared that shortly after note was given, it was discounted by bank and proceeds were credited to agent's account, that credit therefor was duly given to insured by insurer's agent, and that insured paid note in full shortly after maturity. Insurer, opposing any allowance of credit therefor to insured, relied on general rule that agent to collect cannot receive payment in notes of debtor.

5. Principal and agent ⇐105(9).

In California, agent to collect may receive payment by check.

6. Insurance ⇐188(2).

Evidence showed that insured justifiably regarded certain charges as indebtedness due insurer's agent; hence jury properly found that insured's note, accepted by agent, did not create overdraft of insurer's credits with insured.

It appeared that charges in question included charges made by insurer for execution of finance bonds required by company from which insured was borrowing money, it being orally agreed between insured and company that company would pay such charges on final settlement; that this oral agreement was duly performed, but in meantime bonds were ordered by insured, and statement of charges made for their execution was rendered to insured and appeared in insured's books as indebtedness owed to insurer's agent on date on which note involved was executed; and that it was not until several weeks later that insured learned that charges had been paid by company directly to insurer.

7. Insurance ⇐188(2).

Under evidence, insurer could not complain that agent, to secure immediate payment from insured, granted discount and assumed interest on note; agent's commissions on insured's business exceeding discount and interest (Pol. Code, § 633b).

It was contended that transaction in question was void by reason of Pol. Code, § 633b, prohibiting insurance agents from allowing any rebate of premiums, but it appeared that such statute was inapplicable, inasmuch as it prohibits granting of rebates as inducement to insurance, and evidence showed that allowance of discount and payment of interest were not made as inducement to insurance.

8. Trial ⇐252(4).

Instructions concerning meaning and effect of statute *held* properly refused; statute being inapplicable under evidence (Pol. Code, § 633b).

9. Interest ⇐45.

Generally, in absence of contract for interest, law awards interest from time money becomes due, if time and sum are certain.

General rule with respect to allowance of interest is that, where there is no contract to pay interest, law awards interest on money from time it becomes due and payable, if such time is certain and if sum is certain or can be made certain by calculation.

10. Interest ⇐19(3).

Instructions authorizing interest on amount found due *held* properly refused, where plaintiff alleged and defendant denied that certain balance was due.

Complaint alleged that, after deducting certain payments, particular balance remained due. Answer denied that amount claimed was due, and alleged payments largely in excess of those admitted in complaint. Action was tried by court on theory that answer amounted to general denial that any sum was due, and proof at trial showed that amounts of certain disputed items, as alleged in complaint, were in excess of amount properly due.

11. Interest ⇐19(1).

In determining right to interest on amount due, test is whether exact sum found due was known and admitted by defendant to be due.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by the Indemnity Insurance Company of North America against E. P. Watson, Jr., and another, copartners doing business under the firm name and style of Watson & Sutton. From a judgment granting partial relief, plaintiff appeals.

Affirmed.

Franklin A. Plank, of San Diego, for appellant.

Ray M. Harris, of San Diego, for respondents.

JENNINGS, J.

This action was instituted by plaintiff to recover from the defendant the sum of $5,743.13 alleged to be due from said defendant for earned premiums on certain policies of

public liability and workmen's compensation insurance issued by plaintiff in which defendant was named as the insured and for charges made by plaintiff for the execution of a considerable number of bid bonds and contract bonds for and on behalf of defendant. At all times material to the present action defendant was a copartnership engaged in general contracting business in the county of San Diego. Included in the complaint and forming a part thereof is a schedule of the various charges made by plaintiff for its services in issuing the aforesaid policies and bonds. This schedule comprises seventy-five different items specifying the date on which each bond was executed and each policy of insurance was issued and the charge made for each such bond or policy. Defendant's answer denied that the aforesaid sum was due to plaintiff. On the same date on which defendant's answer was filed, there was filed on defendant's behalf by its counsel an offer to confess judgment in the sum of $1,743.13. This offer was not accepted by plaintiff, and the case proceeded to trial on the issues framed by the pleadings. At the conclusion of the trial the matter was submitted to a jury selected for the purpose and a verdict was returned in plaintiff's favor for the sum of $1,699.09. Plaintiff thereupon moved the court to render judgment in its favor in the sum of $5,199.09 notwithstanding the verdict, which motion was by the court denied. Plaintiff's motion for a new trial was likewise denied, and, from the judgment entered in conformity with the verdict, this appeal has been prosecuted. For the purpose of clarifying the matters presented by this appeal a brief statement of facts is required.

During the greater part of the time when the various insurance policies and bonds were issued and executed by plaintiff as aforesaid, the total amount of the charges for which comprise the sum named in plaintiff's complaint, plaintiff was represented in the county of San Diego by a certain agent. This agent was a copartnership operating under the firm name of Faraday & Reilly. There is no dispute that the aforesaid copartnership was the duly appointed agent of plaintiff, and the evidence is ample to show that the agent was authorized to collect premiums and charges for the issuance of insurance policies and the execution of bonds in plaintiff's name. An open account existed between plaintiff and its agent for insurance premiums and bond charges for policies of insurance and bonds which were issued through the agent in said county of San Diego. Among the clients of the agent was the defendant. Between defendant and plaintiff's agent there likewise existed an open account covering the premiums for insurance policies and bonds. The evidence produced during the trial showed that from January 1, 1927, until February 21, 1928, payments for insurance premiums and charges for the execution of bonds were consistently made by defendant to plaintiff's agent in response to statements therefor rendered to defendant by the agent. On February 21, 1928, plaintiff notified defendant that the firm of Faraday & Reilly no longer represented plaintiff, that it held from the agent an assignment of the account between defendant and the agent, and that remittances should thereafter be made direct to plaintiff. Accompanying the letter of notification was a statement under date of February 20, 1928, showing defendant indebted to plaintiff for insurance policies and bonds written through Faraday & Reilly in the total amount of $3,823.47.

Before entering upon a discussion of the various matters presented by this appeal, it is to be observed that, during the course of the trial, it was conceded by plaintiff that defendant was entitled to a credit of $442 upon the amount for which the action was brought. This credit was allowed by reason of an overcharge in one of the items appearing in the schedule of charges which was set out in the complaint. When the amount of this credit is subtracted from the amount named in the complaint, a balance of $5,301.13 remains as the sum claimed by plaintiff to be due from defendant.

Exclusive of the contention of plaintiff that it was entitled to interest at the legal rate on the amount properly due from defendant which will hereafter receive attention, it is contended that the jury improperly took into account and deducted from the amount claimed by plaintiff certain sums claimed by defendant as proper credits, which sums amounted to a total of $3,544.04. Examination of the record indicates that the total sum specified was allowed by the jury since the verdict is for the exact amount admitted by defendant during the trial to be due to the plaintiff. The sum of $3,544.04 is comprised of three items. The first of these items consists of claimed overcharges for premiums on two policies of insurance issued by plaintiff, and amounts to the sum of $44.04. The second item consists of a credit for $500 allowed to defendant by plaintiff's agent on June 20, 1927. The third item consists of a credit for $3,000 allowed to defendant by plaintiff's agent on November 28, 1927.

[1, 2] With respect to the credit of $44.04 it is plaintiff's contention that defendant offered to confess judgment for the sum of $1,743.13 which it will be observed is the amount found to be due by the verdict, plus the sum of $44.04. This fact, together with the additional feature that defendant's answer contained merely a denial that the amount claimed in the complaint was due, forms the basis of plaintiff's contention that this particular item was incorrectly allowed as a credit by the jury. The contention is not sound. Plaintiff did not accept defendant's offer to confess judgment for the amount

specified, but chose to proceed to trial on the issues framed by the pleadings. The final issue presented by these pleadings was plaintiff's claim that a certain sum was due and defendant's denial that it owed this sum. Plaintiff was compelled to assume the burden of proving that the amount claimed by it was the proper amount due from defendant. Direct evidence was produced by defendant showing that, with respect to two items contained in the schedule of charges, there were overcharges which amounted to $44.04. The jury was therefore justified in making allowance for the amount indicated.

[3] The circumstances attending the $500 credit of June 20, 1927, are as follows: During the month of December, 1926, Harry W. Faraday and two other individuals proposed to form a corporation for the writing of insurance, principally insurance required by contractors. Subscriptions for capital stock in the corporation were taken. Among the subscriptions for capital stock was that of the defendant in the amount of $500, represented by two checks of defendant each for $250. The corporation was formed under the name of the Harry W. Faraday Corporation. No stock was issued, and a short time thereafter Harry W. Faraday became a member of the firm of Faraday & Reilly. The sum of $500 was not used in developing the corporation. When the firm of Faraday & Reilly was formed, the assets of the Harry W. Faraday Corporation were transferred to the copartnership. Among these assets was the sum of $500 advanced as aforesaid by defendant. This sum of money had been deposited in a bank. During the month of May, 1927, it was agreed between the copartnership of Faraday & Reilly and the defendant that this sum of $500 should be credited to the open account of defendant with the firm of Faraday & Reilly. This was accordingly done, and on June 20, 1927, plaintiff's agent issued a credit memorandum which recited that defendant was given credit for this amount on the premium charged for a certain designated contract bond which had been theretofore executed by plaintiff. In support of its contention that the jury improperly allowed a credit for this amount, plaintiff relies upon the general rule that an agent given authority to make collections is authorized to collect money only, and may not offset against the amount due the principal and indebtedness due from the agent to the third person. Here, however, there was evidence that the sum of $500 paid as aforesaid by defendant came into the hands of plaintiff's agent was deposited in the bank to the credit of the agent and was paid to the various companies through whom Faraday & Reilly placed insurance or executed bonds for defendant. It cannot be disputed that, if plaintiff's agent had repaid the money to defendant, and defendant had then paid this sum to plaintiff's agent to be applied on the open account between these parties, plaintiff could not effectually complain. Exactly this same result was achieved by the procedure adopted. We conclude, therefore, that there was evidence presented to the jury which justified it in allowing credit to the defendant for the sum indicated.

[4-6] The credit for $3,000 was allowed to defendant by plaintiff's agent under the following circumstances as disclosed by the record: During the latter part of November, 1927, Messrs. Faraday and Reilly went to the office of defendant in the city of San Diego and stated that they needed $3,000, and requested defendant to make a payment of this sum on their account with the copartnership of Faraday & Reilly. An examination of defendant's books showed that defendant was then indebted to Faraday & Reilly in the sum of $3,260.54. After some consultation it was arranged that defendant would execute a promissory note in favor of Faraday & Reilly in the sum of $2,887.50, payable in ninety days, and that defendant would in return therefor receive credit for $3,000 from Faraday & Reilly. The difference of $112.50 between the amount for which the note was given and the credit for $3,000 which was to be allowed to defendant represented a discount of 2 per cent. on the sum of $3,000 allowed by Faraday & Reilly and interest on the note for the 90-day period at the rate of 8 per cent. per annum which Faraday & Reilly were willing to assume. Shortly after the note was given, it was discounted at the bank where the firm of Faraday & Reilly had its account and the proceeds of the note were credited to the account of Faraday & Reilly. It does not fully appear just what amount was realized by Faraday & Reilly through the discounting of the note, although there is some evidence that the full amount for which the note was given was realized by the firm. Thereafter credit for $3,000 was duly given to defendant by Faraday & Reilly. The note was paid shortly after its maturity by defendant. The allowance of this credit of $3,000 by the jury is attacked by plaintiff on several grounds. The general rule which forbids an agent empowered to make collections to receive anything other than money is again invoked. Plaintiff's counsel in his brief quotes the rule as announced in 2 C. J. 628, in the following language: "In the absence of special authority, as a general rule, an agent to collect cannot receive payment in notes of the debtor payable either to the agent himself or to his principal." However, the last sentence of the text from which the above quotation is taken is as follows: "But even though the receipt of such a payment is unauthorized, if the agent collects the money on the paper accepted by him the payment is good." The modification indicated by the last-quoted language would appear to fit exactly the situation here presented and to furnish a complete answer to plaintiff's contention that the giving of the note effectually precludes the al-

lowance of a credit therefor even though it is undisputed that thereby the agent received in money the amount of the note which upon maturity was paid by the debtor.

In California the general rule which prohibits payment to an agent authorized to collect in any form other than money has been relaxed to permit payment by check. California Stearns Co. v. Treadwell, 82 Cal. App. 553, 256 P. 242. On principle, no good reason appears why the relaxation should not be extended as stated in the above-quoted language from Corpus Juris to include payment by note where, as here appears, money or its equivalent in bank credit was immediately secured by the agent through sale of the note which upon maturity was paid in full by the maker. Further attack is made upon the allowance of the credit for $3,000 on the ground that at the time the note was given, defendant was indebted to plaintiff's agent in a sum much less than the amount for which the note was made. In this connection, it is said that the acceptance of the note by plaintiff's agent constituted an overdraft of plaintiff's credits with the defendant which is prohibited. Faulkner v. Bank of Italy, 69 Cal. App. 370, 231 P. 380. The essential element of this attack rests in the declaration that, at the time the note was given, defendant was indebted to the agent and more particularly to plaintiff in an amount much less than the amount represented by the note. Examination of the record discloses that defendant's bookkeeper testified that on the date on which the note was made defendant's books showed an indebtedness to the firm of Faraday & Reilly, plaintiff's agent, in the amount of $3,260.54, of which the sum of $3,174.81 was due to plaintiff. It must be observed that included in this latter amount were charges amounting to $979.30, which were later paid direct to plaintiff by another concern known as the Municipal Bonding Company. It appears that the last-named figure comprised charges made for the execution of certain finance bonds which were required by the Municipal Bonding Company from which defendant was borrowing money for the purpose of performing contracts into which it had entered. There was an oral agreement between defendant and the representative of the Municipal Bonding Company that the latter concern would pay the charges made for the execution of the bonds upon completion of the work covered by defendant's contracts and final settlement, and it appears that this oral agreement was duly performed. In the meantime, however, the bonds were ordered by defendant, a statement for the charges made for execution of the bonds was rendered to defendant, and on the date on which the note for $2,887.50 was executed these charges appeared in defendant's books as items of indebtedness due from defendant to plaintiff's agent. It further appears that it was not until the month of January, 1928, that defendant received information that payment of the charges had been made direct to plaintiff by the Municipal Bonding Company. The above-narrated circumstances were sufficient to entitle defendant to regard the charges for the bonds as an indebtedness due from defendant to plaintiff's agent, and the jury was thereby justified in concluding that no overdraft of credits in defendant's favor was created by the execution of the note for the amount heretofore stated.

[7] Complaint is also made of the allowance by plaintiff's agent of a discount of 2 per cent. on the credit for $3,000 amounting to $60 and the further assumption by the agent of interest on defendant's note for the period of 90 days. These two items amounted to the sum of $112.50, which was deducted from the proposed credit for $3,000, so that the note was made for the sum of $2,887.50. This action on the part of plaintiff's agent is said to constitute a violation of section 633b of the Political Code, which prohibits insurance agents and brokers from allowing any rebate of premiums, and thus rendered void the transaction between defendant and plaintiff's agent whereby the credit of $3,000 was allowed. However, the record contains evidence that plaintiff's agent was entitled to commissions on business which the agent secured ranging from 17½ per cent. to 30 per cent. of the charges made for the issuance of insurance policies and bonds and was authorized to retain such commissions before making remittance to its principal, the plaintiff. As heretofore indicated, the record contains evidence that on the date the note was executed defendant's books showed an indebtedness of $3,174.81 due the agent for policies and bonds theretofore issued in the name of plaintiff. On this amount the agent was entitled to commissions in excess of $500 according to the evidence respecting the agreement between plaintiff and its agent for the payment of compensation to the agent. Plaintiff could not therefore complain if its agent chose to grant a discount and pay interest in order to secure immediate payment of money, some of which the evidence shows was past due, when the total amount of such discount and interest charges did not exceed the amount of compensation which the agent was entitled to receive. The language of section 633b, Political Code, indicates that it is not applicable to the situation here presented, since it prohibits the granting of rebates "as an inducement to insurance." The evidence produced by defendant entirely negatived any inference that the allowance of discount and payment of interest were made as an inducement to insurance.

[8] Complaint is made that the trial court erred in refusing to give without modification eight instructions offered by plaintiff. Of the instructions thus offered, three related to section 633b of the Political Code. We have here-

tofore stated our opinion that the evidence presented during the trial was such as to justify the court in concluding that the statute mentioned was not applicable. It follows, therefore, that no error was committed in the refusal of instructions which advised the jury as to the meaning and effect of the statute. Two other offered instructions related to the question of negligence and were properly refused. Two of the instructions offered as aforesaid related to the allowance of interest on unpaid premiums, and will receive later consideration in connection with plaintiff's contention that it is entitled to an allowance for such interest. The remaining instruction related principally to the credits of $500 and $3,000 allowed to defendant by plaintiff's agent, and incorporates statements of legal principles which are not in accord with the views heretofore expressed. It is our opinion that the instruction was properly refused.

Objection is also made to two instructions which were given by the court. One of the instructions is obviously faulty, as it contains the suggestion that defendant gave to plaintiff's agent a note for $3,000, whereas the evidence was clear that the note was given for a less sum. However, scrutiny of the instructions as a whole indicates that the jury was correctly informed with respect to the fact that the note executed by defendant to plaintiff's agent was for a less amount than the credit allowed. The second instruction to which objection is made related to the allowance of the $500 credit by plaintiff's agent. It contains some indefinite language but, when the instruction is considered in its entirety and in connection with the other instructions given by the court, we are of the opinion that the jury was not thereby misled to plaintiff's prejudice.

[9-11] The final contention presented by plaintiff on this appeal is that interest should have been allowed on whatever balance was found to be due for unpaid premiums and charges from the time when such insurance premiums and bond charges became due, and it is urged that the court erred in refusing so to instruct the jury at plaintiff's request. As heretofore noted, the complaint alleged that certain insurance policies had been issued and certain bonds executed by plaintiff at defendant's request and certain charges were made for such services, the total amount of which charges was a certain sum. It was further alleged that a certain amount had been paid by defendant on account of such charges and that a certain balance remained due for the recovery of which plus interest the action was instituted. Defendant's answer denied that the amount claimed by plaintiff was due from defendant and alleged payments by defendant largely in excess of those admitted in the complaint. The action was tried by the court on the theory that the answer amounted to a general denial that any sum whatever was due from defendant to plaintiff. The general rule with respect to the allowance of interest is that, where there is no contract to pay interest, the law awards interest upon money from the time it becomes due and payable, if such time is certain and the sum is certain or can be made certain by calculation. Gray v. Bekins, 186 Cal. 389, 399, 199 P. 767; Perry v. Magneson, 207 Cal. 617, 623, 279 P. 650; 14 Cal. Jur. p. 678. Having in mind the theory upon which the case was tried and the fact that with respect to certain items contained in the schedule of charges appearing in the complaint, the amounts of such items were in dispute, and the proof produced at the trial showed such amounts as alleged to be in excess of the amounts properly due, we have arrived at the conclusion that the court was justified in refusing to advise the jury that it might make an allowance for interest. The test to be applied is whether or not the exact sum found to be due was known and admitted by defendant to be due to plaintiff. Gray v. Bekins, supra. When this test is applied, it is apparent that not until the trial of the action was it ascertained or could it have been ascertained that a certain definite sum was due from defendant to plaintiff.

The judgment is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

127 Cal.App. 773

In re PIERCE.

PEOPLE v. HELKO.

Cr. 72.

District Court of Appeal, Fourth District, California.

Nov. 30, 1932.

1. Infants ⇐16.

Delay of about a month and a half in bringing juvenile delinquency proceeding after offense was committed *held* not unreasonable (St. 1915, p. 1225, § 1, subd. 13).

2. Infants ⇐16.

On appeal on judgment roll alone, appellate court must assume that juvenile delinquency proceedings in lower court were regular in all respects (St. 1915, p. 1227, § 3, as amended by St. 1929, p. 1061, § 1).

3. Infants ⇐19.

Failure to include in order findings required respecting parent's incapacity to take

care of child, deprived juvenile court of jurisdiction to take minor from parent's custody (St. 1915, p. 1227, § 9b).

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Proceeding under the Juvenile Court Law by the People against Louis Pierce. From an order declaring Louis Pierce to be a ward of the Juvenile Court and ordering him to be committed to the Preston School of Industry, Vera P. Helko appeals.

Reversed and remanded.

Roland Thompson, of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Sam L. Collins, Dist. Atty., Orange County, and Preston Turner, Deputy Dist. Atty., both of Santa Ana, for the People.

JENNINGS, J.

This is an appeal from an order of the superior court of Orange county, sitting as a juvenile court, declaring Louis Pierce to be a ward of said court and ordering that he be committed to the Preston School of Industry at Ione, until further order of the court. It appears that no phonographic reporter was present at the hearing, hence no transcript of the proceedings could be prepared. Counsel for appellant has not seen fit to have prepared a bill of exceptions. The appeal therefore is presented on the judgment roll alone. From the record thus presented it is made to appear, first, that a petition was duly filed alleging that Louis Pierce was 16 years of age and a person such as is defined in subdivision 13 of section 1 of the Juvenile Court Law (St. 1915, p. 1225) in that on a certain date he had committed a lewd and lascivious act upon the body of a child, said act constituting a violation of section 288 of the Penal Code; second, that an order was made by the court fixing a date for the hearing and directing that a citation issue directed to certain designated persons; third, that on the date appointed a hearing was had and the court made the order from which the appeal herein has been taken.

[1] Appellant urges several reasons which he maintains warrant a reversal of the order. It is first contended that an unreasonable time elapsed between the date of the alleged commission of the offense and the filing of the petition seeking to have the minor declared a ward of the court. The offense is alleged to have been committed on April 24, 1932, and the petition was filed on June 2, 1932. The mere recitation of the above-mentioned dates is sufficient to dispose of the contention. We know of no rule of law and can conceive of no legal theory that would justify us in holding that the delay in filing the petition was unreasonable.

[2] Appellant's second contention may likewise be readily determined. It is pointed out that section 3 of the Juvenile Court Law (as amended by St. 1929, p. 1061, § 1) requires that, prior to the filing of a petition showing that a person has come within the provisions of section 1 of the act, "the probation officer of such county shall make such investigation as he may deem necessary, and no petition shall be filed without the approval of such probation officer except by order of the juvenile court." It is then said that the record herein fails to show that the probation officer made any investigation prior to the filing of the petition. As above noted, the appeal herein is taken on the judgment roll alone. Under such circumstances, we must assume that the proceedings taken in the lower court were regular in all respects. Caruthers v. Hensley, 90 Cal. 559, 27 P. 411; In the Matter of Cannon, 27 Cal. App. 549, 150 P. 794.

[3] Appellant's third and fourth contentions may be treated together. These contentions are that custody of the minor was improperly removed from the mother of said minor and that the findings of fact recited in the order are insufficient to invest the court with jurisdiction to make the order by which the minor was adjudged to be a ward of the court. Section 9b of the Juvenile Court Law (St. 1915, p. 1227) provides as follows: "Taking ward from parent. No ward of the juvenile court as defined in this act shall be taken from the custody of his parent or legal guardian, without the consent of such parent or guardian unless the court shall find such parent or guardian to be incapable of providing or to have failed or neglected to provide proper maintenance, training and education for said person; or unless said person has been tried on probation in said custody and has failed to reform, or unless said person has been convicted of crime by a jury, or unless the court shall find that the welfare of said person requires that his custody be taken from said parent or guardian." In the order from which this appeal is taken the court found, first, that notice of the filing and hearing of the petition had been given in all respects as required by law; second, that the minor resides in Orange county and is 16 years of age; third, that the minor is a person coming within the provisions of subdivision 13 of section 1 of the Juvenile Court Law. There is no finding that the parent of the minor is incapable of providing or has failed or neglected to provide proper maintenance, training, and education for said minor or that the minor has been tried on

probation on the custody of the parent and has failed to reform or that the minor has been convicted of crime by a jury or that the welfare of the minor requires that his custody be taken from the parent. It has been decided that the court must make the findings required by section 9b of the act and in writing (In re Brodie, 33 Cal. App. 751, 166 P. 605, 607; In re Gutierrez, 47 Cal. App. 128, 190 P. 200), and that the failure to include in the order some one of the findings specifically required by section 9b of the act deprives the court of jurisdiction to take the minor from the custody of the parents (In re Edwards, 208 Cal. 725, 731, 284 P. 916). Respondent relies on the decision in the case of In re Daedler, 194 Cal. 320, 228 P. 467, 468. In this case it appears that a minor had been charged with the crime of murder in a criminal complaint, and, when he was brought before a magistrate, it was made to appear that he was of the age of approximately 14 years, whereupon the magistrate suspended the criminal proceedings and ordered that he be taken before the juvenile court. Thereupon the minor was taken before the juvenile court upon the charge that he was within the provisions of subdivision 13 of section 1 of the Juvenile Court Law. After a hearing it was found that the minor was of the age of 14 years; that a felony had been committed by him; that he should be a ward of the court within the meaning of section 1, subdivision 13, of the Juvenile Court Law; "that the welfare of said minor required the he be taken from the custody of his said parents." An order was then made declaring the minor to be a ward of the juvenile court and by further order he was committed to the Preston School of Industry until he should attain the age of 21 years. On application for a writ of habeas corpus it was one of the contentions of petitioners, parents of said minor, that no finding was made by the judge of the juvenile court that the parents of the minor were incapable of providing for or had failed or neglected to provide proper maintenance, training, and education for the said minor and that a finding to this effect is required by the provisions of section 9b of the Juvenile Court Law. The Supreme Court pointed out that such a finding is by express terms rendered unnecessary if the court shall find "that the welfare of such person requires that his custody be taken from said parent or guardian" and that the judge of the juvenile court had made an express finding that the welfare of the minor required that his custody be taken from his parents. In discussing the claim that this finding was not supported by the evidence the Supreme Court used the following language: "It is expressly found by said magistrate that there was testimony before him showing that the minor had committed the crime of willful murder, which in itself would not only be sufficient, under the terms of subdivision 13 of section 1 of said act to require that said minor be made a ward of said court, but would suffice to furnish some evidence that said minor had passed beyond parental control." The statement contained in the above-quoted language to the effect that the finding of the magistrate that the minor had committed the crime of murder would of itself suffice to require that the minor be made a ward of the court is obviously dictum since there was an express finding that the welfare of the minor required that his custody be taken from his parents. Furthermore, the statement was made in discussing the question of evidentiary support of the very finding which the Supreme Court had held was a sufficient compliance with section 9b of the act under consideration. The dictum thus enunciated does not overcome the plain provisions of section 9b of the Juvenile Court Law and as declared in the case of In re Brodie, supra, "it is essential that the court make such findings as are required by section 9b and in writing."

While the offense here charged, if found to have been committed by this minor, might well justify his removal from the custody of a parent by a juvenile court, if it appears from all of the circumstances that his welfare requires such action, the statute requires what must be found by the judge of the juvenile court before this may be done. If the facts justify the required finding, the making thereof is a simple matter, and in no way opens the door to those technicalities and formalities in juvenile court proceedings, which the entire spirit and purpose of that act demand should be kept therefrom.

For the single reason herein noted the order from which this appeal is taken is reversed and the matter is remanded to the juvenile court for such action as may be appropriate in conformity with the views herein expressed.

We concur: BARNARD, P. J.; MARKS, J.

128 Cal.App. 57

PITTAM v. CITY OF RIVERSIDE.

Civ. 637.

District Court of Appeal, Fourth District, California.

Dec. 5, 1932.

Hearing Denied by Supreme Court Feb. 2, 1933.

1. Municipal corporations ⇐745½.

Municipal corporation is not liable for damages resulting from its officers', agents', or employees' negligence in exercise of governmental functions, unless statutes give right of action therefor.

2. Municipal corporations ⇐742(4).

Person may recover from city for injuries to property in exercise of governmental function only under statute and should confine pleadings and evidence to right of action given thereby (St. 1923, p. 675, § 2).

3. Municipal corporations ⇐736.

City knowingly maintaining public property in condition dangerous to another's person or property, operating municipal works on city property in manner creating like dangers, or permitting such property to remain in dangerous condition after notice, is guilty of negligence justifying recovery of damages from it by person injured (St. 1923, p. 675, § 2).

4. Municipal corporations ⇐733(1).

Garbage disposal by city is governmental function.

5. Municipal corporations ⇐739(2).

Municipality derives rights to provide for garbage disposal and prevent destruction of its citizens' property by fire from its sovereign power to preserve public health.

6. Municipal corporations ⇐739(2).

City collecting garbage, trash, and similar refuse, hauling them to dumping ground, and burning them, exercises governmental function which is not completed until ashes are disposed of.

7. Trial ⇐139(1), 140(1).

Jury is judge of weight and sufficiency of evidence and witnesses' credibility.

8. Municipal corporations ⇐739(2).

City is liable for damages to private property by fire, spreading from fire on city dumping ground at place fixed by plan, established by municipal authorities for consumption of garbage and other inflammable refuse, as result of prior dangerous condition, which such authorities permitted to continue for unreasonable time after notice thereof (St. 1923, p. 675, § 2).

9. Municipal corporations ⇐742(5).

Evidence in action against city for destruction of personalty by fire *held* sufficient to support jury's implied finding that fire spread from burning area, maintained or permitted by city on its dumping ground, not from fire kindled by trespassers (St. 1923, p. 675, § 2).

10. Municipal corporations ⇐739(1).

Complaints to city council and member thereof by property owner and others that municipal dumping ground, on which trash was burned, constituted fire hazard, constituted sufficient notice to city of dangerous condition (St. 1923, p. 675, § 2).

11. Trial ⇐243.

Instructions on general negligence in action against city for destruction of personalty by fire escaping from municipal dumping ground *held* erroneous as inapplicable and conflicting with instruction correctly stating substance of governing statute (St. 1923, p. 675, § 2).

12. Trial ⇐243.

Giving of conflicting instructions on material point is error.

13. Appeal and error ⇐1170(9).

Whether giving of conflicting instructions is prejudicial error, requiring reversal of judgment, depends on particular circumstances (Const. art. 6, § 4½).

14. Appeal and error ⇐1170(9).

Erroneous instructions on general negligence in statutory action against city for destruction of personalty by fire, escaping from municipal dumping ground, *held* sufficiently prejudicial to require reversal of judgment for plaintiff (Const. art. 6, § 4½; St. 1923, p. 675, § 2).

15. Municipal corporations ⇐742(6).

Contributory negligence of one suing city for destruction of personalty by fire, escaping from municipal dumping ground, in violating terms of city ordinance, *held* for jury (St. 1923, p. 675, § 2).

Appeal from Superior Court, Riverside County; A. C. Finney, Judge.

Action by L. E. Pittam against the City of Riverside. Judgment for plaintiff, and defendant appeals.

Reversed.

Eugene Best, City Atty., of Riverside, for appellant.

Estudillo & Schwinn, of Riverside, for respondent.

MARKS, J.

This is an action for damages for loss of bees and apiary equipment destroyed by fire which plaintiff alleges escaped from the dumping ground of the city of Riverside. A verdict was rendered in favor of plaintiff and judgment entered in the sum of $1,328.70, from which defendant appeals.

The city of Riverside, a municipal corporation organized and existing under a freeholders' charter, owned a sizable tract of land which it used as a dumping and burning ground for trash and garbage collected from within the city. Respondent owned a small tract of land upon which he lived and operated an apiary. The northerly boundary of his property was about 1,000 feet southerly from the city dump. At occasional periods of the year winds of varying intensity blow from the north to the south in that locality.

At the time of the fire which consumed respondent's property the city maintained what the witnesses referred to as a burning area near the center of its property. The southern end of this area was about 550 feet from the southerly line of the city property. It was surrounded with trees and lay along a small watercourse and was below the level of the adjacent property. It was about 550 feet in length and had a maximum width of about 50 feet. The area between the properties of the city and of respondent was level and was covered with a growth of salt grass and small bushes.

The city of Riverside had owned its property for about thirty-five years and had used portions of it as a garbage, trash, and other refuse disposal ground for many years. In the summer of 1929 a number of the residents of the district, including respondent, complained to the city council of the city of Riverside that its dumping ground constituted a menace to health and was a fire hazard. About six months thereafter the city employed a resident caretaker, moved its burning area to a place more nearly in the center of its property, and otherwise sought to improve the conditions prevailing there.

At about 2 o'clock in the afternoon of January 19, 1931, at a time when a strong wind from the north was blowing, respondent saw a fire burning in the salt grass just south of the city property and nearly 1,000 feet northerly from his apiary. It was blown south rapidly and consumed the personal property for which he obtained judgment.

This action was brought under the provisions of section 2 of an act of the Legislature approved June 13, 1923 (Stats. 1923, p. 675). Under this section of the act municipalities are made liable for injuries to property resulting from the dangerous or defective condition of public "grounds, works and property in all cases where the governing or managing board * * * or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such * * * grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition." It is not questioned that the city council of the city of Riverside was the governing body of that municipality with authority to remedy any condition existing at the dumping ground.

Under the provision of that portion of section 2 of the act, which we have quoted, the following conditions must exist to support the judgment of the court below: (1) The injuries to respondent through the destruction of his personal property must have resulted from a dangerous or defective condition of the dumping ground; (2) the city council of the city of Riverside, or some officer or person having authority to remedy such condition, must have had notice or knowledge thereof; (3) it, or he, must have failed or neglected to remedy such dangerous or defective condition within a reasonable time after acquiring such knowledge or receiving such notice; or (4) must have failed to take such action as might be reasonably necessary to protect the public against such dangerous or defective condition within a reasonable time after such knowledge or notice.

Appellant presents the following grounds upon which it relies for a reversal of the judgment: That the trial court erred in denying his motion to strike certain portions of the complaint; that the trial court erred in denying its motion for an instruction directing the jury to return a verdict in its favor; that there was no evidence of a dangerous or defective condition of the dumping grounds; that there was no evidence of notice to or knowledge of the city of Riverside of a defective or dangerous condition, if one existed; that the trial court misdirected the jury on questions of law; and that respondent was guilty of contributory negligence as a matter of law.

Appellant moved to strike out the italicized words in the following quotations from the complaint: "That defendant on said 19th day of January, 1931, wrongfully, dangerously, defectively *and negligently* maintained, *operated, managed* and owned a City Dump. * * * That by reason of the wrongful, dangerous, defective *and negligent* maintenance, *operation, management,* and ownership of said City Dump." The questions presented by the motion to strike must be considered elsewhere and need not be separately reviewed here.

The argument in support of the contention that the motion for an instructed verdict should have been granted is involved in a discussion of the third and fourth specifications of error, so that this question need not be separately considered.

[1] We must approach a consideration of the questions presented by this appeal with the well-settled rule of common law in mind that a municipal corporation in the exercise of its governmental functions was not liable for damage resulting from the negligence of its officers, agents, or employees in the exercise of these governmental functions. As was said in Coleman v. City of Oakland, 110 Cal. App. 715, 295 P. 59, 60: "Appellant seeks to hold the city of Oakland under the common-law liability imposed upon a municipal corporation when it is acting in a proprietary, as distinguished from a governmental, capacity. The general distinction between the two functions of a city is thus stated in Chafor v. City of Long Beach, 174 Cal. 478, 487, 488, Ann. Cas. 1918D, 106, L. R. A. 1917E, 685, 163 P. 670, 674: 'Under the theory of the common law, that the municipality is protected from liability only while exercising the delegated functions of sovereignty, the governmental powers of a city are those pertaining to the making and enforcing of police regulations, to prevent crime, to preserve the public health, to prevent fires, the caring for the poor, and the education of the young. And in the performance of these functions all buildings and instrumentalities connected therewith come under the application of the principle. City of Kokomo v. Loy (185 Ind. 18), 112 N. E. 994.'" It is only where statutes give a right of action that an action can be maintained to recover damages inflicted by a city in the exercise of its governmental functions. Kellar v. City of Los Angeles, 179 Cal. 605, 178 P. 505; Miller v. City of Palo Alto, 208 Cal. 74, 280 P. 108, 109.

[2] Where the exercise of a governmental function is involved, and, under such facts as are here presented, the right to maintain an action against a municipality is conferred by the act approved June 13, 1923, supra, and a person suffering injury can only recover against a city when the right to sue has been conferred upon him by this act. He should confine his pleadings and his evidence to the right of action there given him. Section 1 of this act makes certain municipal officers liable for negligence of employees under conditions there specified. We are not concerned with this liability for negligence of employees because the complaint does not attempt to state a cause of action under this section. If the judgment is to be sustained, this must be accomplished under the provisions of section 2 of the act from which we have already quoted.

[3] Respondent has devoted a considerable portion of his brief to arguing the question of the liability of the city for general negligence in the operation of the dumping ground. It seems to be his theory from the allegations of his complaint, his conduct of the case during the trial, and the instructions prepared by him and given at his request, that the rules of general negligence governing actions between individuals govern here and will support the judgment. On the other hand it is the theory of appellant that negligence has nothing to do with the action and that its rules cannot be invoked to support the judgment. There is some truth, but much error, in both contentions. Negligence does not enter into the case except in so far as it is injected into it by the statute.

Under the pleadings and facts of the instant case the liability of the municipality in the exercise of a governmental function is limited to "injuries to persons and property resulting from the dangerous or defective condition of public * * * grounds, works and property." Knowingly maintaining public property in such a condition that it is dangerous to the life, limb, health, or safety of the person or property of another, or the operation of municipal works upon its own property in accordance with a general scheme put in effect by municipal authorities, in such a manner that like dangers would exist, is a form of negligence. This is the doing of something in a manner in which an ordinarily prudent person would not do it. Permitting property to remain in a dangerous or defective condition after notice, without remedying such condition or taking such action as might be reasonably necessary to protect others from injury, is also a form of negligence. This is the failure to do what a reasonably prudent person should do under like circumstances. In these respects this action involves negligence.

[4-6] It is well established that the disposal of garbage by a city is the exercise of a governmental function. Miller v. City of Palo Alto, supra; Manning v. City of Pasadena, 58 Cal. App. 666, 209 P. 253. The municipality derives the right to provide for garbage disposal from its sovereign powers of preserving the public health. In re City and County of San Francisco, 191 Cal. 172, 215 P. 549; 13 Cal. Jur. 291. The same power gives to the city the right to prevent the destruction of the property of its citizens by fire. Coleman v. City of Oakland, supra. The collection and disposal of waste materials which constitute a fire hazard should be just as much a governmental function as the collection and disposal of garbage which is a menace to health. Ex parte Pedrosian (Cal. App.) 13 P.(2d) 389. We can see no escape from the conclusion that the city of Riverside, in collecting garbage, trash, and other similar refuse matters, hauling them to its dumping ground, and disposing of them by fire, was exercising a governmental function which "is not completed until the ashes are disposed of." Miller v. City of Palo Alto, supra.

Appellant urges with sincerity that there

is no evidence of a dangerous or defective condition existing at the dumping ground. The jury has resolved all conflicts in the evidence in favor of respondent. We need particularize only the conflicting evidence favorable to respondent, and only evidence undisputed, either by direct or circumstantial evidence, inferences, or presumptions.

We will have occasion to give various distances and measurements in this opinion. They will be taken from our scalings of the map of the area in question as more accurate than some of the estimates of witnesses which were given without any definite measurements or close observation.

The evidence discloses that on January 17, 18, and 19, 1931, a strong wind from the north was blowing over the city dumping ground, so that any burning embers arising there would be carried in the direction of respondent's property. At about 2 o'clock in the afternoon of January 19th, respondent was working at his apiary. A fire was burning on the city dumping ground, and had been for two previous days, the flames at times extending a number of feet in the air. There were no other fires burning in the neighborhood. At about 2 o'clock respondent saw a fire burning in the salt grass a few feet south from the south boundary of the city dumping ground and about 1,000 feet north of his property. The wind spread the fire so that between ten and twenty minutes thereafter it had reached the apiary and set it on fire. Respondent testified that the fire burning on the city dumping ground was about 150 feet north of its south boundary and about 400 feet south of the southerly end of the burning area. None of the witnesses located this fire within the burning area.

The caretaker testified that he burned garbage and rubbish in the burning area on January 17th; that the flames died down before 6 o'clock on that evening; that there was nothing dumped on the grounds on the 18th, and that there was a little smoke but no fire on that day; that on Monday morning, the 19th, "when I came back there was some fish heads and fish hides and chicken entrails, like that, that hadn't been burned up and were smoking a little bit; and that is all the fire I had"; that no fire was lit on the 19th until about 4 o'clock p. m.; that he did not see the large fire described by respondent and located by him about 400 feet south of the burning area.

[7] Under the rule that the jury is the judge of the weight and sufficiency of the evidence and the credibility of the witnesses, we must take it as an established fact that the fire described by respondent was burning on the 17th, 18th, and 19th of January at the place on the dumping ground where he located it. The evidence of the caretaker as to the condition of the fire on the dumping ground is undisputed except as to the fire seen by respondent. The caretaker is strongly corroborated by Fred Weist, a witness for respondent, who testified that he walked over the dumping ground between 11 and 12 o'clock on the morning of Sunday, January 18, 1931. He saw no blaze or fire, but perhaps a little smoke in the regular burning area. He did see a fire at about the place designated by respondent. He described this fire as about 25 feet long and 3 feet wide with a blaze about 3 or 4 feet high rising from it. It was tended by two men whom he neither knew nor identified.

There is rather positive evidence on behalf of the city that prior to April, 1930, garbage and trash were dumped and burned at various convenient places on the dumping ground, but that about the middle of April the city put into operation a definite new policy governing dumping and burning. The burning area was established at the place already described and all dumping and burning at other places prohibited. The gates through which the grounds were entered were kept locked. However, some trouble was experienced by trespassers entering, dumping, and burning rubbish. In one instance a lock on one of the gates was stolen. This evidence is contradicted only by that of respondent, who testified that the change in the burning area was not made until after his fire on January 19, 1931. This testimony of respondent is contradicted by that of his own witness, Fred Weist, who testified that during his walk over the dumping ground on January 18th the burning area was in the place described by the witnesses for the city. It does not appear that respondent had been on the dumping ground after April 1, 1930.

[8] It is evident from the evidence that the general plan of operation of the dumping ground adopted by the city provided for the consumption of garbage, trash, and other inflammable refuse by open fires. It is undisputed that winds from the north occasionally blew with considerable intensity at certain times of the year and carried charred and partly burned paper onto the property of respondent and his near neighbors. If the proper municipal authorities had notice of a dangerous or defective condition of the dumping ground prior to the fire and permitted such condition to continue for an unreasonable time; if the fire which consumed respondent's property had spread or was carried from a fire on the dumping ground burning at a place, or one of the places, where fires were to be kindled in accordance with the plan of operation established by the municipal authorities and in operation at the time of the destruction of respondent's property; and if the fire was not spread from one wrongfully started by another agency such as trespassers on the city prop-

erty, then we are of the opinion that a dangerous or defective condition of the public grounds, works or property of the city of Riverside existed which would render it liable for damages to the property of respondent. Huff v. Compton City Grammar School District, 92 Cal. App. 44, 267 P. 918.

[9] Did the fire in question spread from the regular burning area in the dumping ground, or did it spread from some other fire, probably from one kindled by trespassers? If the latter be true, there would be no liability on the part of the city because there had been no notice of this fire and it could not be considered a dangerous or defective condition maintained by the city. We presume, however, that we must accept the testimony of respondent that the change in the burning area was not made by the city until after his fire, and that at that time the city permitted the burning at any place in the dumping ground, although this portion of his evidence is met by clear evidence to the contrary. Accepting this portion of his testimony, it would support an inference by the jury that the fire in question spread from a burning area maintained or permitted by the city in its plan of operation of the dumping ground, which would bring the case within the rule of the statute of 1923 making the city liable for injuries to property resulting from the dangerous or defective condition of public grounds, works, or property.

Appellant relies upon the case of Miller v. City of Palo Alto, supra, as establishing a rule under which respondent cannot recover. This case went up on appeal from a judgment entered after a demurrer to the complaint had been sustained. The complaint alleged that on or about October 9, 1926, the city of Palo Alto deposited certain hot and burning materials from its garbage incinerator on property about one-quarter of a mile from that of the plaintiffs, from which fire was spread to their property. As remarked by the Supreme Court, the complaint "alleges a single act of negligence on the part of the city." It contained no allegation from which it could be made to appear that the city maintained a dangerous or defective condition of its property.

[10] Appellant maintains that no sufficient notice was given of the defective or dangerous condition existing at the dumping ground. We have already mentioned the notice that was given the city council of the city of Riverside by the delegation, including respondent, which appeared before that body in 1929. In the summer of 1930 respondent complained several times to Mr. Lohrli, a councilman of the city of Riverside, of the fire hazard created by the burning of trash on the city dumping ground. This was more definite notice than was held to be sufficient in Boyce v. San Diego High School District of San Diego County (Cal. Sup.) 10 P.(2d) 62.

[11-13] The trial court at the request of respondent gave the following instructions to the jury:

"Negligence is the doing of some act which a reasonably prudent man would not do, or the omission to do something which a reasonably prudent man would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care or skill by one sought to be charged with negligence in the management of his property or person. It is not intrinsic or absolute, but relative, and always relates to circumstances of time, place or persons."

"Section 1714 of the Civil Code of this state lays down the law that 'everyone is responsible not only for the result of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, wilfully, or by want of ordinary care, brought the injury upon himself.' The word 'negligence' as used in these instructions means the same thing as the expression 'want of ordinary care,' as used in the quotation from section 1714 of the Civil Code, which I have just read to you. It is opposed to diligence or carefulness and is never absolute or intrinsic, but is always relative to some circumstance or circumstances of time, place or person. It must be determined in all cases by reference to the situation and knowledge of the parties, and on the attendant circumstances."

"You are instructed that, although the plaintiff must not only prove by a preponderance of the evidence that the defendant was guilty of negligence proximately contributing to or causing the damage complained of, this rule does not require demonstration of the connection between the proved or admitted negligence, if any, and the resulting injury. It is not necessary that an eye witness be produced to testify directly to the fact. The connection may be made by circumstantial evidence in the same way that any other fact can be proved."

"You are instructed that the defendant had a right to use its property for any legitimate purpose; but, on the other hand, the owner of property must use the same in such a manner as not to infringe upon the rights of another."

The trial judge, at the request of appellant, correctly instructed the jury concerning the liability of the city under the provisions of section 2 of the act of the Legislature approved June 13, 1923, supra.

The law of general negligence, except in so far as we have already indicated, has no application to this case, and the quoted instructions as requested by respondent should

not have been given by the court. The rules there stated conflict with those announced in the instruction given at the request of appellant, which correctly stated the substance of section 2 of the act approved June 13, 1923. These contradictory instructions might well have confused the minds of the jurors upon the true rules of law governing their deliberations and applicable to the facts of the case. "The giving of conflicting instructions upon a material point is undoubtedly error." Treadwell v. Nickel, 194 Cal. 243, 271, 228 P. 25, 37. Error in instructions is not necessarily reversible error. Section 4½, art. 6, Cal. Const.; James v. E. G. Lyons Co., 147 Cal. 69, 81 P. 275. Whether or not the error committed in giving conflicting instructions "is prejudicial depends upon the particular circumstances of each case." Barkhaus v. Producers Fruit Co., 192 Cal. 200, 219 P. 435, 439. We must, therefore, determine whether or not the error committed in giving the conflicting instructions was sufficiently prejudicial to require a reversal of the judgment.

[14] We have already gone to some length in detailing the evidence. From what we have said it appears that on some of the questions involved there is no dispute between the parties; on others, the evidence is hopelessly conflicting; on still others, the evidence on which respondent must rely is very meager, with the seeming weight against him. We have held that this meager evidence furnished support for the implied findings which the jury made in reaching its verdict. There still remains the question of whether or not the erroneous instructions given by the trial court at the request of respondent tended to confuse or mislead the jury by giving it mistaken rules of law under which it could reach the verdict which it returned. The answer to this question must be in the affirmative.

There is abundant evidence in the record to support the following theory: That for more than nine months before the fire, free entrance to the city dumping ground was prevented by a fence, the gates in which were kept locked; that a caretaker was in charge whose duty it was to carry out the city's plan of operation; that all garbage, trash, and other rubbish was to be dumped and burned only in a central area and not at any other place; that on January 18 and 19, 1931, up to the time of the fire, there were no fires in the burning area except that some fish heads, fish hides, and chicken entrails were smouldering there; that on January 18, 1931, some unidentified trespassers entered the dumping ground and dumped a considerable quantity of trash and rubbish at a point about 400 feet south of the regular burning area, being the place where respondent and his witnesses saw the fire; that these trespassers lighted this trash and rubbish, burning embers from which were carried by the wind into the salt grass south of the dumping ground, causing the fire which spread to and destroyed respondent's property. If the jurors had been of the opinion that these facts had been established by a preponderance of the evidence and the instructions on general negligence had not been given, it would have been their duty to return a verdict in favor of the city, because the dangerous condition was not created by the city in its maintenance or operation of its dumping ground, but by trespassers, and further, because the responsible city officials had no notice of the dangerous condition created by the trespassers. With the instructions on general negligence in mind the jurors might well have concluded under the facts stated that the caretaker either saw or should have seen the fire started by the trespassers; that as a reasonably prudent man he should have known that a fire of the size described created a dangerous hazard to adjoining property with the strong wind blowing from the north; that he should have extinguished the fire himself or called assistance so that it could be extinguished and the danger of its spreading to adjoining property be obviated. If the jury thus arrived at its verdict, it was not based upon a liability of the city for injuries to property resulting from a dangerous or defective condition of its public grounds, works, or property, but upon the negligence of a city employee who failed to do those things which a reasonably prudent person should have done under the circumstances. As we have said before, negligence of the caretaker can furnish no support for the judgment under the law and pleadings in this case. We have concluded that the erroneous instructions were sufficiently prejudicial to require a reversal of the judgment.

[15] Appellant urges that respondent was guilty of contributory negligence as a matter of law because of his alleged violation of the terms of the city ordinance. We have examined the record carefully and cannot find that the evidence supports this contention. The question of contributory negligence was one for the jury.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

128 Cal.App. 104

ASSOCIATED INDEMNITY CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8620.

District Court of Appeal, First District, Division 2, California.

Dec. 9, 1932.

Master and servant ⇐405(2).

Evidence that newspaper seller was paid weekly wage for supervising "news hustlers" supported Industrial Accident Commission's finding that she was publisher's employee.

Certiorari to Industrial Accident Commission.

Proceeding for compensation under the Workmen's Compensation Act by Mattie Toy, employee, opposed by the San Francisco Chronicle, employer. To review an order of the Industrial Accident Commission awarding compensation for injuries sustained by claimant, the Associated Indemnity Corporation, insurance carrier, brings certiorari.

Award affirmed.

John J. Taheny and R. O. Purvis, both of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

SPENCE, J.

Petitioner seeks annulment of the award of the respondent commission granting compensation to Mrs. Mattie Toy for injuries sustained by her on July 6, 1931.

The petitioner is the insurance carrier of the San Francisco Chronicle, a daily newspaper. Contending that Mrs. Toy was merely a news lady engaged in selling the papers of the publishing company, petitioner cites and relies upon New York Indemnity Company v. Industrial Accident Commission, 213 Cal. 43, 1 P.(2d) 12, and Hartford Accident & Indemnity Company v. Industrial Accident Commission (Cal. App.) 10 P.(2d) 1035. In our opinion, these authorities are not determinative of the present controversy. In addition to retaining the difference between the amount which she received from the purchasing public and the amount which she paid to the publishing company for the papers, Mrs. Toy was paid the sum of $3 per week by the publishing company. There is some conflict in the testimony regarding the nature and purpose of these weekly payments, but the testimony offered by the applicant tended to show that the money was paid as wages for the supervision of ten to thirteen "news hustlers." This testimony clearly distinguishes this case from the authorities relied upon, and we find no merit in petitioner's contention that there was no evidence to support the finding to the effect that the applicant was an employee of the publishing company.

The award is affirmed.

I concur: STURTEVANT, J.

128 Cal.App. 133

DAHL v. SPOTTS et al.

Civ. 633.

District Court of Appeal, Fourth District, California.

Dec. 9, 1932.

1. Automobiles ⇐244(20).

Evidence that cartons, weighing 30 pounds each, with 11 year old boy, were precipitated from truck making right turn, supported jury's implied finding that driver was guilty of gross negligence.

2. Automobiles ⇐245(24).

Whether negligence of automobile driver is gross is question of fact for jury.

3. Evidence ⇐589.

Physical facts surrounding automobile accident may be relied on to support judgment and contradict direct testimony of defendant.

4. Negligence ⇐136(25).

Whether negligence of defendant proximately caused injury is question of fact for jury.

5. Automobiles ⇐245(36).

Whether defendant was owner of truck driven by another at time of accident *held* for jury (Civ. Code, § 1714¼).

6. Evidence ⇐75.

Where defendant refuses to produce evidence which would overthrow case made against him if not founded on fact, presumption arises that evidence, if produced, would operate to defendant's prejudice (Code Civ. Proc. § 2061, subd. 6).

7. Appeal and error ⇐105.

Order denying motion for nonsuit *held* not appealable (Code Civ. Proc. § 963).

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Milford W. Dahl, by Edward W. Dahl, guardian ad litem, against Charles Spotts and another. From a judgment for de-

fendants and an order denying a motion for judgment notwithstanding the verdict, defendants appeal.

Affirmed.

Eugene P. Fay, of Los Angeles, for appellants.

Chas. D. Swanner, of Santa Ana, for respondent.

MARKS, J.

This is an action for damages brought by Milford W. Dahl, a minor, through his guardian ad litem, against Charles Spotts and Pernel Barnett, for injuries received while he was riding as a guest of Spotts in a Ford delivery truck. Barnett was the owner of the truck. The jury returned a verdict for $2,500 in favor of the minor, from which this appeal is taken, as well as from an order denying motion for judgment notwithstanding the verdict.

Spotts was the distributing agent for the Liberty Magazine in certain parts of Orange county. On July 9, 1930, he took respondent and several other boys from Santa Ana to neighboring towns where they sold magazines. At the close of their work he took them back to Santa Ana. He and respondent then drove to Orange, going to the home of Pernel Barnett, where they obtained the Ford delivery truck, permission having been given by Barnett to Spotts for its use. The two again went to Santa Ana, and Spotts drove to a freight storage office taking respondent with him. Here he loaded eight cartons of breakfast food onto the truck. These cartons were eighteen inches in each dimension, and the sides of the truck body were between twelve and eighteen inches in height. Four of the cartons were placed on the truck bed and the other four on top of them so that the upper tier extended entirely above the sideboards of the truck body. Spotts asked respondent to sit in the back of the truck, watch the boxes and tell him if any of them slipped from position. He then drove from the freight office onto Fourth street. While driving along this street, two of the upper cartons commenced to slide from their position. Respondent informed appellant of this and he stopped the truck and adjusted the cartons, telling respondent to either stand on the floor of the rear end of the truck body holding onto the cartons, or to sit on the upper cartons in the rear tier. When the car reached French street, Spotts made a right-hand turn, and respondent and the two front cartons of the upper tier were thrown to the pavement, respondent receiving a fractured skull and bruises and contusions of his body. Respondent was 11 years of age at the time of the accident.

Appellants urge the following grounds for a reversal of the judgment: "(1) The evidence is insufficient to justify the verdict that the appellant, Charles Spotts, was guilty of gross negligence. (2) The evidence is insufficient to justify the verdict that the negligence of the appellant, Charles Spotts, proximately caused the happening of the accident. (3) The evidence is insufficient to justify the verdict that the appellant, Pernel Barnett, was the owner of the automobile."

[1] In support of appellants' first specification of error, the testimony of Spotts is cited that he made the right-hand turn from Fourth street onto French street at a speed of not more than ten miles per hour, and that respondent could not explain how he fell nor what caused him to fall from the truck, nor did he remember its speed nor the circumstances of the change of direction of the truck at the intersection. Appellants urge that this evidence fails to support the implied finding of the jury that Spotts was guilty of gross negligence. Were this the only evidence before the jury, we would have to agree with this contention. However, we have concluded that the physical facts of the accident furnish sufficient evidence to support the conclusion that Spotts was guilty of gross negligence in making the turn as he did. The fact that the two cartons, weighing between twenty-five and thirty pounds each, together with an 11 year old boy, were precipitated from the truck onto the pavement during the turn is sufficient to contradict the testimony of Spotts that at that time he was driving at not more than ten miles per hour. These circumstances would support the conclusion that he made the turn at such a great speed or in such a manner as to constitute gross negligence on his part.

[2, 3] The question of whether or not the negligence of the driver of an automobile is gross, is held to be a question of fact to be determined by the jury. Malone v. Clemow, 111 Cal. App. 13, 295 P. 70; Taylor v. Cockrell, 116 Cal. App. 596, 3 P.(2d) 16. In announcing the rule that the physical facts surrounding an accident may be relied on to support a judgment and contradict the direct testimony of a defendant, it is said in the 1928 Supplement to California Jurisprudence, title, "Automobiles," at page 120: "Very commonly, the parties advance conflicting theories as to how the collision occurred, and as to what brought it about. Where such a controversy is presented, the truth may sometimes be discovered by reference to the physical facts. Notably, the inferences to be drawn from known facts may satisfactorily resolve questions as to speed, the place where the collision occurred, and the position of the defendant's car with relation to other vehicles. In a recently decided case [Whitmore v. Smith, 75 Cal. App. 125, 241 P. 919] it appeared that the plaintiff was struck by the defendant's automobile after she had pass-

ed in front of a public bus from which she had alighted. The defendant testified that he was attempting to pass the bus at a distance of four or five feet, that he was not traveling more than twelve or fifteen miles an hour, and that the plaintiff ran into his car. The court said: 'If the defendant's testimony were true it is apparent that the accident as detailed by all the witnesses could not have happened as it did. The plaintiff was thrown directly in front of the standing bus, her head toward the curb and her feet toward the path of defendant's machine. If the defendant had been traveling at twelve or fifteen miles an hour on a path five feet west of the standing bus he could not have thrown the plaintiff to the place where she was picked up. And, again, if he had been traveling in that manner he would have had ample opportunity to have avoided the collision.'"

[4] Whether or not the negligence of a defendant proximately caused an injury has always been considered a question of fact to be decided by the jury. Malone v. Clemow, supra. The jury having determined from the evidence that Spotts was guilty of gross negligence in driving the Ford truck, and that his negligence proximately caused the injury to respondent, we cannot disturb the conclusions thus reached.

[5, 6] The liability of Barnett arises under the provisions of section 1714¼ of the Civil Code. He maintains that there was no sufficient evidence from which the conclusion could be drawn that he was the owner of the Ford truck driven by Spotts at the time of the accident. In this we cannot agree with him. Spotts testified that he asked Barnett for permission to use the Ford, which was given him, and that he obtained the truck at Barnett's residence. Barnett testified as follows:

"A. Yes, sir. He asked me if he could use one of my Fords.

"Q. What did you tell him, Mr. Barnett? A. I told him he could.

"Q. Do you know the date this plaintiff was injured? A. No, sir. I don't know anything about it.

"Q. You were the owner of the Ford delivery vehicle, were you, on that date, Mr. Barnett? * * * A. But I owned three Fords at that date."

This evidence was sufficient to support the judgment against Barnett under the rule announced in Tieman v. Red Top Cab Co., 117 Cal. App. 40, 3 P.(2d) 381, 383, as follows: "Appellants' failure to offer any evidence on these issues, although obviously the best advised, requires that the above evidence 'be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict.' Code Civ. Proc. § 2061, subd. 6. 'It is a well-settled rule that when the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which from its very nature must overthrow the case made against him if it is not founded on fact, and he refuses to produce such evidence, the presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary.' Bone v. Hayes, 154 Cal. 759, 765, 99 P. 172, 175; Alloggi v. Southern Pac. Co., 37 Cal. App. 72, 173 P. 1117; Perry v. Paladini, Inc., 89 Cal. App. 275, 264 P. 580."

[7] Appellants have attempted to appeal from an order denying their motion for nonsuit. Such an order is not appealable (section 963, Code Civ. Proc.), and the attempted appeal therefrom is dismissed.

Judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

128 Cal.App. 174

FLEISHMAN et al. v. DAVIS et al.

Civ. 8650.

District Court of Appeal, First District, Division 2, California.

Dec. 13, 1932.

1. Quieting title ⇐10(2).

To recover in quiet title action, where both parties claimed under common source, plaintiffs need but show conveyances from source without further showing title therein.

2. Taxation ⇐734(9).

Tax deed *held* void where notice of sale stated that figures in delinquent list represented taxes and costs, without mentioning assessments and penalties (Pol. Code, § 3764, as amended by St. 1921, p. 107).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Elise Fleishman and another against T. A. Davis and others. From a judgment in favor of plaintiffs, named defendant appeals.

Affirmed.

Winslow P. Hyatt, of Los Angeles, for appellant.

Raphael Dechter, of Los Angeles, for respondents.

SPENCE, J.

This is an action to quiet title. From a judgment in favor of plaintiffs, defendant appeals.

Plaintiffs deraigned their title from Albert Rutherford while defendant relied upon a tax deed dated August 22, 1928, issued to him by the tax collector of Los Angeles county. This tax deed recites that the property was duly assessed for taxation in 1922 to Albert Rutherford and was thereafter sold to defendant by the tax collector "for nonpayment of delinquent taxes which had been legally levied in said year 1922." The trial court found that plaintiffs were the owners of the property and that defendant's tax deed was void and concluded that plaintiffs were entitled to judgment quieting title upon payment to defendant of the amount required by section 3898 of the Political Code.

[1] Appellant contends that respondents failed to show title in themselves and therefore had no right to question the title of appellant. We find no merit in this contention. It appears from the evidence that respondents' title is based upon mesne conveyances from Albert Rutherford to whom the property was assessed in 1922. Both parties, therefore, claimed under a common source of title and it was sufficient for respondents to show conveyances from that source without further showing that Rutherford had title. Denning v. Green, 88 Cal. App. 379, 263 P. 819.

[2] Appellant further contends that the tax deed was not void as found by the trial court. Several grounds are urged by respondents in support of the trial court's findings, but we need consider but one of them. Section 3764 of the Political Code, as amended in 1921 (St. 1921, p. 107), required the publication of the delinquent list "which must contain the names of persons and a description of the property delinquent, and the total amount of all taxes, assessments, penalties, and costs due, and which are a lien thereon." In the proceedings in the present case the delinquent list for 1922 was published and this list contained the name of Albert Rutherford and a purported description of the property, together with the amount of "2.97." The published notice of sale preceding the list stated "that unless the taxes as appears by said list, together with costs and penalties are paid," etc. Following the list it is also stated that the figures "were intended to and do represent—the amount due for taxes and costs—." In other words, according to the express terms of the published notice, the figures contained in the delinquent list, which was a part thereof, purported to be either the "taxes" or the "taxes and costs" and did not purport to be the "total amount of all taxes, assessments, penalties and costs" as required. Appellant claims that these figures did in fact include the penalties and that "no other assessments were levied that year." We need not examine into the merits of these claims for we believe that the notice of sale was defective in that said notice expressly stated that the figures contained in the delinquent list represented amounts other than the amounts required. We find no authority directly in point, but there are several cases decided under section 3764 as it read prior to the amendment of 1921 in which cases somewhat similar questions were presented. Knoke v. Knight, 206 Cal. 225, 273 P. 786; Rexon v. Gaffey, 119 Cal. App. 389, 6 P.(2d) 534; Wyser v. Truitt, 95 Cal. App. 727, 273 P. 147; Snodgrass v. Errengy, 86 Cal. App. 664, 261 P. 497; Bussenius v. Warden, 71 Cal. App. 717, 236 P. 371. In our opinion the trial court properly concluded that appellant's tax deed was void.

The judgment is affirmed.

I concur: STURTEVANT, J.

128 Cal.App. 128

DEPARTMENT OF PUBLIC WORKS OF STATE OF CALIFORNIA, DIVISION OF HIGHWAYS, v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al.

Civ. 4775.

District Court of Appeal, Third District, California.

Dec. 9, 1932.

Master and servant ⊂⇒373.

Death of highway employee when driving over embankment while driving own car, with assistant foreman's acquiescence, from tollhouse to place for work, *held* compensable since occurring "in course of employment."

[Ed. Note.—For other definitions of "Course of Employment," see Words and Phrases.]

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Ruth Dreyer and another, claimants, for the death of Edward E. Dreyer, named claimant's husband, opposed by the Department of Public Works of the State of California, Division of Highways, employer. To review an award of the Industrial Accident Commission awarding compensation, employer brings certiorari.

Award affirmed.

B. E. Pemberton and Henry G. Sanford, both of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is a petition to review an award of damages which was rendered against the Highway Division of the Department of Public Works of the State of California pursuant to the Workmen's Compensation, Insurance and Safety Act, on account of the death of a laborer which occurred as the result of an automobile casualty.

In January, 1932, Edward E. Dreyer was employed by the Department of Public Works of the State of California as a laborer to assist in clearing the highway of snow and débris in the vicinity of San Bernardino. Dreyer lived at Crestline. He was living separate and apart from the respondent Ruth Dreyer, who is his widow. She was partially dependent upon him for support pursuant to an agreement between them for a settlement of property rights. The laborers were required to report for work each morning at 7 o'clock at the Etiwanda tollhouse on the mountain highway about seven miles from San Bernardino. The employer's trucks left San Bernardino for the tollhouse at 6:30 a. m. Workmen were permitted to ride in these trucks free of charge. They were not required to travel this way. Several of them drove their own cars to the tollhouse, where some of the private machines were parked, and some laborers proceeded to the location of their employment in the trucks. Others were accustomed to drive their own automobiles on from the tollhouse to the place of their employment. This was done with the knowledge and consent of the foreman. Mr. Davidson, foreman in charge of the work, testified in that regard:

"Q. Some of them (the workmen) took their own cars all the way up (the highway, to the place where they were engaged in working)? A. Yes.

"Q. Without any objection from the foreman or instructions to the contrary? A. I never made any objection."

On the morning of January 23, 1932, Dreyer drove his own machine from Crestline to the tollhouse, where he reported for work at 7 o'clock. Roy Clark, who was an assistant foreman in charge of the highway work that day, directed Dreyer to assist him in transferring to the trucks the hand tools which were stored at the tollhouse. The workmen were engaged in clearing the highway of snow and débris at a point several miles beyond the tollhouse. It was a cold snowy morning. The workmen were permitted to ride in the trucks free of charge, from the tollhouse to the place of employment. They were not instructed or required to do so. It was optional with them, whether they rode in the trucks, or drove their own machines. Mr. Clark testified in that regard: "They (the workmen) have been driving in their own car; if a man wants to drive in their own car, why (they are authorized) to go ahead; they were not compelled to ride in the trucks."

After the tools were loaded, there was but one open truck remaining in which Dreyer and the foreman could ride. Dreyer said to Clark that it was cold and windy that morning to ride in an open truck and he was willing to drive his own car on to the point where they were to clear the highway. The foreman volunteered to ride with him. He offered to buy 50 cents worth of gasoline for the trip. Dreyer, however, refused to permit this to be done. They started upgrade from the tollhouse a few minutes after 7 o'clock. The day's work had begun. Dreyer was then subject to the orders of the foreman with whom he was riding. About twenty-five minutes later, as their machine rounded a curve, the morning sun struck the windshield, and apparently blinded the driver. The machine ran over the grade, rolling into a gulch below. Dreyer was killed. Clark was seriously injured.

A claim for compensation was filed by Ruth Dreyer, the widow of the deceased. The Industrial Accident Commission found that Dreyer was injured in the course of his employment, that Ruth Dreyer was the widow of the deceased, and partially dependent upon him for support. The commission thereupon rendered an award of damages against the Department of Public Works for the sum of $462. A petition for a writ of certiorari was then filed in this court to review the award of damages.

The sole question which is involved in this proceeding is whether the deceased received the injuries from which he died while he was engaged in the course of his employment. The petitioner asserts that the award of damages is invalid because Dreyer's injuries were received while he was en route to his work and not while he was actually engaged in the course of his employment; that he was driving his own machine, in the operation of which the employer had no management or control; that the well-established rule of "going and coming from work" relieves the employer from liability.

We are satisfied from the circumstances of this case that Dreyer died from injuries received in the course of his employment. The rule which relieves an employer from liability for injuries received by an employee while he is going or coming from work has no application to the particular facts of this case. He was employed as a laborer to assist in clearing snow and débris from the state highway at any point which might be

designated by the foreman from time to time. He was employed to work eight hours a day. His day's work began at 7 o'clock in the morning. He was required to report at that time at the tollhouse on the High Gear grade. The employer's tools were stored at that tollhouse. They were engaged on the morning of the accident in clearing the highway several miles beyond this point. When Dreyer reached the tollhouse, and reported for work, he was met by the foreman, who directed him to assist in loading the tools for the day. This was a part of his employment. He was then under the direction of the superintendent. While it is true that the employer made provision for workmen to ride to the point of actual service on trucks which were used in the highway work, this means of conveyance was not required of the workmen. Some of them drove to the place of employment in their own machines. The foreman was aware of this custom and acquiesced in the practice. On the morning of the accident the assistant foreman, who was in charge of the day's work, consented to Dreyer's offer to drive them on to the point where they were to commence clearing the highway. He actually rode with Dreyer. Since the day's work had begun, and Dreyer was then under the supervision of the foreman, he was actually subject to directions from Clark. It may not be said they were not engaged in the course of employment merely because the shoveling of snow had not actually commenced. It would be just as reasonable to assert they were not engaged in the course of employment during intervals while they were traveling, either by machine or on foot from one point where snow or débris had accumulated to another. They were employed to clear the highway on the mountain grade above the tollhouse. That section of the highway was their field of employment. The Department of Public Works may not deny liability merely because Dreyer was going in his own machine from one point of service to another in the field of his employment. Dreyer was encouraged to do this. The employer acquiesced in this particular use of the owner's machine.

The case of Matlon v. Matlon, 92 Ind. App. 350, 175 N. E. 369, 370, is authority for affirming the award in the present proceeding. In that case the court held that, the employer having acquiesced in the workman's use of own automobile in going from one job to another, he was estopped from denying liability for injuries which were sustained while doing so. The court said: "Here the employers ordered and acquiesced in the employees' using a means of transportation from one job to another while being paid for such time. The employees, owing their employers the duty of reporting for the work at the place designated, proceeded toward that place, and while traveling a well-recognized route were injured. * * * Even granting that there had been no specific order given to use this particular means of transportation, the acquiescence of the employers has been held sufficient, since the acquiescence abrogates specific instructions. Alberta Contracting Corp. v. Santomassimo (1930), 107 N. J. Law, 7, 150 A. 830."

In the Matlon Case it does appear the foreman may have directly authorized the use of the workman's car, by saying, "Boys, let's get the tools and things * * * and get in the car of Joe Matlon." This does not distinguish that case from the present proceeding. The principle which governs that case also applies to this proceeding. This is a stronger case of acquiescence, for two foremen were aware of the fact that it was the custom of several workmen to ride to the place of their employment in their own cars. No objection was ever made to this practice. This acquiescence in the means of transportation is equivalent to directing it to be done. By approval of the employer it became an authorized alternative means of traveling from one point of service to another in the general field of employment. Under the circumstances of this case it would be unreasonable to say that Dreyer was not actually engaged in the course of his employment at the time of the accident which caused his death.

The award is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

127 Cal.App. 728

HARLOW v. MOTOR COACH CO. et al.

Civ. 7246.

District Court of Appeal, Second District, Division 2, California.

Nov. 29, 1932.

1. Automobiles ⇐244(11, 36).

Evidence *held* to warrant court's findings for plaintiff as to negligence and proximate cause of injuries in collision between plaintiff's automobile and bus.

2. Appeal and error ⇐931(1).

Appellate court presumes that trial court's conclusions on conflicting testimony were governed by witnesses' means of observation, their demeanor, and weight of testimony.

3. Appeal and error ⇐1011(1).

Appellate tribunal cannot say, as matter of law, that trial court erred in relying on only portions of conflicting evidence, unless contrary to only credible substantial evidence.

Appeal from Superior Court, Los Angeles County; H. S. Gans, Judge.

Action by H. I. Harlow against the Motor Coach Company, a corporation, and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

B. P. Gibbs and Walter W. Little, both of Los Angeles, for appellants.

Ivan Kelso, Alfred T. Hutchins, and Maynard Garrison, all of Los Angeles, for respondent.

CRAIG, J.

As the result of three actions which arose from allegedly negligent operation of a motorbus and a private automobile at an intersection of public thoroughfares, consolidated for the purposes of trial, judgments were rendered in favor of the plaintiffs. The defendants presented several appeals therefrom upon the same transcript. The instant appeal is from the judgment entered in favor of the owner and operator of the car last mentioned.

[1-3] The grounds assigned for reversal consist of an asserted insufficiency of the evidence to warrant findings by the trial court as to negligence of the defendants, and that there was no contributory negligence on the part of the plaintiff, but that the sole proximate cause of his injuries and damage was the negligence of the appellant Tappin. It appeared, and is not denied, that the bus of the appellant corporation, driven by said Tappin, approached the intersection while traveling in a southerly direction and that the respondent when first seen by him was driving easterly across his course and in plain view. The respondent testified that while driving on the right-hand side of the easterly and westerly street at about eight miles per hour, as he entered the intersection he observed the bus "two hundred to two hundred and fifty feet north"; that he gave the signal for a left turn, and upon arriving at about the center of said intersection "the bus made a left turn and swerved to the left and crashed into my car." Appellant Tappin testified in part as follows:

"I was thirty feet back when I first saw it.

"Q. Where was the Harlow car at that time? A. It was at the intersection. * * * That is, starting out of the intersection.

"Q. How far had it proceeded into the intersection? A. When I first saw it?

"Q. Yes. A. I was coming at such a speed I could not say. * * *

"Q. Would you say it was traveling fast or slow? A. I would say it was traveling fast.

"Q. Faster than your car? A. Yes, sir."

Other witnesses observed the respective vehicles when about thirty to forty feet apart, their testimony was somewhat at variance as to rates of speed, and their means of observation, demeanor on the stand, and the effect and weight of their testimony must be presumed to have been observed and to have governed the trial court in its rulings and conclusions. It is strenuously urged on behalf of the appellants that in cases where the only credible substantial evidence disproved any negligence upon the part of the defendant and rendered the probability of liability absurd, a finding in his favor has been held imperative. But it is equally true that unless such be the condition of the record an appellate tribunal resolving all intendments in favor of the judgment may not say as a matter of law that the trial court erred in relying upon portions of conflicting evidence and in rejecting others. McCarthy v. McColgan, 99 Cal. App. 492, 278 P. 918; Behler v. Kunde, 100 Cal. App. 731, 281 P. 76; Burgess v. California Mutual Bldg. & Loan Ass'n, 210 Cal. 180, 290 P. 1029. Nor can it be said that Lawrence v. Goodwill, 44 Cal. App. 440, 186 P. 781, 783, cited by appellants, aids their argument. It there appearing that the plaintiff had driven into an intersection upon the state road where the view was obstructed at an excessive and unlawful speed, it was held, in declining to reverse the judgment, that "the jury were well within the record evidence in finding, as their verdict implies that they did find, that, considering the distance of plaintiff's car from the intersecting way and the rate of speed at which the latter was driving at the point of time when the defendant emerged from the Cressey road and entered upon the state highway, the defendant could not with safety have crossed or attempted to cross the center of the state highway." A different conclusion is not impelled by rules announced in Uhl v. Fertig, 56 Cal. App. 718, 206 P. 467, wherein it appeared that uncorroborated evidence of the plaintiffs' one witness created an obvious impossibility and the evidence to the contrary was uncontradicted. Since the instant case has not been brought within the purview of those wherein it was apparent that the defendants were subject to the rule of "last clear opportunity," the discussion of incidental questions, dependent upon conjecture, becomes unjustified.

The judgment is affirmed.

We concur: WORKS, P. J.; STEPHENS, Justice pro tem.

127 Cal.App. 782

Cora A. MILLER, Plaintiff and Respondent, v. MOTOR COACH COMPANY (a Corporation) and Walter Tappin, Defendants and Appellants.

Civ. 7247.

District Court of Appeal, Second District, Division 2, California.

Nov. 29, 1932.

Appeal from Superior Court, Los Angeles County; H. S. Gans, Judge.

B. P. Gibbs and Walter W. Little, both of Los Angeles, for appellants.

George F. Rankin, of Los Angeles, for respondent.

CRAIG, J.

As the result of three actions which arose from allegedly negligent operation of a motorbus and a private automobile at an intersection of public thoroughfares, consolidated for the purposes of trial, judgments were rendered in favor of the plaintiffs. The defendants presented appeals separately upon the same transcript. The instant appeal is from one of said judgments, entered in favor of a passenger of said automobile.

The questions involved herein are identical with those decided in the case of Harlow v. Motor Coach Co. (Cal. App.) 16 P.(2d) 779.

Upon the authority of that case the judgment is affirmed.

We concur: WORKS, P. J.; STEPHENS, Justice pro tem.

127 Cal.App. 781

T. S. MILLER, Plaintiff and Respondent, v. MOTOR COACH COMPANY (a Corporation) and Walter Tappin, Defendants and Appellants.

Civ. 7248.

District Court of Appeal, Second District, Division 2, California.

Nov. 29, 1932.

Appeal from Superior Court, Los Angeles County; H. S. Gans, Judge.

B. P. Gibbs and Walter W. Little, both of Los Angeles, for appellants.

George F. Rankin, of Los Angeles, for respondent.

CRAIG, J.

As the result of three actions which arose from allegedly negligent operation of a motorbus and a private automobile at an intersection of public thoroughfares, consolidated for the purposes of trial, judgments were rendered in favor of the plaintiffs. The defendants presented separate appeals therefrom upon the same transcript. The instant appeal is from one of said judgments, entered in favor of a passenger of said automobile.

The questions involved herein are identical with those decided in the case of Harlow v. Motor Coach Co. (Cal. App.) 16 P.(2d) 779.

Upon the authority of that case, the judgment is affirmed.

We concur: WORKS, P. J.; STEPHENS, Justice pro tem.

128 Cal.App. 84

CAROLINA PINES, Inc., et al. v. CATALINA PINES et al.

Civ. 990.

District Court of Appeal, Fourth District, California.

Dec. 7, 1932.

Trade-marks and trade-names and unfair competition ⊂⇒70(3).

"Carolina Pines" restaurant operators *held* entitled to temporary injunction restraining competitor, 5 miles distant, from using trade-name "Catalina Pines" and imitative devices.

Operators of "Carolina Pines" were entitled to a temporary injunction, as against the contention that such an injunction, if granted, would constitute a mandatory injunction, since denying defendants the continued use of the name "Catalina Pines" and the pine tree emblems on the windows, menus, and menu folders, which were first used by plaintiffs, would not require any material affirmative action, and defendants could carry on their business in a legitimate manner.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by the Carolina Pines, Inc., and another, against the Catalina Pines and others. From an order refusing plaintiffs a temporary injunction, plaintiffs appeal.

Reversed with directions.

Lawrence M. Cahill, of Los Angeles, for appellants.

Ellis I. Hirschfeld, of Los Angeles, for respondents.

MORTON, Justice pro tem.

Plaintiff Rose P. Satterfield, on or about February 1, 1925, commenced doing a restaurant, café, and tearoom business at 4619 Melrose avenue in the city of Los Angeles, Cal., under the fictitious firm name and style of the Carolina Pines. In July, 1929, the business was incorporated as "The Carolina Pines, Inc.," a corporation, plaintiff owning all the stock, except two qualifying shares. She continued at that address until August, 1929, at which time she moved to 7315 Melrose avenue, it being necessary that larger quarters be secured to accommodate her business. She specialized on certain recipes and food combinations which might generally be termed Southern style meals, serving certain definite menus of food, with slight variations for each day of the week and at a fixed and definite charge of lunch 50 cents and dinner 85 cents. The business name of "The Carolina Pines" was prominently used, displayed, and advertised inside and outside the premises and particularly by two large neon signs on top of the building. On either side of the entrance was a large boxed pine tree and at both sides of the cashier's desk, a potted pine tree. A large oil painting of pine trees adorned the interior and the business name superimposed upon the design of a pine tree was printed on the menu cards and menu folders. The table and chairs were of a distinctive pattern, painted black and decorated with green. Two distinctive patterns of dishes were used, the waitresses wore distinctive calico and print dresses in assorted colors and the other girl employees wore characteristic dresses and uniforms. Plaintiff acted as hostess in the dining room, wearing a pink organdie dress of a certain definite pattern and style. By reason of the characteristic devices, styles, symbols, and contrivances and the quality, flavor, and excellent preparation and service of foods, she alleges that the attractive reputation and patronage of her business extended beyond the city of Los Angeles and throughout a large area, particularly the counties of Los Angeles, Riverside, San Bernardino, Kern, Ventura, Orange, and San Diego.

On or about August 15, 1929, the defendants Jacob Rosenberg and Mary Rosenberg offered and asked to purchase from plaintiffs the lease on the then occupied premises at 4619 Melrose avenue, together with certain of the furniture, furnishings, fixtures, and equipment located therein, it being understood that the good will and name of said business was not included as plaintiffs were continuing the business at the new and larger building located at 7315 Melrose avenue. It is alleged that the defendants promised and agreed that, in the event the sale was consummated, they would adopt and use a name other than "The Carolina Pines" and one not resembling that name in any way.

On or about September 1, 1929, they abandoned the contemplated purchase of the lease, furnishings, etc., from plaintiffs, stating the deal was too restrictive, particularly as to use of a trade-name. About December 3, 1929, they opened and commenced to operate a restaurant, tearoom, and café business at 2525-2527 West Seventh street in the city of Los Angeles, under the fictitious firm name and style of "The Catalina Pines." Two large neon signs on top of the building display this name, on the menu cards and menu folders the name is superimposed over a pine tree, and the same design appears on the windows. At the entrance are two large pine trees, the chairs and tables are almost identical and painted black and decorated with green in close imitation of plaintiffs'. The dishes used are identical in pattern with plaintiffs', the same food combinations and daily menus on the same day of the week are served and are listed under practically identical language. Defendants' waitresses wear practically identical dresses of calico and print in assorted colors as worn in plaintiffs' place of business, and also the uniforms of the other girl employees are identical. Defendant Mary Rosenberg acts as hostess in the dining room, always wearing a pink dress of a pattern and style as worn by plaintiff. It is contended by plaintiffs that this imitation and duplication of their business by defendants is for the purpose of deluding and deceiving the public generally and appropriating to defendants' use and benefit the business, patronage, good will, and reputation of plaintiffs' business.

Defendant Mary Rosenberg in her affidavit admits ownership of the business designated as "Catalina Pines"; states it is approximately five miles from plaintiffs' place of business; alleges she has certain sums of money invested in neon electric signs, cuts, and menus; that a statement is printed daily on her menus which reads: "Note: Catalina Pines has no connection with any other establishment in California," or "Note: Catalina Pines has no connection with any restaurant, tea-room, or café in the entire world." Further she alleges her business to be mainly that of steady customers of that section; that her furnishings, dishes, and foods are of standard quality and type; that her waitresses without instructions from her, wear their own dresses as they see fit; that she does not wear a pink organdie dress; that she does not intend or desire to deceive the public and in fact is not deceiving the public or injuring the business of plaintiffs. A temporary injunction was asked for by plaintiffs during the pendency of this action, enjoining defendants from using the trade-name "The Catalina Pines" or any name, phrase, or device in any manner resembling or imitating, whether by sound, appearance, or spelling, the name or phrase, "The Carolina Pines" and continuing the imitation and duplication complained of.

The trial court held "that the order sought by plaintiffs, restraining defendants from the use of the trade name set forth in said order to show cause, would, if granted, constitute a mandatory injunction and that, therefore, this is not a proper case for the granting of a preliminary or temporary injunction." Plaintiffs appealed and the sole question involved is whether the relief sought in the trial court would constitute a mandatory injunction.

The allegations of the pleadings and the statements in the affidavit, which must be taken as the facts for the purpose of this proceeding, indicate a case of unlawful business competition. The commercial life of the country can only develop under a principle of fair and honest dealing. Irrespective of the question of the solvency or insolvency of the offending party, when one merchant with studied effort and imitation endeavors to deceive the public into believing that in buying his goods they are receiving the goods of another merchant who through honest effort has established a reputation and public demand for his product, then the law must step in, and, under its equity jurisdiction, restrain the unfair practices and imitation of the pretender. A court of equity will not permit such deception to continue. "By device, defendant is defrauding plaintiff of its business. He is stealing its good will,—a most valuable property,—only secured after years of honest dealing and large expenditures of money; and equity would be impotent, indeed, if it could contrive no remedy for such a wrong." Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, at page 539, 42 P. 142, 145, 30 L. R. A. 182, 50 Am. St. Rep. 57. Further at page 537 of 109 Cal., 42 P. 142, 144:

"In Celluloid Mfg. Co. v. Cellonite Mfg. Co. [C. C.] 32 F. 94, 97, Justice Bradley, of the Supreme Court of the United States, in speaking to the question of similarity in name, said: 'It was not identical with the plaintiff's name. That would be too gross an invasion of the complainant's rights. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer, is obnoxious to the law.'"

Considering now the mandatory injunction feature of the issue, we find in Jaynes v. Weickman, 51 Cal. App. 696, at page 699, 197 P. 672, 673, the court said:

"The injunctive features of the decree under consideration here enjoin the appealing defendants from continuing to do certain things. An order or decree restraining the further continuance of an existing condition does not take on the character of a mandatory injunction merely because it enjoins the defendants from continuing to do the forbidden act. An injunction that restrains the continuance of an act or series of acts may be just as much a preventive of prohibitory injunction as one that restrains the commission of an act. State v. Superior Court, 39 Wash. 115, 109 Am. St. Rep. 867, 4 Ann. Cas. 229, 1 L. R. A. (N. S.) 554, 80 P. 1108; United Railroads v. Superior Court, 172 Cal. 85–87, 155 P. 463, and cases there cited.

"Appellants, contrary to the injunctive inhibitions, are continuing to carry on their business under the proscribed trade-name. They are not enjoined from engaging in the transfer business in the city of Los Angeles or elsewhere. What they are enjoined from doing is to use in their business the interdicted trade-name. It is true that, in order to carry on their business in a manner conformable to the injunctive features of the judgment, they must remove the forbidden trade-name or names from their trucks, from the entrance to their place of business, and from their display advertising signs; and it also is true that these are affirmative acts. But the affirmative acts necessary to be done by defendants in order to continue the transaction of their business without disobeying the injunctive features of the judgment are but acts that are necessary to effectuate the principal purpose of the injunction, which is to forbid further infringement upon plaintiff's right to the exclusive use of the business name that she had adopted before the defendants entered the field of competition."

Denying respondents the continued use of the name "Catalina Pines" and the pine tree emblems on the windows, menus, and menu folders is not requiring any material affirmative action. They can carry on their business in a legitimate manner and without the artifice in practice now, by which it appears an effort is being made to unjustly obtain a portion of appellants' business. From the allegations of the complaint and respondents' affidavit in opposition thereto, we are convinced that appellants were entitled to a temporary injunction, restraining the continuance of the deception in name and symbols. A temporary injunction is proper where "it appears from positive averments that respondent was first in time in business and first in the selection of a combination of words as a designation of a business which he had established and conducted some six or seven years before appellants entered the field, and which business was extensive, and to the development of which respondent had expended much time and devoted energy and doubtless some skill." Lutz v. Western Iron & Metal Co., 190 Cal. 554, 213 P. 962, 965. See, also, Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879; Morton v. Morton, 148 Cal. 142, 82 P. 664, 1 L. R. A. (N. S.) 660.

On the question of injunctive relief in a similar situation involving the restaurant

business this court expressed itself as follows:

"It may be added that it is the purpose of the law to protect by registration or injunction the exclusive use of a name, symbol, or sign of the ownership of a particular business." Hall v. Holstrom, 106 Cal. App. 563, 289 P. 668, 671.

Further, at page 572 of 106 Cal. App., 289 P. 668, 673:

"The object of injunctive relief is to prevent injury, threatened and probable to result, unless interrupted. Why should a person be required to stand by and see his property impaired, before he may stay the hand of the person seeking to offend? Actual injury may be the best evidence of its own existence, but a person should not be compelled to abide the results of trespass for the purpose of obtaining evidence of its injurious effects. Wrongs which are the probable result of given means should be prevented, not awaited."

During the pendency of this action we feel the appellants are entitled to protection by law. The order appealed from is reversed and the trial court, without further proceedings, is directed to enter an order granting plaintiffs' application for a temporary injunction enjoining defendants and each of them during the pendency of this action in the trial court, from using or continuing to use the name Catalina Pines, or any name, phrase, or device in any manner resembling or sounding similar to the name, the Carolina Pines, and is further restrained from using the name Catalina Pines or any name, phrase, or device similar thereto, superimposed on a pine tree in any manner resembling the sign or symbol used by appellants in connection with their business. Appellants are awarded judgment against respondents for their costs on this appeal.

We concur: BARNARD, P. J.; MARKS, J.

128 Cal.App. 144

LYONS et ux. v. LONG.

Civ. 8378.

District Court of Appeal, First District, Division 1, California.

Dec. 10, 1932.

1. Appeal and error ⇐931(1).

On appeal from judgment for plaintiffs, evidence must be construed most favorably to plaintiffs, and benefit of every inference which can reasonably be drawn from evidence given them.

2. Automobiles ⇐244(36).

Evidence sustained finding that negligence of motorist striking pedestrian was sole proximate cause of pedestrian's injuries.

Appeal from Superior Court, City and County of San Francisco; S. L. Strother, Judge.

Action by Charles A. Lyons and wife against Charles Long. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Lloyd J. Cosgrove and Edmund J. Holl, both of San Francisco, for appellant.

Pardini & Scampini, of San Francisco, for respondents.

PER CURIAM.

This action was brought to recover for injuries received by Elizabeth Lyons (hereinafter referred to as the plaintiff) as the result of having been struck by defendant's automobile, and for consequential damages sustained by Charles A. Lyons, her husband.

The cause was tried by the court, which found in favor of the plaintiffs in the sum of $800, and defendant has appealed from the judgment.

At about 8 o'clock p. m. of March 20, 1930, in San Francisco plaintiff was crossing Mission street from west to east near its intersection with Ney street. A street car company maintains double tracks on Mission street and a safety station on the east side of the tracks at the southeast corner of Ney and Mission streets. The evidence shows that Charles S. Lyons preceded his wife and was near the east curb of the latter street when plaintiff was struck. According to her testimony, before starting to cross she looked and saw that the street was clear. She then passed over to a point immediately north of the markers or buttons constituting the north boundary of the safety zone. When she reached this point and was about to proceed, she heard the noise of the brakes on defendant's car, which was being driven by him in a northerly direction along Mission street, and was immediately thereafter struck and injured. She also testified that the car turned to the driver's left, passing between her and the safety zone or over the same, and that she was struck by the right end of the rear bumper. In this connection the record discloses other testimony tending to show that the driver's course was erratic, and the latter, according to one of the witnesses, admitted that when the brakes were applied the car swerved. Defendant also testified that he turned his car to the left and that the rear end struck plaintiff; further, that his brakes would not always stop the car quickly. He claims that no negli-

gence on his part was shown, and that the evidence shows contributory negligence as a matter of law on the part of each of the plaintiffs.

[1, 2] While, as is usual in cases of this character, there is conflict in the testimony, and different inferences might be drawn, nevertheless the evidence must be construed most favorably to plaintiffs. They must be given the benefit of every inference that can reasonably be drawn therefrom. 2 Cal. Jur., Appeal and Error, §§ 515, 543, pp. 880, 926. We cannot say that plaintiffs' version of the affair was inherently improbable, or that the court was not justified in its conclusion that defendant was guilty of negligence which was the sole proximate cause of the injuries complained of.

There is no merit in the further contention that the trial court failed to find on all the material issues. We have examined the entire record, and are satisfied that the findings are fairly supported and nothing which would warrant the reversal of the judgment has been shown.

The judgment is affirmed.

128 Cal.App. 151

HANSON et ux. v. HESS et al.

Civ. 581.

District Court of Appeal, Fourth District, California.

Dec. 12, 1932.

1. Appeal and error ⇐110.

Denial of motion for new trial by operation of law is unappealable.

2. Damages ⇐216(1).

Instruction on measure of damages, using word "carelessness" instead of "negligence," *held* not erroneous as misleading, especially where same matters were fully covered in other instructions.

3. Trial ⇐241.

In action for intersectional collision, refusal to read to jury portion of amendment to Vehicle Act not taking effect until after accident *held* not error (St. 1923, p. 517, as amended).

4. Trial ⇐296(3).

In automobile collision action, alleged error in omitting word "proximately" in instruction on contributory negligence *held* cured by other instructions.

Any possible error in such respect was cured by proper language in many other instructions given, which fully set forth rule that any negligence must be such as proximately contributed to accident, in order to bar recovery.

5. Trial ⇐296(4, 5).

Instruction on contributory negligence *held* not formula instruction, and hence alleged errors therein in punctuation and in using word "contributed" instead of "contributes" were cured by other instructions given.

Instruction that negligence on part of deceased, amounting to want of ordinary "care, which operating" concurrently with negligence of defendant, "contributed" to injuries, would prevent recovery, was not prejudicially erroneous, notwithstanding alleged error in inserting comma after word "care" instead of after "which," and alleged error in using word "contributed" instead of "contributes," since such instruction was not a formula instruction, and could not have been understood by jury as purporting to direct verdict, especially in view of other correct instructions on subject of contributory negligence and in view of instructions that jurors were sole and exclusive judges of facts in case, and were not to take any one instruction alone and that it was their duty to pass on question of whether deceased had been guilty of contributory negligence proximately contributing to injury.

6. Trial ⇐295(1).

Instructions should be read together.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Charles Hanson and wife against Julius Hess, Jr., and others. From a judgment in favor of defendants, and from the denial of a motion for a new trial by operation of law, plaintiffs appeal.

Appeal from the denial of the motion for a new trial dismissed, and judgment affirmed.

See, also, 119 Cal. App. 211, 6 P.(2d) 280.

Joseph Seymour, of Riverside, for appellants.

Estudillo & Schwinn, of Riverside, for respondents.

BARNARD, P. J.

[1] In this action the plaintiffs sought to recover damages for the death of their son Edwin J. Hanson, resulting from an automobile accident which occurred at the intersection of Lime street and Twelfth street in the city of Riverside. Lime street runs north and south and Twelfth street east and west. The deceased, who was 27 years old, was driving an automobile westerly on Twelfth

street about 10 o'clock on the morning of a clear day. Julius Hess, Jr., who was about 16 years of age, was driving another automobile south on Lime street, and the two cars collided at this intersection, which is conceded to have been a "blind corner" within the meaning of the California Vehicle Act (St. 1923, p. 517, as amended). Edwin J. Hanson was almost instantly killed, and this action was brought against the driver of the other car, together with his father and mother, who had signed the minor's application for a license. The action was defended upon the double ground that the deceased had been guilty of contributory negligence, and that the driver of the other car had not been guilty of negligence. The jury returned a verdict in favor of the defendants, and, from the judgment which followed, the plaintiffs have appealed. A purported appeal was also taken from the denial, by operation of law, of a motion for a new trial, which need not be considered here, since no appeal lies therefrom.

The only grounds for reversal relied on relate to the giving and refusing of certain instructions. Most of these are not very strenuously urged, are without merit, and need receive but slight consideration.

[2] The first instruction sets forth the issues which the jury were to decide, and a small portion thereof, a part of one sentence, is attacked as misleading and as omitting one issue. Not only is the portion questioned not susceptible to the construction placed upon it by the appellants, but the instruction in its entirety fully and fairly sets forth the issues. The claim is made that instructions numbered 7, 11, and 34 are confusing and erroneous, but no attempt is made to point out how they are confusing or in what respect they are erroneous. They are a part of a series of instructions defining negligence and contributory negligence, and do not materially vary from the usual and ordinary form of such instructions. It is then urged that instruction No. 12 is contradictory, an invasion of the province of the jury, and not a correct statement of the law. This contention is supported neither by argument nor authority, and we are not even told what it contradicts, how it invades the province of the jury, or why it is erroneous. It is also suggested that there is no evidence in the record justifying the giving of this instruction. The instruction was one relating to the duty of a driver confronted with sudden peril, the giving of which was amply justified by the evidence. Instruction No. 28 is attacked because the word "carelessness" was used therein instead of the word "negligence." This was an instruction on the measure of damages, its meaning is entirely clear, it could not have misled the jury, and the same matters are fully covered in many other instructions given. A similar unsupported attack is made on instruction No. 39, and the same is without merit.

[3] It is next contended that the court erred in refusing to give four instructions at the request of the plaintiffs. The first two of these were fully and correctly covered in two other instructions given, which included almost the identical language of the instruction refused. The third related to the failure of the defendant to sound a warning. There was nothing in the evidence produced at the trial which called for or justified the giving of this instruction. In the fourth of these instructions, the court was asked to read to the jury a portion of an amendment to the California Vehicle Act which did not go into effect until after this accident occurred. While the instruction in this form was refused, the court did read to the jury the corresponding portion of the same section of the California Vehicle Act as the same was then in force.

[4, 5] Appellants' main contention is that the court erred in giving instruction No. 26, which reads as follows: "The court instructs you that negligence on the part of Edwin J. Hanson, amounting to a want of ordinary care, which operating concurrently with the negligence of the defendant, Julius Hess, Jr., contributed to the injuries suffered by Edwin J. Hanson, will prevent a recovery in this action by the plaintiffs, Charles Hanson and Margaret D. Hanson, whether or not the defendant, Julius Hess, Jr., could have, by the exercise of ordinary care, guarded against it."

We are told that this instruction was based upon the case of Phillips v. Hobbs-Parsons Co., 67 Cal. App. 199, 227 P. 622, 626, wherein the following appears: "The law is, as the trial court in clear language stated it to the jury, that 'negligence on the part of the plaintiff amounting to a want of ordinary care which, operating concurrently with the negligence of the defendant, contributes proximately to plaintiff's injuries, will prevent a recovery in this action by plaintiff, whether or not defendant, by the exercise of ordinary care, could have guarded against it.'"

It is pointed out that the instruction as given differs from the language of the case cited in three respects: First, in the instruction given there is a comma after the first word "care," while in the case cited the comma is after the following word "which"; second, in the instruction here given the word "contributed" is used, while in the case cited the word used was "contributes"; third, the word "proximately" following the word "contributes" in the case cited is entirely omitted in the instruction as here given. The omission just referred to may be disregarded, as any possible error therein was covered by proper language in many other instructions

given which fully set forth the rule that any contributing negligence must be such as proximately contributed to the accident, in order to bar a recovery. Phillips v. Hobbs-Parsons Co., supra.

Appellants contend that the other two variations mentioned are fatal, in that they completely change the meaning of this instruction to the extent that, while the one in the case cited is a qualified statement, telling the jury, in substance, "that if certain conditions exist the law is thus and so," the one here given invaded the province of the jury, told them that contributory negligence existed as a matter of fact, and prevented a recovery by the plaintiffs. It is argued that this instruction directed a verdict for the defendants and expressly told the jury that "the negligence of Edwin J. Hanson contributed to his injuries and will prevent a recovery in this action by the plaintiffs." It is further argued that, since this instruction directed a verdict, any error therein cannot be cured by other instructions; the case of Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 201 P. 599, being cited in support thereof. In that case there was considered a so-called "formula" instruction directing a verdict if certain facts were found, which was held to be incomplete and erroneous. The instruction here in question is not such a formula instruction, and does not purport to direct a verdict. The situation existing here is not unlike that in the case of Hodge v. Weinstock, Lubin & Co., 109 Cal. App. 393, 293 P. 80, 84, where the court, in considering an instruction somewhat similar to the one now before us, so far as the principle involved in the rule here relied on is concerned, although otherwise different, said:

"Appellant's whole objection might be dismissed with the statement that the instruction does not direct or advise a verdict for the plaintiff. It goes little if any further than the usual instruction in negligence cases that where one is shown to have been guilty of negligence, he is liable in damages for the injuries proximately occasioned thereby. In a proper case, as here, other and qualifying instructions follow. But reading the instruction as appellant reads it, this rule has never been carried so far as to hold the giving of such an instruction as the one in question to be a reversible error."

And, after discussing certain other cases, the court continued: "The instruction in this case simply states that in certain circumstances stated 'a recovery of damages may be had for the injuries proximately caused thereby.' This instruction is far from a direction to find for the plaintiff upon the facts stated. It simply says that upon such facts you 'may' find a verdict. Other instructions fully setting forth the defenses of defendant tell the jury with equal clarity the conditions upon which they 'may not' find for the plaintiff. Read altogether, the charge properly states the law, and the instruction in question does not conflict with other, and qualifying ones."

The instruction here attacked simply states that the existence of certain circumstances will prevent a recovery, while in other instructions the jury were told that, in the absence of such circumstances, a recovery will be permitted, in so far as that issue is concerned.

Examining the other instructions given, we find that in No. 1 the jury was instructed that "it will be your duty to ascertain whether Edwin J. Hanson was guilty of negligence proximately contributing to the accident." In No. 2 the jury was told not to take any one instruction by itself but to take all instructions together and in relation to each other. In No. 4 the jury was told, "You are the sole and exclusive judges of the facts of this case." In addition to at least six other instructions on contributory negligence, the court gave three instructions on this subject at the request of the plaintiffs. One of these, No. 13, reads as follows:

"The defendants in this case have set up alleged contributory negligence of the deceased, Edwin J. Hanson, as a defense in this action.

"That is to say, the defendants claim that even if they were negligent, the deceased, Edwin J. Hanson, was also negligent.

"In this connection, I charge you that contributory negligence is a matter to be proven affirmatively by the defendants before it becomes a good defense, unless it appears from the plaintiff evidence.

"That is to say, if you believe from the evidence that the defendants were, or either of them was, guilty of negligence, causing or contributing approximately to the accident and death of Edwin J. Hanson, then the plaintiffs are entitled to a verdict against the defendants unless it is proven to you, by a preponderance of all the evidence, that the deceased, Edwin J. Hanson, was also guilty of negligence that contributed proximately to the accident.

"The burden of proving the absence of this contributory negligence is not upon the plaintiffs, but the burden is affirmatively upon the defendants to prove the contributory negligence of the deceased before it constitutes any defense to an action of this kind."

No. 21 was in language almost identical with the one just quoted. Still another, No. 22, was given, reading as follows:

"In this case the defendants allege that the deceased, Edwin J. Hanson, was negligent, and that his negligence was a proximate cause of the accident in question and his death.

"The burden is upon the defendants to

prove the negligence of the deceased Edwin J. Hanson, by a preponderance of the evidence, and in so considering the evidence upon this point, you will keep in mind that the law presumes that Edwin J. Hanson at the time in question here, took ordinary care of his own concerns."

[6] In view of all of these instructions, which should be read together, and since the jury was specifically told that they were the sole and exclusive judges of the facts in the case, that they were not to take any one instruction alone, and that it was their duty to pass upon the question of whether or not Edwin J. Hanson had been guilty of negligence proximately contributing to his injuries, we are unable to see how the jury could have construed this instruction as being one of fact, and as determining this issue so much stressed throughout the trial and so elaborately submitted to them. While a careful study reveals that the language used in this instruction could be given the meaning attributed to it by the appellants, not only does this require a strained construction, but the natural effect of the language used, especially on the first reading, would be to convey the idea to the jury that the court was instructing them on a matter of law and not on one of fact. In effect, the jury were told that any negligence on the part of Hanson will prevent a recovery if it concurred with negligence on the part of the defendant and contributed to the injuries sustained. While the qualifying words "any" and "if" were not used, and while the language used could be so emphasized in reading as to convey contrary meaning, a natural and ordinary reading thereof would convey the same impression as would be conveyed were the qualifying words added. This is especially true when the instruction is taken and considered with the many other instructions given on the same subject. Under such circumstances, we think it may not be assumed as possible that the jury disregarded all of the other instructions, and the evident intent of the one under attack, and accepted this instruction as one to the effect that the deceased was in fact guilty of contributory negligence, and that this fact would prevent a recovery by the appellants.

It may not be amiss to point out that the evidence in this case is such as to indicate that the jury could hardly have been expected to find the deceased free from contributory negligence. The driver of the other car testified that as he approached this intersection he was going uphill; that he was proceeding at not more than 20 miles an hour as he approached the intersection; that he decreased his speed, and was not going more than 5 miles an hour at the time of the collision; and that the car driven by the deceased entered the intersection after he did, passing through the same at about 40 miles an hour. Another witness, who was a passenger in this other car, corroborated this testimony, stating that their car had been coming at 20 to 25 miles an hour; that, as it approached the intersection, its speed decreased "because it was going uphill"; that just as they were coming into the intersection his attention was called to the possibility of an accident by seeing Julius Hess, Jr., put his foot on the brake; that their car swayed to the right and stopped at the northwest corner of the intersection; that, as their car came to the right, Julius' left fender hit the rear of the other car; that he felt no jar in the car in which he was riding and was not thrown forward in his seat; that the other car passed in front of them at a speed of 35 to 40 miles an hour; and that the other car swerved to the left just before it passed them, turned completely over three times, and came to rest in an upright position on the far side of Twelfth street with its rear wheels on the curb. There is evidence that the only damage appearing on the Hess car after the accident was the "left front fender outside dented and a scar on left front wheel," and that the Hanson car was "considerably twisted and torn, steering wheel broken off, fenders bent and in a bad state and condition." Aside from the two occupants of the Hess car, only two eyewitnesses of the accident testified. One of these, who had only a fleeting glance prior to the accident, testified that the car driven by the deceased was going faster than the other car. The only real eyewitness, who observed the accident from a distance of about 350 feet, testified that the defendant's car approached the intersection at not more than 15 miles an hour, and that it was practically stopped at the time of the impact; that the car driven by the deceased was traveling at a speed of 40 miles per hour or more; that there was no change in its speed as it approached the point of collision; and that: "The Hess car seemed to be slowing up, no change in the speed of the Hanson car. The Hess car was whirled to the right and came to a stop across the sidewalk on the northwest corner of 12th and Lime St. obstructing the sidewalk, remaining stationary in an upright. The Hanson car proceeded to skid slightly, rear end of car to the left continuing in a westerly direction for practically 75 feet, then turned over, lighting wheels up, then continued turning coming to a stop about 50 feet from where it left the pavement, righting itself, with hind wheels on park lawn south side of 12th St. At the point where the Hanson car hit the pavement wheels up, steering post made quite a dent in the pavement, leaving bits of the steering wheel and the brains of Mr. Hanson."

While the situation thus disclosed may not be conclusive in view of the possible inferences from other evidence produced, this evidence does negative the theory of the appel-

lants that the instruction complained of furnishes the only possible explanation of the verdict of the jury, and that the only conclusion possible is that the jury took this instruction as directing them to return a verdict in favor of the defendants. While the instruction under attack was not properly worded, our conclusion is that any error therein was cured by other instructions given, and was not sufficiently prejudicial to require a reversal.

The purported appeal from the denial of the motion for a new trial is dismissed, and the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

PATTEN & DAVIES LUMBER CO. v. McCONVILLE et al.*

Civ. 982.

District Court of Appeal, Fourth District, California.

Dec. 2, 1932.

Hearing Granted by Supreme Court Jan. 30, 1933.

1. Principal and surety ⇐101(1).

Transaction whereby owner and contractors without surety's knowledge changed construction agreement from fixed price to cost-plus basis *held* alteration of contract, releasing contractor's surety.

Facts disclosed that the original contract, in connection with which the bond was issued, fixed a specific price for the erection of the building, payable in definite amounts as the work progressed, and that thereafter, without surety's knowledge, contractors and owner entered another written agreement superseding all prior agreements, and calling for the erection of the building on a cost-plus basis, providing that the contractors were to receive a fixed fee of 10 per cent. of the costs, that the owner should furnish the money, that no materials should be bought without the owner's consent, that no money should be paid out without his countersignature, and in fact making the supposed contractors merely agents of the owner.

2. Mechanics' liens ⇐315.

Material claimant having possession of contractors' bond specifically referring to original building contract, and contracting under terms totally different from its provisions, *held* chargeable with notice of substitution of agreements releasing surety.

Facts disclosed that material claimant had possession of contractors' original bond specifically referring to and having attached a copy of the original building agreement, providing that contractors were to buy materials and erect the building for a fixed sum, which was to be paid in specific installments in proportion to progress of the work, and that material claimant, with such contract before it, agreed directly with the owner and contractors to furnish materials, and took an assignment of a note given to the contractors and secured by the second trust deed, knowing it was given as first payment for the building.

3. Payment ⇐16(1).

Giving of note for indebtedness does not constitute payment, in absence of agreement to such effect.

4. Appeal and error ⇐1010(1).

Trial court's finding that note was not accepted in payment for debt supported by evidence *held* conclusive.

Appeal from Superior Court, Los Angeles County; William Frederickson, Judge.

Action by the Patten & Davies Lumber Company against Lawrence McConville and another, doing business under the name and style of McConville & Perryman, and another. From a judgment for plaintiff, defendants appeal.

Affirmed in part and reversed in part, with directions.

Kidd, Schell & Delamer, of Los Angeles, for appellant Globe Indemnity Co.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for appellants McConville & Perryman.

Dana R. Weller, of Los Angeles, for respondent.

BARNARD, P. J.

This is an action brought against the contractors and the surety on a bond furnished by them, to recover for materials used in the erection of an apartment house. The complaint alleged that materials of the value of $31,282.61 were furnished between May 1, 1927, and September 27, 1927, in pursuance of a contract between the plaintiff and the defendant contractors; that the defendant contractors agreed to pay for the same; that only the sum of $3,138.37 has been paid; and that the balance unpaid is $28,144.24. It was also alleged that the defendant surety company entered into a bond or undertaking conditioned for the payment of labor and material claims which by its terms was made to inure to the benefit of labor and material claimants. The defendant surety company answered, denying all of the allegations of the

complaint which are material here, and setting up several separate defenses, including one to the effect that the bond had been issued in connection with a contract providing for the erection of a building upon certain terms, while the building had been erected under another and different contract, and upon completely, changed terms. As another defense, it was alleged that the entire transaction had been fraudulent, that the owner and contractors after entering into one form of agreement had later pretended to enter into another form of agreement for the purpose of obtaining a bond from this defendant, and that, thereafter, they had returned to the original form of agreement and proceeded in accordance therewith, all without the knowledge or consent of this defendant.

Four findings were made by the trial court. In finding number one it was found that the contractors ordered the materials as alleged in the complaint and agreed to pay for the same; that they were furnished for and used in the construction of the building; that their agreed value was $31,282.61; and that the balance due and unpaid was $28,144.24. In number two it was found that the defendant surety company entered into an undertaking conditioned upon the payment by the defendant contractors for all materials used in the erection of said building, and that this undertaking was by its terms made to inure to the benefit of all persons furnishing such materials. Finding number three is to the effect that, while the defendant contractors had delivered to the plaintiff their promissory note in the sum of $37,500, this note was not delivered or accepted in payment for materials to be delivered, and did not estop the plaintiff from recovering in this suit. In finding number four it was found that all of the allegations of the defendant surety company's second, third, and fourth separate defenses are untrue. Judgment was entered against the defendant contractors and against the defendant surety company, from which judgment both have appealed.

It appears that S. E. Bancroft was the owner of certain real property upon which an apartment house was to be erected, and that, throughout this transaction, her husband acted for her under a written power of attorney. The owner entered into an agreement with the contractors for the erection of a building upon a cost-plus basis; the owner to pay for all labor and materials, and the contractors to receive 10 per cent. of the cost of the building as a profit. The question of a contractor's labor and material bond arose, and the parties consulted an insurance broker. This broker informed both the owner and the contractors that no such bond could be obtained where the work was to be done upon a cost-plus basis, and that it would be necessary to have a contract at a fixed price before such a bond could be obtained. Shortly thereafter a written contract was entered into between the owner and the contractors, dated March 7, 1927, under the terms of which the contractors agreed to erect a four-story apartment building upon the owner's property, and to furnish all necessary labor and materials, and the owner agreed to pay therefor the sum of $100,000, payable in seven installments of $14,285.72 each; the installments to be paid as certain designated portions of the work should be respectively completed, with the last installment payable thirty-five days after completion. Under date of March 18, 1927, a bond was executed and signed by the appellant contractors as principals and the appellant surety company as surety, in the sum of $50,000. This bond, in its conditions, referred specifically to the building contract of March 7, 1927, between the owner and the contractors, and stated that, whereas by said contract these contractors agreed to furnish the necessary labor and materials to complete the work described in said contract, and in accordance with the terms thereof, and for the contract price therein set forth, in the event the said contractor should well and truly pay or cause to be paid all claims against them for such labor or materials, the bond was to be null and void; otherwise to remain in full force and effect. A copy of the contract of March 7, 1927, was attached to this bond which, although dated March 7, 1927, was not delivered until some time after the execution of the note and trust deed next referred to. Under date of March 25, 1927, the owner of the property executed and delivered to the contractors a note for $60,000, secured by a second trust deed upon the real property on which the building was to be erected. It fully appears that it was agreed between the parties that this trust deed was taken by the contractors as a first payment of that amount upon the building to be erected, and that the remainder of the cost of the building was to be paid by the owner, although the times and manner of such further payment has not been called to our attention.

Under date of April 29, 1927, the owner and the contractors entered into another written contract which, in brief, provided that it was to supersede all prior contracts between the parties; that the contractors were to erect a four-story apartment building on the owner's property; that the contractors were to receive a fixed fee of 10 per cent. of the cost of the building, which should be their entire profit, and which should be payable on the completion of the building, except that they were each to receive a salary of $10 per day during the time of building, which amount was to be deducted from the 10 per cent. referred to; that the owner was to supply all necessary money for the building and for the contractors' profit; and that the owner was to authorize the contractors to receive the proceeds of a certain first loan on the property. The contract further referred to the second trust deed given by the owner to the contrac-

tors and specifically provided that the funds to be received for said trust deed were not to be disbursed without the countersignature of the owner, and that no subcontracts for material or labor should be let without the consent of the owner.

Along about this time, the exact date not being clear, the owner and the contractors went to the respondent and entered into an agreement for the purchase of certain materials to be used in erecting this building. It is not disputed that the respondent agreed to furnish materials to the amount of $37,500, and that the respondent demanded and received a promissory note for that amount payable on or before seven months after date, with interest at 1 per cent. per month. This note is dated March 25, 1927, and is signed by the owner, the contractors, and by another party not appearing to have any other connection with the transaction. The note contains a statement that as collateral security for its payment a note and trust deed for $60,000 on the real property here involved has been deposited, and that if the note is not paid the respondent is authorized to sell or collect the collateral security and apply the proceeds to the payment of the note. At the same time the note and trust deed were assigned to the respondent. Subsequent to the making of this agreement between the respondent, the owner, and the contractors, and the giving of this note with the assignment of the trust deed referred to, the bond here in question, with the agreement of March 7, 1927, attached thereto, was delivered to the respondent. It appears that the building was completed, that the sum of $100,000 was never paid to the contractors, that none of the payments called for by the contract of March 7, 1927, were made, and that the respondent did not furnish materials to the full amount of $37,500, as agreed. It also appears that until after this suit was filed the appellant surety company had no knowledge of the change in the contract, the agreement with the respondent, the delivery to the contractors of the second trust deed for $60,000, the assignment of this trust deed to the respondent, or the existence of a new cost-plus agreement. It does not appear what the respondent did with the $60,000 second deed of trust, nor whether or not anything was ever collected thereon. It does appear, however, that the respondent knew that this note and trust deed had been received by the contractors at its face value as a first payment on the building to be erected.

[1] While the appellant surety company urges many grounds for reversal, most of them based upon the contention that the findings of the trial court contain a number of inconsistencies, that they are not supported by the evidence and that they in turn do not support the judgment, and while we think some of these contentions are well taken, it will not be necessary to consider them all, under the view we take of one of the principal contentions; namely, that this surety has been released by the complete and absolute change in the contract under circumstances where the respondent must be charged with knowledge thereof. While the trial court found against this appellant's contention to the effect that a change, and in fact a substitution of contracts, was intentionally and fraudulently made for the purpose of securing from this appellant a bond which could not otherwise have been obtained, the fact remains that such a result was actually accomplished through the admitted actions of the owner and contractors, whether or not this was their original intention. It fully appears that they originally agreed that the building should be erected upon a cost-plus basis; that, upon being told that a bond could not be secured in connection with such a contract, they entered into a written agreement fixing a specific price, payable in definite amounts as the work progressed and in which the contractors were in fact to act as independent contractors; that upon the strength of this agreement they secured the bond here in question, which was written in connection with and as a guarantee for the terms of that particular contract, and particularly referring thereto; and that shortly thereafter, whether or not another reason intervened, as contended, they entered into another written agreement calling for the erection of the building on a cost-plus basis, providing that the owner should furnish the money, that no materials should be bought without the owner's consent, that no money should be paid out without the countersignature of the owner, and in fact making the supposed contractors merely the agents of the owner.

It can hardly be questioned that there occurred a complete and absolute change in the contract, which, if upheld, would result in a bond, written in accordance with and for the purpose of securing the terms of one specific contract to which it referred and to which it was even attached, being held to apply to and to guarantee an entirely different contract, one in connection with which the other parties had been told that no surety company would issue a bond and one obviously increasing the risks assumed by the surety. The contract of March 7, 1927, referred to in the bond and attached thereto became, in law, a part thereof. Roberts v. Security T. & S. Bank, 196 Cal. 575, 238 P. 673, 676. In Tuohy v. Woods, 122 Cal. 665, 55 P. 683, 684, the court said: "When a surety has shown that the contract as to which he became surety has been changed, he has then shown that there has been an attempt to make him liable on a new and different contract, and the burden is then upon the other party to show that the surety has consented to the new contract."

Not only was no effort made to show that this appellant consented to any such change, but no contention whatever is made that this

surety had any knowledge thereof or of any fact in connection therewith until after this suit was brought. Not only did the agreement of April 29, 1927, specifically provide that it was to supersede all prior contracts between the owner and the contractors, but it discloses as complete and absolute a change from the contract referred to in the bond as could well be imagined. The result was a change from a fixed price to a cost-plus basis, from a definite amount to an indefinite amount, from a definite time to an indefinite and unnamed time, from definite payments as specific portions of the work were completed to an advance payment of considerably more than half of the proposed cost of the building with the remaining payment indefinite as to time and amount and without relation to the progress of the work, and from a guarantee that the contractor would pay the material bills incurred to one that the owner would pay the same. The owner became the principal in place of the contractors; the contractors became agents of the owner instead of independent contractors; in effect, the bond was changed from one to protect the owner from acts of the contractor to one to guarantee the owner in reference to his own acts; and finally, the first payment of $60,000 was made in the form of a trust deed upon the property itself instead of a similar and corresponding payment in cash, which would naturally be required in carrying on the work.

[2] Nor is this a case where the respondent, as an innocent third party, may claim that he relied upon the bond as written and had no notice or knowledge of any such change or substitution as would or might release the surety. In addition to all other considerations growing out of the nature of the transaction between the respondent and the owner and the contractors, it fully appears that the respondent had such knowledge of the changes in the contract, and of the fact that the contractors were not complying with the terms thereof, as to put it on guard and to at least require, in equity and good conscience, that it take the matter up with the surety company before furnishing such a large quantity of materials, if it expected to rely upon the bond and hold the surety under its provisions. It had in its possession the original bond specifically referring to the agreement of March 7, 1927, with a copy thereof attached, providing that the contractors were to buy the materials and erect the building, that they were to be paid the sum of $100,000, and that this was to be paid in seven specific installments in proportion to the progress of the work. With this before it and with knowledge that the owner had already purported to pay to the contractors the sum of $60,000, not in cash but in the form of a second trust deed, and before any work had been begun, it agreed not only with the contractors, but directly with the owner, that it would furnish materials to the amount of $37,500, it took a note signed not only by the contractors, but by the owner and by another apparently outside party, and it also took an assignment of the $60,000 trust deed knowing that the same had been given as a payment of that amount upon the cost of the building, and that the difference between the face value thereof and the $37,500 worth of materials which it was to furnish, would in no way be covered by anything representing real money, available to persons furnishing labor or materials. It dealt with the owner himself as the purchaser of the materials, having him join in a note to pay for the same; and one of its officers even testified that the agreement was that it was to exhaust the security furnished by the trust deed before collecting from the signers of the note. The respondent not only knew that material changes had been made in the contract upon which it now relies, but it became a party to a portion of such changes under circumstances that must be held to charge them with knowledge that the contract as it was being carried out by the parties was absolutely different from, and almost in no respect like, the contract referred to in the bond and made a part thereof. It would appear that the respondent, having dealt directly with the owner, and having accepted this second trust deed with the knowledge that it was made as a first payment on the building, must have known that the so-called contractors were not to receive payments in accordance with the terms of the agreement attached to the bond, and that the actual agreement being carried out by the parties was different from the agreement upon the terms of which the obligation of this surety was conditioned. While possessing this knowledge, the respondent took and kept, but apparently never used, the major payment made, in the form of a deed of trust, and now seeks to hold the surety in accordance with its actual contract for matters and things arising out of a contract it never made, and for payments that might easily have been made had the respondent not been a party to the violation of the terms of the very agreement now relied on.

It appearing that the terms of the bond, as conditioned upon the contract, were thus completely changed, even to the extent of substitution of a new and entirely different contract, that the necessary knowledge and notice of this fact was brought home to the respondent and that all of these facts were entirely and completely unknown to this appellant, the only question remaining is as to whether such a change or substitution, under such circumstances has released the surety from its obligation under the express terms of its bond and contract. We think this question must be answered in the affirmative.

The respondent relies especially upon the case of Hubbard v. Jurian, 35 Cal. App. 757, 170 P. 1093, and upon Western Brick Co. v. Smith, 94 Cal. App. 370, 271 P. 356. In each of these cases it was held that the building

there involved was erected in accordance with the conditions of the respective contracts, and that the resultant liability had been assumed by the surety. While the decision in each of these cases was in part based upon the provision of section 1183 of the Code of Civil Procedure, that the surety on such a bond shall not be exonerated by any change or alteration of the work or modification of the contract between the owner and the contractor, neither case goes to the extent of holding that this section of the Code applies or governs in a case of substitution of an entirely new agreement, as distinguished from a case involving a mere "modification" of some of the terms of the contract. The distinction between immaterial variations in procedural methods and such changes as amount to a destruction of the identity of one contract, and the substitution of another in place thereof, is pointed out in the case of Roberts v. Security T. & S. Bank, supra, where the court said: "No principle of law is perhaps better settled than that the liability of a surety is not to be extended by implication beyond the express terms of his contract. Civ. Code, § 2836. It is also the law that, when the undertaking is to assure the performance of an existing contract, if any change is made in its requirements in matters of substance without the consent of the surety, his liability is extinguished."

In that case, the court further said: "We are not now dealing with an alteration of the contract for the performance of which the appellant became surety. About the most that can be said is that we are considering a departure from or a violation by the parties of certain provisions relating to the method of procedure during the performance of the contract. Smith v. Molleson, supra [148 N. Y. 241, 42 N. E. 669]; Hustace v. Davis, 23 Hawaii, 606. In this last case it was said (page 612): 'Courts have properly drawn a distinction between changes in the contract or in the work to be performed, and a departure from the terms of the contract relating to the method of procedure or performance in the manner of carrying out the contract. As to the latter, deviations will not result in the release of the surety unless they tend to prejudice his rights.' The rule seems to be quite concisely stated in Martin v. Whites, 128 Mo. App. 117, 106 S. W. 608, where, in discussing the rule that the liability of a surety is strictissimi juris, and that an alteration or change in the terms of the contract by the principal parties without the consent of the surety will operate to release him, the court said (page 123 [of 128 Mo. App. (106 S. W. 609)]): 'There is a marked distinction, however, between a case where the identity of the surety's contract has been destroyed without his consent and a case where there has been merely an immaterial deviation in performance from its terms without any implied or express agreement between the parties adding to or deducting from the original terms. The principle above referred to is entirely without influence under the circumstances mentioned, when there has been a mere permissive deviation in acts and omissions with respect to the performance of the contract. Now, in such cases, the matter of the surety's liability or nonliability turns upon the question as to whether or not the deviations by the owner or obligee are material to the surety's risk. The sum and substance of the entire adjudicated law upon this subject is, we believe, that whenever a creditor does an act, whereby injury or loss or liability to loss or increase of risk accrues to the surety without his assent, the surety is entitled, by reason thereof, to be discharged. In accord with this doctrine, it has frequently been adjudged in building cases that in the matter of acts and omissions with respect to the performance of the contract assured, mere immaterial variations and insubstantial deviations which do not, in any manner, prejudice the right or encroach upon the liability of the surety, will be insufficient to operate a discharge.' "

In our opinion, the changes made in the contract now before us and in the manner of carrying out the same, constituted an alteration in the contract itself as distinguished from a mere change in procedure in carrying out the terms thereof, and these changes were so extensive and material as "to amount to a departure from the original building contract, rather than a permissible modification of its details."

[3, 4] An appeal has also been taken by the contractors McConville and Perryman. In their behalf it is urged that the respondent accepted the $37,500 note above referred to in full payment for the materials to be furnished, and that any recovery for such materials must be in and by an action brought upon that note. It is well settled that the giving of a note for an indebtedness does not constitute payment of the debt, unless there is an agreement to that effect. American System of Reinforcing v. Breakers' Hotel Co. (Cal. App.) 11 P.(2d) 636. While there is some evidence in this record which would justify the inference that this note was so accepted by the respondent, there is also evidence to the contrary which fully supports the court's finding that this note was not delivered or accepted in payment for these materials, which finding is controlling here.

That portion of the judgment which was rendered against Lawrence McConville and Charles Perryman, doing business under the name and style of McConville & Perryman, is affirmed. That portion of the judgment which was rendered against Globe Indemnity Company, a corporation, is reversed, with directions to the trial court to enter a judgment in favor of that defendant.

We concur: MARKS, J.; JENNINGS, J.

128 Cal.App. 38

JOHNSON v. OSTROM.

Civ. 4609.

District Court of Appeal, Third District, California.

Dec. 5, 1932.

1. Appeal and error ⇐979(2).
New trial ⇐70.

Granting of new trial because judgment is not supported by evidence is largely discretionary, and order will not be disturbed except for clear abuse of discretion.

2. Appeal and error ⇐1015(4).

Where appellate court could not say as matter of law that judgment was not excessive, it could not disturb order granting new trial.

3. New trial ⇐70, 72.

In granting new trial, court may consider weight and sufficiency of evidence as well as credibility of witnesses.

4. New trial ⇐69.

Court could consider irreconcilable contradictions between testimony and previous statements of plaintiff's witness in determining defendant's motion for new trial.

5. Automobiles ⇐181(1).

Guest injured in automobile accident could not recover without establishing gross negligence of host (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

6. New trial ⇐68.

Court could grant new trial on issue of contributory negligence independently of negligence of defendant.

7. Automobiles ⇐242(2).

Where plaintiff and witnesses rode in automobile and observed manner of operation and testified to every detail thereof and presumably knew as much regarding cause of accident as defendant did, res ipsa loquitur doctrine *held* inapplicable.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Hank Johnson against Carl Ostrom. Judgment was rendered for plaintiff, and from an order granting a new trial, plaintiff appeals.

Affirmed.

Hallinan & Riordan, Emmett R. Burns, and C. K. Bonestell, all of San Francisco, for appellant.

Humphrey, Searls, Doyle & MacMillan, of San Francisco, and Levinsky & Jones, of Stockton, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The plaintiff obtained judgment for $15,000 damages for personal injuries sustained in an automobile casualty. The cause was tried with a jury. Upon motion, the court granted a new trial on the grounds that the amount of damages is excessive and that the judgment is not supported by the evidence. From this order granting a new trial the plaintiff appealed.

On the evening of September 22, 1930, plaintiff and three other men accompanied the defendant as guests in his Ford sedan on a fishing expedition from Escalon to the Stanislaus river. Only one member of the party attempted to fish. They lay about on the sand, eating, drinking, and telling stories. One witness infers they had an uproarious time. The plaintiff fell into the river, soaking his clothing to the waist. There is a flat contradiction of witnesses regarding the presence of liquor. The defendant admits they had a little wine. One other witness admits they drank wine about the campfire. The plaintiff denies that they had wine. Axel Larsen, who testified in behalf of the plaintiff, also denies they had liquor. William Hammerquist, who was called in rebuttal by the defendant, testified that both Larsen and Axel Olsen told him they had a gallon of wine at the party.

About 1 or 2 o'clock in the morning they started on the return trip to Escalon. The night was bright, the weather clear, and the pavement dry. The defendant was driving the machine. Axel Larsen sat by his side in the front seat. The plaintiff and the two other companions rode in the rear seat. They drove at a moderate rate of speed from the river to the Tracy-Modesto state highway over a dirt road, a distance of three-quarters of a mile. Upon reaching the concrete highway, they turned north toward Escalon. Several of the witnesses, including the plaintiff, testify that after they reached the highway the defendant increased the speed of his machine until he was running at the dangerous rate of fifty or sixty miles an hour; that the car swayed from side to side traveling all over the concrete portion of the highway, and sometimes out upon the shoulders thereof; that he was warned against this excessive speed, and the plaintiff demanded he either decrease the speed of the car or let him out to walk; that just before reaching a concrete culvert the car was running on the left-hand shoulder of the roadway and in pulling it back upon the paved portion of the highway the car skidded and upset on its left side, rolling over twice and landing about the middle of the bridge. There is no evidence of any mechanical defect in the machine. After the accident the right rear wheel was found to be twisted. The evidence quite clearly indicates that in returning to the pavement the wheels of the machine caught upon the

shoulder of the concrete or skidded, causing it to turn sharply to the right and overturn on account of its momentum.

[1, 2] The granting of a new trial upon the ground that the judgment is not supported by the evidence is largely discretionary with the trial court and the order will not be disturbed except for a clear abuse of discretion. 2 Cal. Jur. 905, § 533; Peri v. Culley, 119 Cal. App. 117, 6 P.(2d) 86, 87. In the case last cited a new trial was granted on the ground that the amount of damages which was awarded was inadequate to compensate the plaintiff for the injuries sustained. On appeal the order was affirmed. The court said: "In view of the broad discretionary power thus vested in trial courts, we are not prepared to hold as a matter of law in the present case that the granting of the new trial constituted an abuse of such power, for in addition to the evidence itself showing the nature and extent of plaintiff's injuries the trial court was afforded full opportunity during the course of the trial to observe plaintiff's condition. * * *"

This language is appropriate to the present case. The order granting a new trial recites that "the amount of the verdict is excessive to such an extent that the court concludes it is rendered by passion and prejudice." In addition to considering the evidence adduced at the trial, the court had an opportunity to observe the plaintiff and to better determine the nature and result of his injuries. On appeal, we are unable to say as a matter of law this judgment of $15,000 damages is not excessive. The appellate court may therefore not disturb this exercise of discretion on the part of the trial court in granting a new trial.

[3] In granting the motion for a new trial the court held that: "The evidence introduced at the trial * * * (is) of such a character as to force the court to the conclusion that the truth in this case is not on the plaintiff's side." In determining a motion for new trial the court has a right to consider the weight and sufficiency of the evidence adduced as well as the credibility of witnesses. In justification of the above quotation from the court, it may be observed that while the defendant admitted the drinking of intoxicating liquor at the river by the members of the party, the plaintiff's witnesses denied this fact. In rebuttal, William Hammerquist was called by the defendant and testified that both Axel Larsen and Axel Olsen admitted to him the party had consumed a gallon of wine at the river. Plaintiff's witnesses, including his brother, Otto Johnson, testified with unanimity that the defendant operated his machine in a reckless manner, running at an excessive rate of speed estimated at from fifty to sixty miles an hour, and that plaintiff protested against such excessive speed, declaring he would get out and walk if the speed were not decreased. On cross-examination of plaintiff's brother, he admitted signing a written statement concerning the circumstances of the accident, twenty days after it occurred, in which he said: "Ostrom was driving at a moderate rate of speed, not exceeding thirty-five miles an hour. * * * At the time when this accident occurred, he was driving very carefully, not one in his car had any reason to complain of the manner in which he drove his car. I cannot understand how the accident occurred." When this witness was asked how he reconciled these conflicting statements, he declared that he had changed his mind about those matters since he signed the written document.

[4] These irreconcilable contradictions are matters which the trial court had a right to consider in determining the motion for a new trial.

[5, 6] The appellant asserts that the application of the doctrine of res ipsa loquitur establishes the negligence of the defendant and precludes the granting of a new trial. At the time of the accident the plaintiff was riding in the automobile as the guest of the defendant. Under the provisions of section 141¾ of the California Vehicle Act (as added by St. 1929, p. 1580), as it then existed, it was necessary to establish gross negligence on the part of the defendant to support the judgment. Even though an application of the doctrine of res ipsa loquitur under proper circumstances would infer gross negligence as distinguished from ordinary negligence, which we do not decide, it is difficult to see how that doctrine would add any weight to the evidence regarding the cause of the accident. Moreover, the alleged contributory negligence of the plaintiff was also an issue in the case, upon which the court was entitled to grant a new trial independently of the negligence of the defendant.

[7] The application of the doctrine of res ipsa loquitur depends upon the particular circumstances of each case. It is predicated on the theory that the complainant has no knowledge of the direct cause of the accident, and that the operator of the instrumentality by means of which the injuries are inflicted, possesses superior knowledge or opportunity to ascertain the cause of the accident. Under such circumstances, the one having charge and control of the machine must assume the burden of explaining the cause of accident, or upon failure to do so, a prima facie showing of negligence will be inferred. 45 C. J. 1205, § 773; 15–16 Huddy's Ency. of Automobile Law, p. 280, § 157. The converse of this rule is likewise true. If the evidence affirmatively shows the operator or manager of the instrumentality by means of which the injuries are inflicted has no superior knowledge or by the exercise of reasonable care is unable to secure information regarding the cause of the accident, or the evidence estab-

lishes the fact that the complainant possesses all the knowledge or information thereof which is reasonably accessible to the operator of the machine, then the doctrine of res ipsa loquitur has no application.

In the present case the plaintiff and three of his witnesses rode in the car. They observed the defendant's manner of operation and testified to every detail thereof. Presumably they knew as much regarding the cause of the accident as he did. They testified that he drove the Ford sedan along the highway in a reckless manner, at a high rate of speed, estimated at from fifty to sixty miles an hour, swaying from one side of the roadway to the other; that the machine was running on the shoulder of the wrong side of the highway immediately prior to the accident, and was suddenly pulled back upon the concrete without diminishing its speed; that the car headed diagonally across the concrete, upset, rolled over twice, and landed near the middle of the bridge. There is no evidence of any mechanical defect of the machine. Assuming that this evidence is true, it is apparent that the cause of the accident was the sudden diverting of the course of the automobile, without diminishing its excessive speed, from the shoulder of the highway to the paved portion thereof, upon the edge of which the wheels either caught or skidded, overturning the machine. This is evidently the plaintiff's theory of the cause of the accident. It leaves no room for the application of the doctrine of res ipsa loquitur. But, even though the inference of negligence created by this doctrine is added to the weight of plaintiff's evidence, it does not preclude the court from granting a new trial on the theory that the plaintiff was guilty of contributory negligence.

The order granting the motion for a new trial is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

128 Cal.App. 28

SOUTHWESTERN CREDITORS' ASS'N v. GARVEY.

Civ. 636.

District Court of Appeal, Fourth District, California.

Dec. 2, 1932.

1. Appeal and error ⇐936(1).

In absence of evidence in record, appellate court would presume costs were legally and regularly taxed within time prescribed by law.

2. Appeal and error ⇐931(1).

Absent evidence to contrary, appellate court would presume evidence was sufficient to support implied finding that trade acceptance drawn to drawer's order, not indorsed by drawer, was transferred to plaintiff (Civ. Code, § 3265).

3. Appeal and error ⇐966(1). Continuance ⇐7.

Motions for continuance are directed largely to trial court's discretion, and, absent abuse of discretion, its order will not be disturbed.

4. Continuance ⇐26(3).

Refusing continuance for absent witness *held* not abuse of discretion because no diligence was shown.

No diligence was shown because affidavit merely alleged that defendant had been unable to serve subpœna upon certain witness for reason that he had been unable to learn his address, he being a nonresident of the state, that he had used due diligence to ascertain whereabouts and address of witness, but had been unable to do so until certain date, and that he did not know that witness was nonresident until certain date, and that he immediately entered into investigation to find out where witness resided, and in doing so letters were returned uncalled for until date when he received a letter from witness.

Appeal from Superior Court, Riverside County; Benjamin F. Warmer, Judge.

Action by the Southwestern Creditors' Association against Stanley W. Garvey. From a judgment for plaintiff, defendant appeals.

Affirmed.

H. K. Stahl, of Corona, and James A. Hall, of Hemet, for appellant.

Raymond B. Wells and Paul S. Crouch, both of Los Angeles (Charles D. Warner, of Los Angeles, of counsel), for respondent.

AMES, Justice pro tem.

This action was brought for the purpose of recovering on two trade acceptances or bills of exchange. The complaint contains two causes of action, the first one of which alleges the execution of a trade acceptance by B. Hayman Company, Inc., drawn upon itself, in the sum of $1,028.65, dated March 13, 1930, and payable August 1, 1930, to the order of the drawer and which was accepted by the defendant on the 18th day of March, 1930. It then alleges "that said trade acceptance arose out of the purchase of goods, wares and merchandise by said defendant from said B. Hayman Company, Inc.," and that no part of the sum of $1,028.65 has been paid except the sum of $528.65, which was paid thereon on the 20th day of November, 1930. The complaint then alleges that B. Hayman Company, Inc.,

for a valuable consideration, assigned, transferred, and set over all its right, title, and interest in and to said trade acceptance to the plaintiff.

The second cause of action is similar in form to the first, and is based upon a trade acceptance in the sum of $924.38, drawn by B. Hayman Company, Inc., upon itself, payable on the 26th day of October, 1930, and accepted by defendant on the 29th day of May, 1930, upon which nothing has been paid. In his answer defendant does not deny the execution of the instruments sued on or their acceptance by him, and admits his indebtedness on the first cause of action in the sum of $500, and further pleads as an affirmative defense an agreement in which he alleges that plaintiff's assignor failed to perform certain conditions of a contract of conditional sale, under the terms of which he alleges he purchased a certain tractor. Whether or not the tractor is the "goods, wares and merchandise" referred to in the complaint does not appear. In the complaint the instruments sued on are not set out in hæc verba, but the legal effect is pleaded. From the recitals of the judgment it appears that written findings of fact were orally waived in open court and judgment was rendered in favor of the plaintiff on both causes of action. The judgment awarded plaintiff the sum of $1,534.68 as principal and $110.30 interest, together with costs amounting to the sum of $16. Following the designation of that amount, the words "amended to $30.50" appear in parentheses. From such judgment defendant appeals.

The appeal purports to have been taken under the so-called alternative method, but no transcript of the testimony has been furnished. The reporter's transcript contains copies of two instruments designated "Plaintiff's Exhibit 1" and "Plaintiff's Exhibit 2," respectively, in the form of trade acceptances or bills of exchange. These purported copies are merely inserted in the reporter's transcript without any supporting testimony or any evidence whatever, although it appears from the clerk's transcript that, at the trial, witnesses for both parties, including the defendant himself, were sworn and testified. Upon the meager facts presented by this record, we are asked to reverse the judgment of the trial court.

[1] The first point made by appellant is that the court had no authority to amend the judgment, taxing the costs at the sum of $30.50 instead of the sum of $16. The only evidence in the record of any such amendment appears from the judgment itself, above set forth. We are not furnished with a copy of the memorandum of the costs and disbursements or any order of the court taxing the costs, and, while it is intimated in the briefs of counsel that this amendment, if it is an amendment, was made by stipulation, we are not furnished with a copy of the stipulation, and the record does not disclose when, how, and in what manner, if any, the same was made. In the absence of all evidence in the record, we will presume that the costs were legally and regularly taxed within the time prescribed by law.

[2] The next point presented by the appellant is that the amount of interest awarded in the judgment is excessive. This point is too trivial to deserve much attention from this court. Suffice it to say, however, that the computation of the interest, based upon the allegations of the complaint, is not excessive.

It is next urged by appellant that the instrument sued on in the second cause of action is incomplete because it was not indorsed by the drawer, as required by section 3265 of the Civil Code, having been drawn to his order. In the absence of evidence to the contrary, we will presume that the evidence was sufficient to support the implied finding that it was transferred to plaintiff.

[3, 4] Lastly, the defendant urges that the court erred in denying his motion for a continuance. No proceedings with respect to any such motion appear in the record before us, except a copy of a purported affidavit for a continuance made by defendant which is incorporated in the record, and a copy of the minute order of the court denying such motion. Assuming that this affidavit of defendant is the affidavit upon which such motion was based, it is wholly insufficient, in failing to show diligence in ascertaining the whereabouts of an absent witness. The affidavit alleges that defendant had been unable to serve a subpœna upon W. R. Black for the reason that he has been unable to learn the address of said Black; he being a nonresident of the state and residing at Caldwell, Ark. He further alleges that he has "used due diligence to ascertain the whereabouts and address of said W. R. Black, but has been unable to do so until the 21st day of September, 1931." He further alleges that he did not know that Black was a nonresident of the state until July, "and immediately entered an investigation to find out where the said Black resided and in doing so his letters were returned 'uncalled for,' until the 21st day of September, 1931, when defendant received a letter from said Black." The affidavit does not disclose to whom such letters were addressed nor when nor why they were written, nor does it show of what the "investigation" otherwise consisted. Motions for continuance of trials are directed largely to the discretion of the trial court, and, in the absence of an abuse of such discretion, its order will not be disturbed. We find no such abuse of the court's discretion in this case.

The judgment appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

127 Cal.App. 374

GRAY v. CRAIG et al.

Civ. 4678.

District Court of Appeal, Third District, California.

Dec. 3, 1932.

Hearing Denied by Supreme Court Jan. 30, 1933.

Conspiracy ⇐20.

There being no definite basis for actual damages, only nominal damages *held* proper in action for conspiring to abuse process and thereby deprive plaintiff of his rights under contract whereby plaintiff, after surrendering one-half of honey, wax, and increase from bees for five years, if equaling certain minimum value, would become owner of property (Civ. Code, § 3301).

Under terms of contract in question, plaintiff was given possession of certain bees and equipment and was obligated to keep them in good condition and deliver to other party 50 per cent. of honey and wax; it being further agreed that at end of five years bees and equipment should become property of plaintiff, provided all conditions of contract were complied with and increase from bees was equally divided, and provided also that market value of honey and wax delivered to other party was not less than specified amount. It appeared that, about three months after execution of this contract, the other party thereto obtained judgment against plaintiff and execution was levied on bees and equipment mentioned in contract; the writ and levy being subsequently declared invalid.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 15 P.(2d) 762.

John Gray, in pro. per.

H. E. Schmidt, of Bakersfield, and George Wadsworth, of Tracy, for respondents.

PER CURIAM.

Appellant requests a rehearing by this court, suggesting that sufficient facts were not set forth in the opinion to clearly show the transaction involved, and, having no desire to limit a party to a full discussion of the issues, we are elaborating the statement of facts.

The defendant Craig was the owner of five hundred swarms of bees and certain equipment which was used to extract the honey they produced.

On May 15, 1928, Craig and the appellant herein executed a contract of lease and sale, the essential portions of which are as follows:

"Now therefore, for and in consideration of the party of the first part delivering possession of said five hundred swarms of bees, ford truck, honey tank and equipment for extracting honey to the party of the second part, the receipt whereof is hereby acknowledged, the party of the second part hereby agrees to keep and maintain said five hundred swarms of bees in a good condition and in such a state of condition as is usually practiced by a reliable bee man in the bee business, and that he shall not abandon or desert said bees or any portion thereof.

"It is further understood and agreed that the party of the second part shall keep said Ford Truck and equipment for extracting honey in good repair at his own expense and furnish all work and labor at his own expense and cost in connection with the care, upkeep and maintenance of said bees and the extraction of honey, and that within seasonable and reasonable time he shall deliver to the party of the first part, fifty percent (50%) of all honey obtained from said bees together with fifty percent (50%) of the wax. Delivery to be made to warehouse most convenient to party of the second part. Party of the first part to furnish cans for his portion of the honey.

"It is further understood and agreed that at the end of five years from date hereof said five hundred swarms of bees, Ford Truck, honey tank and equipment for extracting honey shall become the property of the party of the second part provided all conditions of this agreement have been fulfilled and complied with by the party of the second part, and provided further that the amount of honey and wax the party of the first part shall have received from the party of the second part shall have at least amounted to the market value of four thousand dollars ($4000.00), in excess of the cost of the cans and cases furnished by the party of the first part for his portion of the honey, and provided furthermore the increase in and from the five hundred swarms of bees shall be equally divided between the parties hereto at the end of five years.

"It is further understood and agreed that in the event said party of the second part shall become dissatisfied with this agreement he shall return said five hundred swarms of bees together with the Ford truck, honey tank and equipment for extracting honey to the County of Kern, the original location of said five hundred swarms of bees."

Pursuant to this contract, appellant took possession of the bees and equipment.

In August of the same year Craig obtained a judgment against appellant in the justice court of Kern county, and shortly thereafter he caused an execution to be issued out of

said justice court and it was levied upon the bees and equipment mentioned in the agreement. This writ and levy was, in the case of Gray v. Gieseke, 108 Cal. App. 271, 291 P. 590, 292 P. 656, declared invalid and void on its face, in that it was not signed by the justice, but by a clerk. Thereupon appellant brought this action against Craig and others for conspiring to abuse the process of the court and by that means convert his property to their use and benefit.

On the trial of this action respondents had judgment, and the lower court found that the interest of appellant in said contract was of such a vague, uncertain, and hazy character that the court could not place a value thereon, and for that reason found in favor of the plaintiff and appellant herein for the nominal sum of $50.

One of the grounds urged for a reversal is this finding of the lower court. We are of the opinion that a reading of the contract and the testimony adduced clearly shows that there was no basis or standard whereby the trial court could determine the actual damage sustained by appellant.

In the case of Parke v. Frank, 75 Cal. 364, 17 P. 427, 429, the court said: "It seems not infrequently to be lost sight of in the trial courts that, in actions upon contracts, the amount of damages caused by an alleged breach is to be proved as a fact."

In the case at bar, the evidence offered no definite basis upon which judgment could be predicated that would not be conjectural and speculative, and the trial court properly held that nominal damages only could be recovered. Civ. Code, § 3301.

The petition for rehearing is hereby denied.

WARD v. READ.*

MATTHEWS et al. v. SAME.

Civ. 615.

District Court of Appeal, Fourth District, California.

Dec. 9, 1932.

Hearing Granted by Supreme Court Feb. 6, 1933.

1. Appeal and error ⇐1064(1).
Negligence ⇐139(1).

Instruction defining "negligence" and directing verdict for plaintiff if facts supported either of two hypotheses *held* prejudicially erroneous.

Instruction recited that "negligence" may consist in originating a cause of injury or in failing to control the same when possible and that jury was to find a verdict for plaintiff if collision would have been avoided if defendant had acted in a prudent and careful manner "or" if plaintiff was driving on his right side of highway and in a careful manner. Definition was erroneous because element of reasonable care and diligence was omitted therefrom, and it placed upon a person charged with negligence the burden, which the law does not impose, of controlling the same when possible. Hypotheses were incorrect because first alternative did not limit the "prudent and careful manner" in which defendant would have been required to operate automobile if collision would have been avoided to the reasonable care which the law exacts, and it omitted element of contributory negligence, and second alternative omitted defendant's negligence as proximate cause of accident.

2. Trial ⇐253(7).

Formula instruction directing verdict on condition that certain facts are true must contain all of legal elements essential to recovery, and absence of any one element is prejudicial.

3. Trial ⇐296(1).

That correct rule is announced in other instructions does not, in absence of saving clause in erroneous instruction, prevent reversal.

Appeals from Superior Court, Riverside County; G. R. Freeman, Judge.

Actions by Bertha L. Ward, and by Leontine Matthews and others, against W. P. Read. From judgments in favor of plaintiffs, defendant appeals.

Reversed.

George H. Moore, of Los Angeles, for appellant.

Sarau & Thompson, of Riverside, for respondents.

AMES, Justice pro tem.

These actions were brought for the purpose of recovering damages for personal injuries arising out of an automobile accident. Both cases arose out of the same accident and by stipulation of the parties the two cases were consolidated for the purposes of trial and appeal.

The accident occurred on a public highway in the county of Riverside. Plaintiffs were traveling in a westerly direction towards the city of Riverside, and defendant was driving his car in an easterly direction. The accident occurred at a point on the highway where it had been cut and graded through a hill leaving a steep bank on either side, the paved portion being sixteen feet wide with a shoulder on each side covered with crushed granite.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 25 P.2d 821.

At the time of the accident about 6:10 o'clock on the morning of October 25, 1930, a heavy fog prevailed and the paved portion of the highway was wet and slippery. Defendant testified that he was operating his car at about 25 miles per hour. Witnesses for the plaintiffs, however, testified he was driving at the rate of 45 miles per hour. Plaintiff Robert E. Matthews testified that prior to the accident he had been operating the car in which he was riding at a rate of about 25 miles per hour, but he had reduced his speed to the rate of 5 miles per hour after he heard the approach of defendant's car.

The plaintiffs' case is predicated upon the alleged negligence of defendant, which consisted in the driving of his automobile upon his left, or the north side, of the center of the road. On the other hand, defendant attempts to substantiate his plea of contributory negligence by evidence tending to show that the plaintiff Robert E. Matthews was on his left-hand side or south half of the road. The evidence was in sharp conflict and was ample to sustain a verdict for either party. The jury returned verdicts in favor of plaintiff Leontine Matthews in the sum of $1,000, Evelyn E. Matthews in the sum of $500, Robert E. Matthews in the sum of $10,000 and Bertha L. Ward in the sum of $3,000. Several judgments were entered on these verdicts, and from them defendant appeals.

The contention mainly relied upon by appellant is that the court erred in giving instruction No. 12. That instruction is as follows:

"I further instruct you that the word 'negligence' does not mean an act or thing that can be measured according to a precise standard.

"It is always relative to particular circumstances. It may consist in originating a cause of injury or in failing to control the same when possible. It imports an omission or disregard of some duty and is opposed to diligence or carefulness. It has been clearly defined as an omission to do something which a reasonable man or woman guided by those circumstances which ordinarily regulate the conduct of human affairs would do or in doing something which a reasonable or prudent man or woman would not do. Such being the meaning attached by the courts to this word and in view of the fact that each of the parties to this action charges the other with negligence it will be your duty to carefully consider all the evidence in the case and determine whose act it was that directly caused the collision, and if you find that the collision would have been avoided if the defendant had acted in a prudent and careful manner or if you find that the plaintiff was driving on his right side of the highway and in a careful manner and as a reasonable and prudent man would drive then in that event you will find a verdict for the plaintiff."

The first part of this instruction purports to contain a definition of "negligence." In the second paragraph the jury is informed that negligence may consist in originating a cause of injury or in failing to control the same when possible. The element of reasonable care and diligence is entirely omitted from this definition. It places upon a person charged with negligence the burden of controlling the same when possible, a burden which the law does not impose.

[1] In the concluding portion of this instruction, by two incorrect and inaccurate hypotheses, the court gives the jury a mandatory direction to find a verdict for the plaintiff if it finds facts supporting either of such hypotheses. In other words, the jury was instructed as follows: "If you find that the collision would have been avoided if the defendant had acted in a prudent and careful manner * * * you will find a verdict for the plaintiff." The alternative condition upon which the jury was directed to find for the plaintiff was that "if you find that plaintiff was driving on his right side of the highway and in a careful manner and as a reasonable and prudent man would drive." It will be observed that in the first alternative submitted to the jury, upon which it was directed to find for plaintiff, the court did not limit the "prudent and careful manner" in which defendant would have been required to operate his automobile if the collision would have been avoided, to the reasonable care which the law exacts and, in view of the preceding definition, the jury might readily place upon the defendant the burden of proving a degree of care and caution in excess of that which the law exacts. In this portion of the instruction the essential element of contributory negligence of the plaintiff, upon which subject substantial evidence was introduced, was entirely omitted and the jury was directed to return a verdict for the plaintiff on one condition only, viz., if it found that the collision would have been avoided if the defendant had acted in a prudent and careful manner regardless of the extent to which the conduct of plaintiff may have contributed to the accident. This condition upon which the jury is directed to find for plaintiff is connected with an alternative condition to find for plaintiff, by the disjunctive "or." The latter alternative directs a verdict for plaintiff upon the sole condition that it finds that plaintiff was driving on his right side of the highway in a careful and prudent manner. Upon this sole condition the jury is directed to find for plaintiff. The negligence of defendant, as the proximate cause of the accident, is entirely omitted from this instruction. Following these incorrect hypotheses is a mandatory direction to find for the plaintiff. We think this instruction was prejudicially erroneous.

[2] It has long been the rule in California that a so-called formula instruction, directing

a verdict on condition that certain facts are found to be true, must contain all of the legal elements essential to a recovery, and that the absence of any one of such elements is prejudicial. This doctrine was first applied in the case of Killelea v. California Horseshoe Co., 140 Cal. 602, 74 P. 157, 158, wherein Mr. Justice McFarland announced the rule as follows: "The instruction concludes with a direction to the jury to render a verdict for the plaintiff if they find that the things therein stated are true; and it seems clear that the things therein stated are not sufficient to warrant such direction. * * * But waiving these, and other omissions which might be suggested, the instruction was erroneous, because it omits all reference to the proposition of contributory negligence. It is certainly not the law that a person between 15 and 16 years old cannot possibly be guilty of contributory negligence."

The same doctrine again came before the court in Pierce v. United Gas & Electric Co., 161 Cal. 176, 118 P. 700, 704, in which the rule was reaffirmed and amplified in the following language: "It is clear that an instruction directing a verdict for the plaintiff in the event that the jury finds certain facts to be true, must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion contained therein that plaintiff is entitled to a verdict, and such is the rule in this State. See Killelea v. California, etc., Co., 140 Cal. 602, 74 P. 157. * * * We have not been able to find anything in the record that would warrant us in holding that this instruction was not prejudicial to the substantial rights of defendant, nothing to overcome the effect of this explicit direction for a verdict in favor of plaintiff if the jury finds the facts specified therein, and contributory negligence on the part of the children is not shown. It is true that other instructions were given at the request of defendant that stated the law in these respects as favorably to defendant as was warranted, if not more favorably. But the giving of these other instructions simply produced a clear conflict in the instructions given the jury by the court, and it is impossible for us to say which instruction the jury followed in arriving at a verdict in favor of plaintiff."

[3] The fact that the correct rule is announced in other instructions does not, in the absence of a saving clause in the instruction, prevent a reversal. In the case of Soda v. Marriott, 118 Cal. App. 635, 5 P.(2d) 675, 678, the court says: "If a single instruction omits an essential element of the cause, but is a correct declaration of the law so far as it goes, and the omitted element is correctly given in another instruction, the omission will ordinarily be cured thereby. If, however, an essential principle of law is stated to the jury materially incorrect, this prejudicial error will not ordinarily be cured by a correct declaration of the same principle in another instruction. The giving of instructions which are contradictory in essential elements may warrant the reversal of a judgment, for the reason that it is impossible to determine which charge controlled the determination of the jury."

We are not unmindful of the fact that some instructions purporting to direct a verdict have been affirmed. The distinction between the phraseology used in such instructions and one which is prejudicial is emphasized by the opinion of the court in the case of Hodge v. Weinstock, Lubin & Co., 109 Cal. App. 393, 293 P. 80, 84. In that case the court directed the jury that the proprietor of a store must keep that portion of the premises permitted to be used by prospective buyers in a reasonably safe condition, and concluded the instruction as follows: "If you find in this case that the injury suffered by plaintiff was caused by defendant's neglect to do so, a recovery of damages may be had for the injuries proximately caused thereby." After reviewing other decisions the court says: "It will be noted that in all of the above cases a verdict upon the two narrow statements of fact was definitely directed by the court. In one case the jury were told that the plaintiff was 'entitled' to a verdict [Killelea v. California Horseshoe Co., 140 Cal. 602, 74 P. 157], in another that the jury 'should' give him a verdict [Pierce v. United Gas & Electric Co., 161 Cal. 176, 118 P. 700], and in the third they were 'instructed' to do so [Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 201 P. 599]. The instruction in this case simply states that in certain circumstances stated 'a recovery of damages may be had for the injuries proximately caused thereby.' This instruction is far from a direction to find for the plaintiff upon the facts stated."

Other cases in which this doctrine was applied are as follows: Dunne v. Hines, 50 Cal. App. 345, 195 P. 276; Beyerle v. Clift, 59 Cal. App. 7, 209 P. 1015; Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066; Sinan v. Atchison, T. & S. F. R. Co., 103 Cal. App. 703, 284 P. 1041; Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 201 P. 599, 603. In the case last cited the court in the following language emphasizes the fact that such instructions are conflicting and prejudicial: "It is true, as respondent points out, that the instructions are to be construed together, but where the instructions are flatly contradictory, as is the case where the jury is instructed upon a specific state of facts to bring in a verdict in favor of the plaintiff or defendant and is elsewhere instructed in general terms not to do so, the instructions must be held to be conflicting and prejudicial, because it cannot be ascertained upon what theory the verdict was returned. The theory of the plaintiff and defendant were diametrically opposed, and

the evidence, as well as the instructions, was sharply conflicting. Under this condition it cannot be said that there is no miscarriage of justice when it cannot be ascertained from the record upon what theory the jury was authorized by the instructions of the court to render its verdict, or upon what state of facts shown in evidence the verdict was reached."

We cannot say that the instruction involved here did not mislead the jury. We think that the mandatory direction of the court in which it said to the jury, "You will find a verdict for the plaintiff," based upon an imperfect and incomplete hypothesis together with an erroneous definition was prejudicial.

All the cases cited by respondent may be readily differentiated from the case at bar. The case of Douglas v. Southern Pacific Co., 203 Cal. 390, 264 P. 237, 238, cited by both parties, can afford the respondent but little comfort. The instruction criticized in that case told the jury that its verdict should be for the plaintiff and against the defendant if it was found that the injury to the plaintiff was caused by the negligence of either of the defendants, omitting entirely the element of contributory negligence. In the concluding part of the instruction the court announced the doctrine of respondeat superior. The judgment of the lower court was affirmed because, as the court says: "We are not prepared to say, however, that said instruction was given to or accepted by the jury as a 'formula' instruction. It does not purport to be a complete statement of the law upon which the plaintiffs might recover, but served merely to inform the jury that responsibility attaches to a principal for the negligent acts of his servant committed within the scope of the latter's employment. The concluding language thereof supports this view, for, following the direction that verdicts be brought in for the plaintiffs if the jury be of the opinion the accident resulted from the negligent operation of the train by defendant's employees, the instruction states: 'Since an employer is bound by the acts of his employees while acting within the scope of their employment, and their negligence is, in law, deemed to be the employer's negligence.' In our opinion the instruction constitutes nothing more than an expression of the doctrine of respondeat superior."

In Towne v. Godeau, 70 Cal. App. 148, 232 P. 1010, the jury was instructed that if it was satisfied from the evidence that certain conditions existed defendant "is responsible therefor." It was held that the instruction did not purport to state all the elements which would justify a verdict and that the instruction was not prejudicial even though the element of contributory negligence which was amply covered in other instructions was omitted therefrom.

In Saltzen v. Associated Oil Co., 198 Cal. 157, 244 P. 338, the instruction complained of announced the rule as to the burden of proof and informed the jury that if it believed that the proof was equally balanced upon any material issue of fact then plaintiff has not sustained the burden of proof which the law imposes upon him, and in such event "it will be your duty to find in favor of defendant upon such issue." This instruction was held to be not prejudicial, as it did not purport to cover the subject to which other correct and specific instructions related.

In the cases of Green v. Southern Pacific Co., 53 Cal. App. 194, 199 P. 1059; James v. Frazee, 209 Cal. 456, 288 P. 784; Burk v. Extrafine Bakery, 208 Cal. 105, 280 P. 522; O'Connor v. United Railroads, 168 Cal. 43, 141 P. 809, all cited by respondent, the instructions involved did not purport to embrace all of the elements which would warrant a verdict for the party in whose favor the jury was directed to find and they are not in point.

In Phillips v. Hobbs-Parsons Co., 67 Cal. App. 199, 227 P. 622, the court instructed the jury to find for the plaintiff under certain conditions omitting the element that the negligence of the defendant must proximately contribute to the injury complained of. The judgment was affirmed upon the ground that the erroneous instruction was fully cured by a correct statement of the rule in other instructions. The case was not decided upon the ground that the instruction was a formula instruction and it does not appear in the reported decision that the point was urged.

The judgments appealed from are reversed.

We concur: BARNARD, P. J.; MARKS, J.

128 Cal.App. 146

AKERS v. HUFFORD et al.

Civ. 8309.

District Court of Appeal, First District, Division 1, California.

Dec. 12, 1932.

1. Mines and minerals ⇨6.

Evidence sustained finding that assignor under contract to assign prospecting rights on government land had failed to perform contract to make survey.

2. Mines and minerals ⇨6.

Evidence sustained finding that contract for assignment of prospecting rights on government land, of which assignees sought rescission, was induced by assignor's false representations.

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

3. Action ⇐63.

Question of existence of laches must be left largely to trial court's discretion.

4. Appeal and error ⇐1010(1).

Appellate court will not interfere with decision on laches unless manifest injustice has been done or decision is unsupported in evidence.

5. Mines and minerals ⇐6.

Assignees, under contract for transfer of prospecting rights on government land, *held* not as matter of law guilty of laches in demanding rescission ten months after contract was executed.

The evidence disclosed that the contract was executed in December, 1923, and up to March, 1924, the assignees were unable to select their land because of the assignor's failure to have a survey made, and that during March the assignees first learned of adverse claim. After spending considerable time trying to locate the assignor, they informed him of the adverse claim, and were told that he would "fix it up." The assignor filed suit in August, 1924, and approximately two months later the assignees filed their cross-complaint asking for rescission of the contract.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Suit by C. S. Akers against G. D. Hufford and others, in which defendants filed a cross-complaint. Judgment was rendered for defendants on the cross-complaint, and plaintiff appeals.

Affirmed.

Henry St. Rayner, of Los Angeles, for appellant.

Edward T. Sherer and Welburn Mayock, both of Los Angeles, for respondents.

KNIGHT, J.

Defendants obtained judgment against plaintiff for $5,000 on a cross-complaint, and plaintiff appeals.

The litigation grew out of a written contract whereby plaintiff purported to sell, assign, and transfer to defendants the exclusive right to prospect and drill for, produce and market oil and gas pursuant to government permit from lands leased or about to be leased from the government. At the time of the execution of the contract, defendants paid to plaintiff $5,000, and the contract called for an additional payment of $7,500, for which amount plaintiff brought suit. In their answer defendants denied the essential allegations of the complaint, and as affirmative defense pleaded fraud and failure of consideration; and in their cross-complaint they asked for a rescission of the contract upon grounds similar to those urged in the affirmative defense, and for the repayment to them of the $5,000 theretofore paid to plaintiff. At the commencement of the trial, plaintiff moved for judgment on the pleadings, and the motion was denied; whereupon he rested his case. Defendants then proceeded to introduce evidence in support of their cross-complaint, and plaintiff objected thereto upon the ground that said cross-complaint failed to set forth facts sufficient to constitute a cause of action or to warrant a rescission of the contract. The objection was overruled, and at the conclusion of the trial the court made findings in favor of defendants and entered judgment accordingly, for the repayment to them of said sum of $5,000.

Summarized, plaintiff's contentions for reversal are that the trial court erred in denying his motion for judgment on the pleadings and in overruling his objection to the introduction of evidence, and that the findings and judgment are not supported by the evidence.

The appeal was taken pursuant to the alternative method set up by section 953a of the Code of Civil Procedure; and, as will be noted, the points urged by appellant on this appeal are based on the pleadings and the findings, and the claim of insufficiency of evidence; but, aside from printing in his brief fragmentary parts of the cross-complaint, he has not set out in his brief or in any appendix thereto, any portions of the complaint, the answer, or the findings; nor has he set out any of the evidence adduced at the trial, except certain portions of the documentary proof. However, in view of the circumstances related in an affidavit filed herein by plaintiff May 20, 1932, some two years after respondents' brief was filed, we have examined the entire record in connection with the points made by appellant, and find no merit in any of the contentions upon which he seeks a reversal. The denials of the answer and the matters pleaded as affirmative defense therein were obviously such as warrant the denial of the motion for judgment on the pleadings; and the allegations of the cross-complaint were legally sufficient to justify the trial court's ruling on plaintiff's objection to the introduction of evidence.

[1] The substance of the two main findings upon which the trial court based its decision on the merits was as follows: First, that plaintiff did not perform his part of the contract in that he refused to have surveyed the larger tracts of land or to point out on the ground the boundaries thereof, so that defendants might select therefrom the acreage upon which to start their drilling operations; and, secondly, that defendants were induced to enter into said contract with plaintiff and to pay

to him the $5,000 by the false representation made to them by plaintiff to the effect that he had a clear and unincumbered title to the rights he purported to sell to them. And the evidence is legally sufficient in our opinion to support both findings. The essential facts disclosed thereby are as follows: Three persons named La Dam, Siefert and Valencia obtained government permits to drill for oil on government lands. The La Dam permit covered 160 acres, the Siefert permit 200 acres, and the Valencia permit 80 acres. Plaintiff secured contracts from the permittees to develop the oil properties on said lands, and soon afterwards disposed of the drilling rights to approximately half of said lands to parties not here involved. Thereafter on December 20, 1923, upon the payment to him of $5,000 and the agreement to pay to him an additional $7,500 within six months, he entered into the contract in question here with the defendants whereby he purported to sell to them the exclusive right to develop 100 acres of the remaining portion of the permit lands. The contract provided, among other things, that defendants should select 20 acres of their lands from the Valencia tract, 30 acres from the La Dam tract, and the remaining 50 acres from the Siefert tract; that they should make such selections at the earliest possible date, not exceeding thirty days, or within ten days if plaintiff so requested. The section corners of the lands covered by the permits had been marked by the government, but the boundaries were unsurveyed and undefined; consequently until they were so designated it was impossible for defendants to select the 100 acres upon which to start their drilling operations. In this regard the evidence shows plaintiff agreed to have said land surveyed, but that he failed to do so; also that he went upon the lands with defendants but was unable to point out or designate the boundaries within which the defendants might make their selection. The trial court was warranted in holding, therefore, that plaintiff failed to perform his part of the contract. Simpson v. Schurra, 91 Cal. App. 640, 267 P. 384.

[2] In support of the second finding, evidence was introduced tending to show that, prior to the execution of the contract with the defendants, plaintiff's drilling rights in and to the Siefert and Valencia lands had been canceled by the permittees upon the ground of plaintiff's failure to comply with the terms and conditions of the contracts with said permittees; that thereupon Siefert resublet the drilling rights to his lands to one Skupen, who, unknown to defendants, was in possession of the property and operating the same at the time plaintiff entered into the contract with the defendants; furthermore evidence was adduced to show that prior to the execution of the contracts with defendants and unknown to them plaintiff's rights in the remaining lands had lapsed by reason of his failure, within the time granted by the government, to install upon some portion thereof as required by the express terms of the government permit, "a substantial and adequate drilling outfit and to commence actual drilling operations." Plaintiff introduced certain evidence tending to show that on the day preceding the expiration date fixed therefor by the government he did place on said land certain drilling equipment; but in this regard the evidence further shows and the trial court found that "plaintiff's purported compliance with the drilling clauses of said government permits were sham and were not entered into nor carried on in good faith."

[3-5] Nor do we find any merit in plaintiff's contention that defendants were barred by laches from seeking rescission of the contract. As held generally, the question of the existence of laches is one to be determined primarily by and must be left largely to the trial court; and the appellate court will not interfere with the exercise of the trial court's decision in the matter unless it appears that manifest injustice has been done, or its decision cannot reasonably be held to find support in the evidence. 10 Cal. Jur. 554. The record in the present case shows that the contract sued upon was executed on December 20, 1923; that up to March, 1924, defendants were unable to make selection of their land because of plaintiff's failure to have a survey made; that during March they first learned of Skupen's claim to drilling rights on the Siefert property and of the cancellation of plaintiff's contracts by Siefert and Valencia; that, after spending considerable time trying to locate plaintiff, they informed him of said adverse claims, and that plaintiff told them it was "all right," that he would "fix it up" and return in a few days, which he failed to do. Plaintiff filed suit on August 14, 1924, and approximately two months later defendants filed their cross-complaint asking for a rescission of the contract. Under the foregoing circumstances, it cannot be held as a matter of law contrary to the trial court's conclusion that defendants were guilty of laches. Moreover, if there was an unnecessary delay on the part of defendants in filing their cross-complaint, it does not appear that plaintiff suffered any prejudice to his rights by reason thereof.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

128 Cal.App. 122

BALDING et al. v. EICH, County Treasurer.

Civ. 4612.

District Court of Appeal, Third District, California.

Dec. 9, 1932.

Waters and water courses ⇐231.

Treasurer of bond fund of reclamation district can only accept bonds of reclamation district matured or maturing within 60 days in payment for lands which are sold upon a delinquent sale for failure to pay calls based upon reclamation assessment (Pol. Code, § 3480).

Application by Julia Adams Balding and another, petitioners, for a writ of mandate, to be directed to Harvey D. Eich, as Treasurer of Yuba County, and as trustee of the Bond Fund of Reclamation District No. 784.

Writ denied.

See, also, 120 Cal. App. 491, 7 P.(2d) 1073.

Snook, Snook & Chase, of Oakland, for petitioners.

Erling S. Norby, of Marysville, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is again before us upon the application of the above-named petitioners praying that a writ of mandate be issued commanding and directing the respondent, as the trustee of the bond fund of reclamation district No. 784 to cancel the entry made by him on the records of said district wherein it is purported to state that in receipt of the face value of $5,000 of unmatured bonds the assessment upon the several lots of land set forth in the petition has been fully paid and discharged.

The record shows that on or about the 29th day of March, 1932, this court in this cause issued a peremptory writ of mandate directed to the respondent, as the treasurer of the county of Yuba, and as trustee of the bond fund of reclamation district No. 784, to proceed with the collection of certain overdue calls based upon a reclamation assessment theretofore levied upon the lands lying within said district No. 784, and also to proceed with the sale of all lands and premises lying within said district upon which calls for the payment of said assessment were delinquent. The peremptory writ issued as aforesaid, among other things, contained the following: "At the time stated in said notice, the County Treasurer shall sell each parcel of land described in said notice, to the highest bidder, unless prior thereto he shall have received payment in full of said delinquent instalment and penalty. No bid for any parcel shall be accepted less than the aggregate sum then due on said instalment thereon, and penalty, and such sale shall be made for cash (except the treasurer may receive from any purchaser at their face value in lieu of cash, bonds of said District, or their interest coupons, issued on said assessment, and then matured, or to mature within sixty days after such sale)."

The petitioners herein further allege that the respondent proceeded to make sale of certain lands described in the petition, and received therefrom matured bonds in payment of the amount due on the lands described, on account of delinquencies, and also received from the purchaser of the lands described in the petition unmatured bonds of the face value of $5,000, as payment of the remaining portion of the assessment levied upon the lands and premises described in the petition, and marked the assessment thereon as fully paid, and the lands relieved from the lien of the assessment referred to in the petition.

The petitioners herein contend that the latter act of the respondent is void; that the paragraph of section 3480 of the Political Code, as amended by an act of the Legislature in 1923 (page 598, § 1), is inapplicable to, and cannot be made the basis for, the receipt and cancellation of any outstanding and unmatured bonds of said district which were issued pursuant to the provisions of section 3480 of the Political Code as it read in 1921, governing the issue of bonds herein. The paragraph added by the Legislature in 1923 reads: "Any land owner of the district who shall desire at any time to lessen or remove the lien upon his land of any assessment on which bonds have been or hereafter may be issued, may deliver to the country treasurer for cancellation any bonds payable out of said assessment, and the treasurer shall credit against the assessment on his land the principal and accrued interest of said bonds."

In addition to the excerpt which we have taken from the peremptory order herein directing the sale of delinquent installments, which is a literal quotation from one of the paragraphs of section 3480, supra, that section also authorizes, limits, and prescribes the powers and duties of the treasurer in making delinquent sales, as follows, to wit: "Any parcel of land bid in and purchased by a treasurer, as aforesaid, as trustee of the * * * district, may be sold and conveyed by him, or his successor in office, at any time after the expiration of said redemption period of one year, at public or private sale, and with or without notice, to any person paying him the amount for which said parcel was bid in by said treasurer at delinquent sale, with interest thereon at the rate of seven per cent per annum compounded yearly from the date of

said delinquent sale, and also the amount of all subsequent installments then delinquent, with accrued interest and penalties thereon. Such payment may be made either in cash or in matured bonds and coupons issued on said assessment, taken at their face value, and the treasurer shall execute a deed to such purchaser upon such sale," etc.

[1] Whether the land is purchased by a bidder other than the treasurer, at a delinquent sale, or whether it is bid in by the treasurer as trustee of the district, and subsequently sold by him, the language of the two paragraphs which we have quoted is plain that the treasurer has no power to accept as payment anything other than cash or bonds and coupons then matured, or to mature within the limited period set forth in the section.

In answer to the application filed by the petitioners, the respondent sets forth the procedure followed by him, setting forth facts indicating that the provisions of section 3480, supra, have been strictly complied with, in so far as the selling of the lands described in the petition was made and had on account of nonpayment of assessment calls. The answer of the respondent schedules thirteen tracts of land involved herein, numbered 148, 184, 185, 187, 188, 194, 195, 196, 211, 404, 405, 406, and 407, upon which there was due on the date of sale the total sum of $12,512.19, delinquent on account of nonpayment of calls based upon the assessment for which bonds had been issued by said district. In payment of the amount so delinquent, the treasurer sets forth that he received matured bonds and matured interest coupons thereon in the sum of $12,525, being the sum of $12.81 in excess of the delinquencies scheduled as above; that, after the receipt of said matured bonds and matured coupons in payment, as just stated, the respondent also received from T. P. Coats, the purchaser of the lots of land referred to herein at the delinquent sale made thereof by the respondent, unmatured bonds in the sum of $4,883.09, with the credit of $12.81, aggregating a total payment of $4,895.90, and credited the same in payment of the balance of the bond lien against tracts numbered 211, 404, 405, 406, and 407.

[2] This action was based upon the paragraph added to section 3480, supra, by the Legislature in 1923, and is the action asserted by the petitioners to be unauthorized and void on the ground that it imposes an additional burden upon the lands lying within district 784 still subject to the lien of said assessment, in that the receipt of the unmatured bonds in this cause, which do not mature until January 1, 1938, necessitates an additional amount to be added to the assessment calls to meet and make payment of the bonds falling due throughout the intervening period. Unless the amount of the interest, which would otherwise fall due on the bonds maturing in 1938, equals the increased amount to be levied upon the lands still remaining in the district to pay the principal of the bonds and interest coupons maturing in the intervening period, the contention of the petitioners is correct. This mathematical calculation is not before us in the record under consideration, and from the view we take of the issues presented, we deem it unnecessary to make the computation.

It is further contended that the Legislature possessed no power to alter or change in any way the law relating to the bonds issued under section 3480, supra, so as to increase the immediate burdens upon the lands lying within said district, and that each landowner was given the privilege, and was subject only to the liability, of paying, during the ten-year period of the maturity of the bond issue, his relative proportion of the accruing obligation as it then existed, paying one-tenth yearly and no more; that any act of the Legislature adding to such burden would be and is unconstitutional.

It is also claimed that the rights of the bondholders would be materially lessened if the paragraph inserted in section 3480, supra, by the Legislature in 1923, is allowed to affect previous bond issues. That bond issues are contracts which cannot be materially altered or changed so as to substantially affect either the landowners or bondholders.

While these questions are presented to us for consideration and are serious in their nature, they are not really involved in this action, and therefore we need not express any opinion thereon. The record before us shows that the petitioners are bondholders, but it does not show that any subsequent calls, based upon the assessment referred to herein, will not raise sufficient money to pay maturing bonds and interest. If any of the instalments called for are increased, and an added burden placed upon the remaining landholders to meet maturing bonds and maturing coupons, then and in that case the question of the validity of the call may be raised. Again, whether a bondholder may, before a call has been issued, maintain proceedings against the county treasurer as trustee of the bond fund to determine the amount of the call, is not involved herein, though the rights of bondholders in respect thereto appear to be in the minds of the petitioners.

It further appears by the return of the respondent that the unmatured bonds tendered by T. P. Coats, and accepted in payment of the balance due on account of the assessment upon the lots mentioned, do not affect any sums of money to which the petitioners are immediately entitled under and by virtue of any instalment calls made by the respondent. Whether the petitioners as bondholders may or may not maintain an action against the respondent and T. P. Coats to have the record of the cancellation of the assessment made by

the respondent on account of the tendered payment of unmatured bonds by T. P. Coats need not be passed upon in this proceeding, further than to state that the record before us does not furnish a basis for the issuance of a writ of mandate as prayed for herein.

We are of the opinion that the inapplicability of the paragraph added to section 3480, supra, to previous bond issues, should not be passed upon or determined, or any opinion expressed thereon where it is unnecessary to do so, as appears to be the situation in the cause now before us.

The writ is denied.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

128 Cal.App. 94

BUCKINGHAM v. SAN JOAQUIN COTTON OIL CO.

Civ. 4622.

District Court of Appeal, Third District, California.

Dec. 8, 1932.

Rehearing Denied Jan. 7, 1933.

Hearing Denied by Supreme Court Feb. 6, 1933.

1. Negligence ⇐32(2).

Person may become invitee for specific purpose, and, at same time, become mere licensee with respect to parts of premises.

2. Negligence ⇐32(2).

Invitation to use premises is inferred where there is common interest or mutual advantage.

3. Negligence ⇐32(2).

License is inferred where object is mere pleasure or benefit of person using premises.

4. Negligence ⇐32(2).

Truck driver who delivered cotton seed to mill, and sustained injuries when feet slipped into screw conveyor through bars while on top to dislodge seed clogging conveyor, *held* implied invitee.

Cotton seed delivered to oil mill was unloaded into long trough containing a screw conveyor, the rotary action of which propelled and conveyed the cotton seed to the mill. Iron bars were placed across the top of the trough. The cotton seed became clogged in the conveyor, whereupon the driver of the truck got on top of the conveyor and removed the obstruction. While retracing his steps along the top of the conveyor, his feet slipped between the iron bars and came in contact with the screw, seriously injuring both feet. The evidence disclosed that the method pursued by the truck driver in removing the obstruction in the screw was the usual and customary method used by truckmen when unloading the seed.

5. Negligence ⇐32(1).

Owner must exercise ordinary care to render premises reasonably safe to invitees, express or implied.

6. Negligence ⇐136(26).

In action for injuries to truck driver who delivered cotton seed to mill, sustained when feet slipped into screw conveyor, contributory negligence of plaintiff in attempting to walk along top of conveyor to remove obstruction *held* question for jury under evidence.

7. Negligence ⇐108(1).

In action for injuries to truck driver delivering cotton seed to mill, sustained when feet slipped into screw conveyor, complaint *held* to sufficiently allege facts constituting negligence.

Allegations of the complaint stated that the defendant kept, maintained, and operated the screw conveyor and the premises in a careless, reckless, and negligent manner, and that, as a proximate result thereof, the plaintiff's two feet and legs became entangled in said conveyor.

8. Negligence ⇐117.

Defense of contributory negligence, if plaintiff's negligence appears from evidence, is available, though not pleaded.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by L. A. Buckingham against the San Joaquin Cotton Oil Company. Judgment for the plaintiff, and the defendant appeals.

Affirmed.

John J. Taheny, of San Francisco, and Barcroft & Barcroft, of Madera, for appellant.

Conley, Conley & Conley, Wakefield & Hansen, and William C. Crossland, all of Fresno, for respondent.

PER CURIAM.

This action was brought by plaintiff against defendant for damages for injuries sustained by him through the alleged negligence of defendant.

The action was tried by a jury which rendered its verdict in favor of the plaintiff. Defendant moved for a new trial, and, the motion therefor being denied, judgment was ren-

dered for plaintiff, and from this judgment defendant has appealed.

Appellant owned and operated a cotton-seed oil mill. The cotton seed was hauled to appellant's yard in automobile trucks, and, after the same was weighed by an employee of appellant, the truck containing the cotton seed was driven to and unloaded into a long trough referred to as the screw conveyor. This screw conveyor was ninety feet long, and contained a screw sixteen inches in diameter and extended throughout the length of the conveyor. The rotary action of the screw propelled and conveyed the cotton seed along the trough to appellant's mill. The screw was operated by an electric motor. The switch buttons for starting and stopping it were located in the mill building some distance from the unloading point. Iron bars were placed across the top of the trough of the conveyor sixteen inches in length, five-eighths of an inch in thickness, and were spaced four and one-fourth inches apart from center to center.

The method used in unloading the truck was as follows: The loaded truck was driven along the side of the conveyor, and a trapdoor twelve feet long and two feet wide was let down, and over this trapdoor the seed was shoveled into the conveyor. The seed frequently became clogged on the bars over the conveyor, and it was then necessary, in order to finish the unloading, that this seed should be agitated and fed through the bars so that the auger would propel it forward. As to the manner in which this could be done there is a decided conflict in the evidence.

Witnesses for appellant testified that the clogging seed could be agitated and removed from the bars by means of a long-handled fork, and that there was no necessity of getting on top of the conveyor to do this. On the other hand, witnesses for respondent testified that it was impossible to remove the clogging seed without getting on top of the conveyor and using the hands or feet to dislodge it.

On February 3, 1930, the date of the accident, respondent, operating a truck loaded with cotton seed, drove into appellant's yard, and had the seed weighed, and then in the customary manner drove to the conveyor and proceeded with the unloading of the cotton seed. After dropping the trapdoor preparatory to unloading, he observed that the conveyor was clogged and would not carry forward the seed he was about to unload, that under this condition it became necessary for him to get on the conveyor for the purpose of removing the clogging seed. This he proceeded to do, and, after removing the obstructing seed, he retraced his steps along the top of the conveyor, and, as he was in the act of stepping from the top of the conveyor to the truck, his feet slipped between the iron bars and came in contact with the said screw, resulting in the loss of one foot and serious injury to the other before the motor could be stopped.

At the time of the accident, respondent was a truck driver in the employment of J. S. Fry, and in the course of his employment had delivered about six truckloads of seed to the mill of appellant. He testified that the clogging of the seed in the conveyor was of frequent occurrence, and that, when it could not be reached with the fork, the only way in which it could be removed was by getting on the conveyor. It appears that the obstructing seed could not be removed while standing upon the ground. The top of the conveyor was some forty-two inches above the ground, and its construction was such that one standing on the ground could not clean it. Witnesses for appellant testified that the obstructing seed could be removed by the truckman, by means of a fork, while standing on the truck. On the other hand, witnesses for respondent testified that the only way in which the conveyor could be cleaned, except in the immediate vicinity of the truck, was by getting on the conveyor; that it was impossible to otherwise remove the obstructing seed; that this was the usual and customary way of removing the clogging seed while unloading; and that this necessity for getting on the conveyor was continually occurring.

Appellant claims that, while respondent was an invitee on its premises, he was merely a licensee when he got upon the conveyor and that therefore the only duty it owed him was to refrain from willful or wanton injury.

[1] It is well settled that one may be an invitee upon premises for a specific purpose and yet become a mere licensee with respect to certain parts of the premises, approaches to it, or appliances contained within it, which were not intended for the use of visitors. State Comp. Ins. Fund v. Allen, 104 Cal. App. 400, 285 P. 1053; Powers v. Raymond, 197 Cal. 126, 239 P. 1069.

[2, 3] An invitation to use the premises of another is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using them. Bush v. Weed Lumber Co., 63 Cal. App. 426, 218 P. 618. The difference between a licensee and an invitee is very clearly set forth in Aguilar v. Riverdale Cooperative Creamery Ass'n, 104 Cal. App. 263, 266, 285 P. 889, 891, wherein the court said: "Whether a person entering the premises of another bears the legal status of an invitee or of a bare licensee depends upon the nature of the business which brings him on the premises, and before such person can be given the legal standing of an invitee it must appear that he entered the premises at the express or implied invitation of the owner or occupant thereof. If it be shown that his purpose in so entering was one of common interest or mutual benefit to the owner or occupant and himself, or was in connection with the former's business which was there being carried on, an invitation is implied. But if it

be shown that he stood in no contractual relationship with the owner or occupant, and that he was there for purposes purely of his own or of a third party which had no relation whatever to the business of the owner or occupant, and in which the latter had no interest beneficial or otherwise, he is deemed in law to be a bare licensee"—citing numerous authorities from this and other states.

[4] In the instant case respondent was on the premises of appellant engaging in work for the mutual benefit of it and himself. There is substantial evidence that, in order to accomplish this work, it was necessary for respondent to get on top of the conveyor for the purpose of removing the obstructions that prevented the cotton seed from being carried to appellant's mill. This was the usual and customary method used by all of the truckmen in unloading the seed into the conveyor. Respondent had received no notice from appellant that such use of the conveyor was not permitted.

While there was no express invitation upon the part of appellant permitting respondent to so use the conveyor, we are of the opinion that under these circumstances there was an implied invitation to use the conveyor for the aforesaid purposes.

[5] Appellant contends that respondent's injuries were owing to his own negligence. It is a well-settled rule that the owner of the premises must exercise ordinary care to render them reasonably safe to persons whom he induces to come thereon by invitation, express or implied (Thompson on Negligence, p. 146), and appellant owed to respondent, as such invitee, the duty of maintaining the property in a safe condition and exercising reasonable care in protecting him from injury. Madigan v. O. A. Hale & Co., 90 Cal. App. 151, 265 P. 574; Goldstein v. Healy, 187 Cal. 206, 201 P. 462; Oles v. Kahn Bros., 81 Cal. App. 76, 253 P. 158.

[6] Appellant admits that the conveyor was unsafe and dangerous to one who attempted to walk along its top, and that this condition was well known to it, but that this dangerous and unsafe condition was obvious and plainly to be seen, and that, when respondent attempted to walk upon said conveyor, he did so with knowledge of its unsafe condition. Many cases are cited by appellant in support of this contention. Among others is the recent decision of the Supreme Court of this state in Weddle v. Heath, 211 Cal. 445, 295 P. 832, 834, in which the court said, approving the language of Shanley v. Amer. Olive Co., 185 Cal. 552, 555, 197 P. 793: "A person so invited upon the premises * * * may recover from such owner 'for any injuries received owing to the dangerous condition of the premises known' to the owner and not known to the person so invited; but such owner 'is not bound to keep his premises absolutely safe.' 29 Cyc. 453. The responsibility of such owner for the safety of such person in such a case is not absolute; he is only required to use ordinary care for the safety of the persons he invites to come upon the premises. If there is a danger attending upon such entry, or upon the work which the person invited is to do thereon, and such danger arises from causes or conditions not readily apparent to the eye, it is the duty of the owner to give such person reasonable notice or warning of such danger. But such owner is entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. He is not required to give to the invitee notice or warning of an obvious danger. 29 Cyc. 471, 474; 26 Cyc. 1213."

H. O. Douglas, appellant's superintendent, testified that appellant had an employee whose duty it was to clean up and keep the seed out of the way and keep the conveyor in working order. It appears that this employee neglected to perform this duty and left the removal of the clogging seed to the unloading truckmen.

C. D. Zwinge, appellant's assistant superintendent, testified that he had seen some of the truck drivers on top of the conveyor and warned them off, but there is no evidence that he had ever seen respondent on the conveyor or had given him any warning to stay off of the conveyor. He further testified that no sign was placed near the conveyor warning the public to keep off of it, and he gave as his reason for not placing such a sign upon or near the conveyor that originally the top of the conveyor was open, but that, after putting on the iron grates, that is to say, the iron bars four and a fourth inches apart, they considered it perfectly safe. He assisted in putting on these iron bars, and was in all ways familiar with the construction of the conveyor.

Respondent testified that, when he arrived at the conveyor, and was preparing to unload the seed, it was getting dark; that there was only one light near the conveyor, and owing to an obstruction between the light and the conveyor, a shadow was cast upon that portion of the conveyor next to the truck; that, by reason of the darkness and the shadow, he could not see very well, and in groping his way back to his truck he missed his footing and met with the accident. He further testified that he was not familiar with the construction of the conveyor, and did not make any investigation as to whether or not it was dangerous to walk on top of it; in other words, that he was not sufficiently familiar with the construction of the conveyor to know or realize that he was in danger while walking on it.

Upon these facts it was a question for the jury to determine whether or not the respondent was negligent in getting upon and walk-

ing along the top of the conveyor. Dobbie v. Pacific Gas & Elec. Co., 95 Cal. App. 781, 273 P. 630.

Appellant next contends that respondent's employer, Fry, had a contract, presumably with a cotton gin operator, to haul cotton seed to appellant's mill and unload it at the conveyor, and that the conveyor was under the constructive control of Fry at the time of the accident. A considerable portion of its brief is devoted to a discussion of this question. We do not see any merit in this contention in its application to the facts of this case. In the well-considered case of Dobbie v. Pacific Gas & Elec. Co., supra, the court held that the relation of master and servant does not subsist between the owner of the premises and the servants of an independent contractor, and that the obligations of master are not imposed upon the former, but that the contractor's servants are deemed to be on the premises by the owner's invitation, express or implied; that he therefore owes the same duty of guarding them against hidden dangers thereon as he would to a guest, customer or other person who came there by his invitation; and that it is his duty to warn them of any danger of which he knows, or as a prudent man ought to know, and of which they are not aware. Many authorities are cited therein in support of the foregoing principles.

Appellant points out one instruction given by the court and three instructions on behalf of appellant which were refused by the court, and claims that in giving the one and refusing the three asked by appellant the court erred.

Taken as a whole, the instructions given by the court fully and fairly informed the jury of the law applying to the facts in this case, and covered all matters contained in the refused instructions. Appellant claims that the court erred in overruling its demurrer to the complaint, in that the complaint does not set forth the particular facts constituting the alleged negligence of appellant.

[7] The complaint states that the appellant kept, maintained, and operated the said conveyor and said premises in a careless, reckless, and negligent manner, and that as a proximate result thereof respondent's two feet and legs became entangled in said conveyor, etc.

In Bergen v. Tulare County Power Co., 173 Cal. 709, 715, 161 P. 269, 271, the court said: "It is well settled in California that negligence may be charged in general terms. It is only necessary to plead what was done, and allege that it was negligently done without stating the particular omission which made the act negligent. But it must appear from the allegations that the negligence caused or contributed to the injury." Barbieri v. Law, 209 Cal. 429, 287 P. 464; McKeon v. Lissner, 193 Cal. 297, 223 P. 965.

It appears that this case was fairly tried on its merits, and it does not appear that appellant was misled by any alleged defects in the pleadings.

[8] Appellant in its answer did not plead contributory negligence on the part of respondent, but in its opening brief it cites authorities in support of that defense to the action. If not pleaded as a defense, still, if it appears from the evidence of the plaintiff that he was guilty of such negligence, the defense may be availed of, though not pleaded. Queirolo v. Pacific Gas & Elec. Co., 114 Cal. App. 610, 300 P. 487; Martinelli v. Poley, 210 Cal. 450, 292 P. 451.

We are of the opinion that there was substantial evidence that respondent was not guilty of contributory negligence. In order to render him guilty of negligence the danger arising from getting on top of the conveyor must have been obvious and plainly to be seen. Respondent testified that he did not see or realize the danger of so doing, and he is corroborated in this by Zwinge, the assistant superintendent of appellant, who testified that he helped construct the conveyor and was familiar with its construction, and, in answer to the question why he had not placed a sign warning people that it was dangerous, he answered, "Simply for the reason that the conveyor we installed first, the first conveyor there was open, and after we put grates on it, we considered it perfectly safe." If the employees of appellant who had aided in the construction of the conveyor and were entirely familiar with it, considered it wholly safe, it would not be reasonable to conclude that respondent, who had only a slight knowledge of it, could have known the danger he incurred in walking on it.

We are of the opinion that there was substantial evidence supporting the verdict of the jury, and therefore that the judgment must be affirmed. Appellant, in his brief, has argued some additional matters, but we deem it unnecessary to lengthen this opinion by discussing them, as they are either herein disposed of or are without merit.

The judgment is affirmed.

128 Cal.App. 80

KILKER v. SUPERIOR COURT IN AND FOR SOLANO COUNTY et al.

Civ. 4826.

District Court of Appeal, Third District, California.

Dec. 7, 1932.

1. Justices of the peace ⇐166(2).

Statute requiring dismissal of appeal from justice court, not brought to trial within year, is mandatory, in absence of written stipulation extending time (Code Civ. Proc. § 981a).

2. Mandamus ⇐43.

Mandamus is proper proceeding to require superior court to dismiss appeal from justice court not brought to trial within year (Code Civ. Proc. § 981a).

Original application for writ of mandate by Andy Kilker, prayed to be directed to the Superior Court of the State of California, in and for the County of Solano, and W. T. O'Donnell, Judge of such court.

Writ granted.

Brantley W. Dobbins, of Fairfield, for petitioner.

Thomas J. Horan, of Vallejo, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This matter is before us upon an application of the above-named petitioner for a writ of mandate directing the respondent to enter an order of dismissal in a certain action pending in said court wherein the above-named petitioner is plaintiff and Albert Casper is defendant, in which action the petitioner had judgment against said Casper in the sum of $158.49 as principal and $6.25 costs, in the justice's court of the city of Vallejo, on the 29th day of April, 1931, and thereafter appealed to the superior court of the state of California, in and for the county of Solano, and now known in said last-mentioned court as civil action No. 11,161.

The record shows that the appeal in said action from the justice's court of the city of Vallejo was perfected on the 12th day of May, 1931, and the papers constituting the appeal filed with said superior court in said action on said date. The record shows that thereafter the cause was set for trial on Wednesday, the 3d day of February, 1932, at 10 o'clock of said day; that at the request of the plaintiff the order setting the cause for trial was vacated, and the cause dropped from the calendar; thereafter, and on the 17th day of May, 1932, the defendant filed a memorandum motion for the setting of said cause for trial; that thereafter, and on the 24th day of June, 1932, before said cause had been set for trial, the plaintiff filed and served his notice of motion and motion to dismiss the appeal on the ground that the cause had not been brought on for trial within one year after the perfecting of the appeal therein; that on the 5th day of July, 1932, the motion came on for hearing; thereafter, on the 19th day of October, 1932, said superior court (Hon. W. T. O'Donnell presiding) made and entered its order denying the plaintiff's motion to dismiss the appeal.

[1] The record shows some controversy between counsel for the defendant and counsel for the plaintiff relative to the setting of the cause for trial, and affidavits were filed in the superior court by counsel for the plaintiff, and also for the defendant. A reading of these affidavits discloses that no written stipulations were entered into, and that whatever agreements or understandings may have been had between counsel for the respective parties, such agreements or stipulations, if any, were purely oral. An examination of the affidavits also discloses no legal basis for the plea of estoppel. Section 981a of the Code of Civil Procedure reads as follows: "No action heretofore or hereafter appealed from the justice court to the superior court, shall be further prosecuted, and no further proceedings shall be had therein, and all such actions heretofore, or hereafter appealed must be dismissed by the court to which the same shall have been appealed, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, where the appealing party fails to bring such appeal to trial within one year from the date of filing such appeal in said superior court, unless such time be otherwise extended by a written stipulation by the parties to the action filed with the clerk of the superior court to which the appeal is taken," etc. Where no written stipulation is entered into extending the time of trial, the section which we have quoted is mandatory and the trial court has no discretion to deny the motion.

[2] Under the circumstances disclosed by the record in this case, the trial court was in duty bound to grant the motion for dismissal. This question has been decided so many times that we do not need to enter into a discussion of the different cases, but will simply content ourselves with the citation of a few of them holding that it is the legal duty of the trial court to enter an order of dismissal, and that mandamus is a proper proceeding to require the trial court to make and enter such order. 15 California Jurisprudence, 547, where the text reads: "Under section 981a of the Code of Civil Procedure, as adopted in 1923, the Superior Court must dismiss the action in case of delay of one year in bringing it

to trial." Abbott v. Superior Court, 79 Cal. App. 746, 251 P. 221, quoting from the syllabus, reads: "On an appeal from a judgment of the justice's court, the fact that the non-appealing party caused the appealed cause to be set for appeal in the superior court for a date more than one year after the perfecting of the appeal neither amounted to a written stipulation nor operated as an estoppel precluding the dismissal of the appeal under section 981a of the Code of Civil Procedure." In the instant case the notice of motion to set the case for trial, dated May 17, 1932, was more than one year after the date of the perfection of the appeal in that cause.

In Cruse v. Superior Court of Los Angeles, 102 Cal. App. 290, 283 P. 73, the court, in construing section 583 of the Code of Civil Procedure relating to dismissal of actions for want of prosecution, which section is identical in its mandatory provisions to section 981a of the Code of Civil Procedure, held as follows, quoting from the syllabus: "The language of section 583 of the Code of Civil Procedure, relating to dismissal of actions which have not been brought to trial within five years after the answer has been filed, does not admit of construction or the exercise of any discretion on the part of the trial court, and upon the lapse of the prescribed period of five years, the dismissal of the action is mandatory." The opinion in the Cruse Case cites a number of authorities supporting the mandatory character of the sections relating to dismissals of actions.

In Swim v. Superior Court, 193 Cal. 539, 226 P. 2, we find the following, quoting from the syllabus: "A verbal stipulation to the effect that further proceedings in an action appealed from the justice's court to the superior court should be indefinitely postponed is insufficient to meet the provision of section 981a of the Code of Civil Procedure, requiring a written stipulation filed with the clerk of the superior court for the purpose of extending the time therein provided for bringing the case to trial."

In the recent case of Mercantile Development Co., a corporation, v. Superior Court in and for Los Angeles County (Cal. App.) 14 P.(2d) 314, it is held that oral understandings are not within the protection of the provisions of said section in such cases (referring to section 583 of the Code of Civil Procedure). See, also, the recent case of Barry v. Learner, 113 Cal. App. 651, 299 P. 82.

Under section 981a of the Code of Civil Procedure and the authorities which we have cited, the trial court had no authority to enter an order other than that of dismissal, pursuant to the plaintiff's motion made in said cause.

It is therefore ordered that a writ of mandate issue herein directing said court and the Honorable W. T. O'Donnell as the judge thereof, to make and enter an order dismissing the appeal in action No. 11,161 pending in said superior court in which Andy Kilker is named as plaintiff and Albert Casper, manager, etc., is named as defendant.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

REHART v. STATE BAR OF CALIFORNIA.

L. A. 13708.

Supreme Court of California.

Dec. 23, 1932.

Rehearing Denied Jan. 20, 1933.

Attorney and client ⇐58.

Attorney's failure to close estate, though paid agreed fee, and failure to pay for surety bond, though paid by client, *held* to warrant three months' suspension.

In Bank.

Petition by Sol A. Rehart to review recommendation of Board of Governors of the State Bar of California that petitioner be suspended from practice for three months.

Petitioner suspended for period of three months.

J. Marion Wright, of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

Proceeding to review an order of the board of governors of the State Bar of California recommending that petitioner be suspended from the practice of law in this state for a period of three months. The recommendation of the local administrative committee was that petitioner should be suspended for an even longer period, to wit, ten months, in that it concluded that he had been guilty of moral turpitude in his dealings with the complainant and had violated his oath of admission in failing to faithfully discharge his duties as an attorney. The sole question to be determined is: What punishment, if any, should be imposed upon petitioner?

The evidence is somewhat unsatisfactory due to the business inexperience of the complaining witness and her trouble with the English language. However, it fairly warrants the conclusion reached in the findings, to wit: That on August 23, 1929, the complainant employed petitioner to probate the estate of her husband for an agreed fee of $150, $50 of which she immediately paid him on account; that thereafter he procured letters of administration for her and took various other steps in the course of the probate proceedings; that on January 6, 1930, he caused to be issued for complainant a surety bond carrying a $30 annual premium for payment of which complainant gave him the sum of $30 but he failed to remit to the surety company and the premium was never paid; further, that on June 12, 1930, complainant paid petitioner the remaining $100 of his fee but he never completed the probate of the estate or rendered any further services for her.

The testimony of petitioner, and his contention upon this review, is to the effect that he could not complete the probate of the estate because complainant refused to furnish him with the needed information therefor. With respect to payment of the $30 premium, there is a direct conflict in the evidence. It is petitioner's claim that he made payment thereof to a man who was working for the broker through whose office the bond was placed. This gentleman testified to the contrary and produced what he termed an original record of the brokerage firm to substantiate his statement that the bill was not paid.

We have carefully reviewed this cause, giving full consideration to the attestations of good character offered in petitioner's behalf, and to the conflicts in the evidence and all the circumstances shown by the record; but we cannot feel otherwise than that petitioner has been derelict in the performance of his obligations as an attorney in the respects above set forth. We approve the recommendation of the board of governors of the State Bar.

It is therefore ordered that petitioner herein, Sol A. Rehart, be and he is hereby suspended from the practice of law in this state for a period of three months beginning on the tenth day from and after the filing of this order.

217 Cal. 61

BLANDY v. BOWDEN.

L. A. 11892.

Supreme Court of California.

Dec. 23, 1932.

1. Brokers ⇐37, 86(7).

Evidence sustained finding that defendant realty broker acted as plaintiff's agent in purchasing lots, and by false statements respecting disbursements, made secret profit, entitling plaintiff to recover such profit, and forfeiting defendant's right to commission.

2. Brokers ⇐37.

In action against realty broker for secret profit retained by defendant in purchase of realty as plaintiff's agent, burden *held* on defendant to prove certain disbursement was made as defendant's agent, in view of fiduciary relation.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Mary V. Blandy against A. L. Bowden. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

George Halverson, Byron Halverson, and Halverson & Halverson, all of Los Angeles, for appellant.

Brown, Bissell & Beery, F. Walton Brown, and Ben S. Beery, all of Los Angeles, for respondent.

TYLER, Justice pro tem.

Appeal by defendant, a real estate broker, from a judgment against him in favor of plaintiff for a secret profit retained by him in connection with his purchase for plaintiff, as her agent, of certain real property.

The complaint, in substance, alleges that defendant received from plaintiff the sum of $1,159 in cash and certain securities which he sold for $7,936.63, the total to be invested in certain lots in Los Angeles. Thereafter defendant purchased for plaintiff three lots known and designated as lots 196, 158, and 159 of tract 7026 as per map recorded in Book 79, page 42, of Maps, in the office of the county recorder of Los Angeles county. After such purchase, defendant rendered a statement to plaintiff showing that he had disbursed the sum of $2,100 in the purchase of lot 196, and that he had further disbursed the sum of $5,256 in the purchase of lots 158 and 159, when in truth and in fact he had only paid the sum of $1,550 for lot 196 and but $1,250 for lots 158 and 159. Defendant denied all the material allegations of the complaint.

It appeared at the trial that defendant had, in rendering his account to plaintiff, charged her with certain expenditures, falsely showing that he had disbursed the sum of $5,256 in the purchase of lots 158 and 159, when in truth and in fact he had expended but $1,250, also that he had disbursed $2,100 in the purchase of lot 196, when in truth he had expended but the sum of $1,550, leaving him a secret profit of $4,000 in connection with lots 158 and 159, and $550 in connection with lot 196. In this statement defendant also showed as a charge against plaintiff a payment from her funds to one Pierce of $327.50 as a commission on $13,100 which the statement falsely showed to be the total purchase price of the three lots, and in the statement he also showed that he had retained for his services in the purchase of the lots a like sum of $327.50 based on the same inflated purchase price, making a total secret profit of $4,877.50.

The trial court found that defendant was plaintiff's agent in the purchase of all three lots. It further found that defendant had disbursed the sum of but $1,250 for lots 158 and 159, subject to an incumbrance, and the sum of but $1,550 for lot 196; that defendant had made false statements and representations of his disbursements for the purpose of securing to himself a secret profit upon the purchase of the property; that out of said secret profit defendant had paid one J. S. Conley the sum of $1,466; and that said sum was not paid by defendant for the account of plaintiff, nor was it a legitimate expense of defendant in the acquisition of the lots. As conclusions of law, the court found plaintiff to be entitled to the sum of $4,877.50, for which plaintiff recovered judgment. It further found that defendant, by his fraud and misconduct in the execution of his agency for plaintiff, forfeited any right to receive or retain any commission from plaintiff.

[1, 2] Defendant does not attack the findings of agency as to lot 196, nor does he deny the secret profit of $550 in connection with this purchase. He does claim, however, that the trial court erred in holding that defendant was not entitled to the profit of $4,000 in the purchase of lots 158 and 159; that the trial court likewise erred in finding and holding that he was not entitled to the sum of $1,466 paid Conley. In support of his claim for the profit on lots 158 and 159, it is appellant's contention that at this time the relation existing between the parties was that of vendor and purchaser, and not that of principal and agent. There is no merit in this claim. The three lots were purchased at or about the same time and were purchased with plaintiff's money. Appellant rendered a statement which definitely indicates that he acted as plaintiff's agent. Other evidence fully supports the finding that appellant was acting solely as plaintiff's agent in the premises. Nor is there any merit in the contention that defendant is entitled to a credit for the sum of $1,466 he claims to have paid Conley. A fiduciary relation existed between the parties. The burden was therefore upon defendant to prove that he made this payment as agent for plaintiff. Conley was not produced as a witness, nor was his absence accounted for. At most, the alleged Conley payment was but a division of defendant's fraudulent profit with Conley, and not a proper expense in the purchase of the property.

The appeal is devoid of any merit. The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.

217 Cal. 56

George W. LUPTON, Jr., Petitioner, v. The STATE BAR OF CALIFORNIA, Respondent.

S. F. 14805.

Supreme Court of California.

Dec. 22, 1932.

In Bank.

Application to review recommendation of the Board of Governors of the State Bar of California that petitioner be suspended for three months. Reprimand administered.

Dunne, Dunne & Cook, of San Francisco, and A. J. Woolsey, of Oakland, for petitioner.

Philbrick McCoy, of Los Angeles, and Dean R. Dickey, of San Francisco, for respondent.

PER CURIAM.

Pursuant to a stipulation entered into between the petitioner and the State Bar of California, it is ordered that the order of this court, dated October 31, 1932, placing this matter on the calendar for hearing in San Francisco, on January 3, 1933, at 10 o'clock a. m., be and the same is hereby vacated and set aside.

It is further ordered that the petitioner, George W. Lupton, Jr., be and he is hereby publicly reprimanded for his participation in the transactions complained of before the State Bar of California, as being conduct violative of the principles, duties, and ethics of a counselor at law, but that, pursuant to said stipulation, the recommendation of the board of governors of the State Bar of California to the court that petitioner be suspended from the practice of the law for a period of three months for his participation in said transactions be not approved.

This order is substituted in lieu of granting said recommendation and does constitute the public reprimand stipulated by the parties.

217 Cal. 29

Ex parte McDONALD.

Cr. 3605.

Supreme Court of California.

Dec. 21, 1932.

1. Contempt ⇨54(4).

Affidavit which forms basis of contempt proceeding must state sufficient facts to constitute offense.

2. Injunction ⇨230(2).

Affidavit made basis of contempt order for violation of injunction, merely alleging knowledge, without alleging judgment was binding on respondent, *held* insufficient.

Affidavit averred merely that named person at time he brought action affecting property to which injunction related, "had full and actual knowledge" of the judgment and all of its provisions, and did not state that he had knowledge of the appeal and final determination of the proceeding. Furthermore, the affidavit did not allege that such person was included within the terms of the judgment, either as an individual or as a member of a class designated therein.

3. Injunction ⇨223(1).

Bringing of suit by assignee of trust deed to establish prior lien *held* not violation of injunction against owner, "her successors and assigns" from asserting any claim against property.

Decree entered in April, 1929, and becoming final in May, 1932, declared that named person had no right, title, or interest in property sought to be subjected to judgment, and that such person, "her successors and assigns are hereby forever enjoined and restrained from asserting or claiming any right, title or interest in or to said real property."

In Bank.

Original application by Kenneth McDonald for a writ of habeas corpus prayed to be directed to the sheriff of Kern county to secure release of petitioner from custody under a commitment for contempt for violation of an injunction.

Writ granted, and the petitioner discharged from custody.

Paul W. Schenck, of Los Angeles, for petitioner.

T. N. Harvey, of Bakersfield, for respondent.

PER CURIAM.

This is a petition for a writ of habeas corpus. On December 21, 1925, El Dora Oil Company, having previously recovered a money judgment against Ronald McDonald, brought an action against Ronald McDonald and Jennie McDonald in the superior court of Kern county to have it decreed that certain real property standing in the name of Jennie McDonald was in fact the property of Ronald McDonald. The object of the suit was to levy execution on the property to enforce the judgment previously obtained. A lis pendens was recorded on said date. Prior to trial, El Dora Oil Company was adjudicated a bankrupt, and William H. Moore, Jr., was appointed trustee and substituted as plaintiff in the action. The court gave a decree in his favor on April 16, 1929, and the decree was affirmed on

appeal and became final on or about May 21, 1932. The said decree declared that the property was owned by Ronald McDonald and that Jennie McDonald had no right, title, or interest therein; and that "the said defendant Jennie McDonald, her successors and assigns, are hereby forever enjoined and restrained from asserting or claiming any right, title or interest in or to said real property."

Subsequently, on June 6, 1932, petitioner, Kenneth McDonald, commenced an action in the said superior court against Jennie McDonald and the trustee of El Dora Oil Company, to have it decreed that he had a prior lien on said property in the amount of $50,000. The complaint alleged that Jennie McDonald had borrowed $50,000 from Security Trust Company on August 26, 1925, and had given as security a deed of trust on the said property; that petitioner, in August, 1927, at her request, paid said indebtedness and took an assignment of the deed of trust from Security Trust Company, it being agreed by Jennie McDonald that petitioner should be substituted for the trust company and should have a first lien upon the property to secure his payment.

Thereafter, on August 9, 1932, A. H. Swallow, one of counsel for the trustee, filed an affidavit with the trial court setting forth these facts and seeking to have petitioner adjudged guilty of contempt, on the ground that the institution of his suit constituted a violation of the injunction contained in the judgment in the prior action. An order to show cause was issued, a demurrer thereto was overruled, and petitioner was adjudged in contempt and a fine of $50 was imposed, with the alternative penalty of one day's imprisonment for each $2 in the event of failure to pay. Petitioner did not pay, and a commitment was issued, followed by his imprisonment. This writ of habeas corpus was granted to determine the legality of his detention.

[1, 2] It is settled that the affidavit which forms the basis of a contempt proceeding must state sufficient facts to constitute the offense. Berger v. Superior Court, 175 Cal. 719, 167 P. 143, 15 A. L. R. 373. The affidavit of Swallow is defective in this regard. It avers that Kenneth McDonald, at the time he brought his action, "had full and actual knowledge" of the judgment and all of its provisions. It does not state that he had knowledge of its appeal and final termination in favor of the trustee. Much more fundamental, however, is its failure to allege that Kenneth McDonald is a party included within the terms of the judgment, either as an individual or as a member of a class designated therein. Since he was a stranger to the former action, he can in no way be considered bound by the judgment unless he comes within the provision thereof referring to the "successors and assigns" of Jennie McDonald. But the affidavit does not allege, and the court in its judgment of contempt does not find, that Kenneth McDonald is the "successor" or "assign" of Jennie McDonald, or that he claims any interest in the property in such capacity. In short, the charge of contempt rests, so far as this record is concerned, upon his knowledge of the judgment. This is plainly insufficient. Berger v. Superior Court, supra.

[3] In addition to the insufficiency of the affidavit, the conceded facts fail to show any basis for a judgment of contempt. The claim upon which petitioner sued arose in August, 1925, prior to the filing of the action by El Dora Oil Company. From the time the lis pendens was recorded (December 21, 1925) no one could acquire rights from Jennie McDonald in said property superior to those of the said company. But the interest represented by the note and deed of trust was acquired before that time. Hence the judgment that Ronald McDonald was sole owner of the property from and after December 21, 1925, in no way determines that Jennie McDonald was not the owner in August, 1925, when she made the deed of trust. Hence it is entirely possible that the deed of trust may be a prior lien. And petitioner is not suing as the successor of the interest of Jennie McDonald, nor as her assignee. She was indebted to the trust company. He paid her indebtedness and succeeded to the claim of the trust company against her. It is that claim upon which he is suing, and not any subsequent promise of Jennie McDonald.

No authorities are submitted by respondent, but we have examined the reported oral argument, and we are satisfied that the order adjudicating petitioner in contempt was invalid.

The writ is granted, and the petitioner is discharged from custody.

217 Cal. 80

HARRIS et al. v. THOMPSON et al.

L. A. 12846.

Supreme Court of California.

Dec. 23, 1932.

Eminent domain ⇐152(1).

One leasing property from owner after condemnation, but before condemned strip was taken, acquired no interest in award to former leaseholder.

In Bank.

Appeal from Superior Court, Los Angeles County; J. C. Needham, Judge.

Suit by Felix Harris and another, doing business as Harris & Cope, against B. F.

Thompson and others. Judgment for plaintiffs, and defendant named appeals.

Reversed.

Leonard S. Barnes, of Los Angeles, for appellant.

Thomas W. Cochran, of Los Angeles, for respondents.

Erwin P. Werner, City Atty., of Los Angeles, for respondent City of Los Angeles.

TYLER, Justice pro tem.

Suit in equity to declare a trust in a certain award and judgment procured in a condemnation proceeding for the widening of a street. The action was tried upon the pleadings and a stipulated set of facts restated in effect in the findings of fact of the trial court. They show in substance that on April 25, 1927, a condemnation suit was filed by the city of Los Angeles for the widening of Manchester avenue. Defendants B. F. Thompson and Frank Alvarez were joined in said suit as owners of leasehold interests in property affected thereby. At the time the condemnation suit was filed, a setback ordinance was in effect, restricting the use of twenty feet of defendant Thompson's leasehold interest in an oil station located along Manchester avenue. On January 25, 1928, duly appointed referees ascertained that Thompson's lease would, by its terms, terminate on October 10, 1929. They also found the amount of rent he was paying, and, further, that the market value of the lease was greater than the rent paid. They ascertained the market value of the property to be taken, and the severance damage to the remaining portion.

The award to Thompson as the owner of the leasehold was fixed at $1,262, and the award to defendant Alvarez, also an owner of a leasehold, was fixed at $350. The award and judgment of the market value of the two leasehold interests was set as of the date the summons was filed. It fixed the bonus value of said leases up to October 10, 1929, the time of the expiration thereof. On January 26, 1929, an interlocutory judgment was docketed affirming the report of the referees. No appeal was taken therefrom and the judgment became final.

On October 11, 1929, the day after Thompson's lease expired, he surrendered possession, and the respondents took a lease direct from the owner of the fee of all the lot except the twenty feet which had been condemned, and on which the setback ordinance had been in effect since April 25, 1927, approximately two and one-half years.

On December 27, 1929, within one month of the year's time allowed to the city to pay over the money to defendants, the former lessees, under the provisions of section 1251, Code of Civil Procedure, the plaintiffs filed this suit in equity, claiming the money to be derived from the judgments in the condemnation suit. The suit was based upon the theory that as defendants had suffered no injury, they were not entitled to the award.

The trial court found that defendants had sustained no injury, as they were never disturbed during the period of their leases; that as no property was taken from either of them during the enjoyment thereof, they had no right, title, or interest in the awards, and that as plaintiffs, as successors to the leases, would suffer injury, they were entitled to a judgment; that a trust be declared in said awards; and that they belonged to and were the property of plaintiffs. Accordingly it was decreed that the city of Los Angeles pay said awards to plaintiffs instead of to defendants.

In support of the judgment, respondents rely on the case of Los Angeles County Flood Control District v. Andrews, 52 Cal. App. 788, 205 P. 1085. This case in substance holds that the public cannot be required to pay for a leasehold interest not taken, which the lessee holds unmolested to the end of his term. Assuming this principle to be true, it in no manner supports the judgment. The right to the award is a matter between the city of Los Angeles and the owners of the property condemned, and their rights are not here involved. Respondents had no interest in the property at the time it was taken, nor were they in privity with appellant. Their lease did not include the condemned portion of the premises, and it was acquired, not from appellant, but from the owner of the fee. It came into existence over eight months after the lease that was compensated for had expired, and their leasehold is still intact and has never been molested. Nor are they under any obligation to remove any of the improvements. Respondents own no property that was condemned, and have everything they acquired under their lease from the owner of the fee. They took the property as they found it, and were mere tenants at sufferance in the condemned property. Under these circumstances respondents never could have, nor did they, acquire any right, title, or interest in or to the award and judgment made to Thompson and Alvarez, and the judgment that they did finds no support in the evidence. Whatever rights appellant may or may not have to the award, certain it is that respondents have none, as no property they owned or had any interest in was ever affected by the condemnation proceedings; nor are they in privity with any one who had any interest.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.

217 Cal. 63

REDPATH et al. v. AAGAARD et al.

L. A. 12850.

Supreme Court of California.

Dec. 23, 1932.

1. Limitation of actions ⇐37(4).

Action to rescind contract to run mining claim to patent *held* action for relief from fraud or mistake and barred by three-year statute (Code Civ. Proc. § 338, subd. 4).

Complaint alleged, in substance, that parties entered into contract to run to patent certain mining claim, and performed annual assessment work from 1914 to 1930; that defendants misrepresented that they knew claim contained vein or lode of quartz or other rock bearing mineral and also misrepresented that law entitled parties, after obtaining patent, to use land otherwise than as a mine; and that in 1930 plaintiffs brought action for rescission within a few months after discovering falsity of these misrepresentations. Whether complaint sought rescission under Civ. Code, § 1688 et seq., for mistake of fact or law or for fraud, or under section 3406, subd. 2, for unlawful purpose, it showed on its face that it was barred by Code Civ. Proc. § 338, subd. 4, since allegations showed no facts constituting fraud or mistake discovered by plaintiffs within three years before beginning action.

2. Limitation of actions ⇐177(3).

Complaint to rescind contract to run mining claim to patent, seeking relief for fraud or mistake, showed that plaintiffs could not then allege cause of action not barred by statute (Code Civ. Proc. § 338, subd. 4).

3. Mines and minerals ⇐38(5).

Rescission of contract to run mining claim to patent *held* barred by laches.

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Kenneth V. Redpath and another against Jack Herman Aagaard and another. From a judgment of dismissal, plaintiffs appeal.

Affirmed.

John O. Bender and John F. Bender, both of Los Angeles, and Frederick H. Brock, of Pico, for appellants.

Theodore Stensland and Stensland & Langford, all of Los Angeles, for respondents.

PRESTON, J.

[1] Appeal from judgment of dismissal entered for defendants after the sustaining, without leave to amend, of their demurrer to plaintiffs' third amended complaint. The sufficiency of the pleading is the sole issue. We shall therefore first set forth the substance of the allegations thereof:

That in April and May, 1914, plaintiffs and defendants entered into a contract to run to patent under the mining laws of the United States a certain lode mining claim situated in the Cleveland National Forest Reserve in Orange county, pursuant to which plaintiff Kenneth V. Redpath acquired an eleven-sixteenth interest in the claim and defendant Jack Herman Aagaard acquired a one-fourth interest therein and said parties performed the annual assessment work thereon every year from 1914 to 1930, but never made application for a patent thereto. That said claim does not contain within its limits a vein or lode of quartz or other rock in place bearing any mineral and said agreement to secure a patent was for the exclusive purpose of developing the land and impounding the water thereon for a public resort and subdividing the land into lots for sale to the public, without any intention of using the property as a mine. That at the time said contract was entered into defendants misrepresented to plaintiffs that they knew said mining claim contained a vein or lode of quartz or other rock in place bearing mineral and also misrepresented to plaintiffs that they knew the law to be that after the parties obtained their patent to the land, they would have the right to use it for the purposes above mentioned, without using it as a mine, and plaintiffs believed said misrepresentations; that plaintiffs are informed and believe that defendants at said time supposed that they knew the law governing the use of a patented mining claim and apprehended that such law would permit use of the land in the manner above indicated, for other than mining purposes. Plaintiffs further allege that their consent to said contract was given by mistake; that about December 1, 1929, they ascertained that said lode claim did not contain a vein or lode of quartz or other rock in place bearing any mineral and learned for the first time that a mining claim could not be run to patent for the exclusive purpose of developing the land for other than mining uses. Further, plaintiffs allege that on June 2, 1914, pursuant to said contract and for no other consideration, they deeded to defendant Leah Aagaard certain property situated in Los Angeles county from which defendants have received rents over the period from 1916 to 1929 in a sum to exceed $30,000 and have converted the whole thereof to their own use and benefit. That plaintiffs first became aware of their right to rescind said contract about December 1, 1929, and on December 17, 1929, brought an action against defendants for rescission thereof and for the cancellation

of the deed of conveyance of said Los Angeles real property; that on May 19, 1930, plaintiffs dismissed said action without prejudice and on the succeeding day instituted this action. The prayer of the complaint is that said contract be rescinded and declared void: that the Los Angeles property be reconveyed to plaintiffs and that the conveyance thereof to defendants be declared canceled; that defendants account to plaintiffs for rents received by them from said Los Angeles property and for other and further relief.

Counsel engage in a widespread discussion not only as to whether the complaint states a cause of action, but also as to the nature of the cause of action attempted to be stated. We need not pause to definitely determine either of these questions, for whether the complaint be for a rescission under section 1688 et seq. of the Civil Code for mistake of fact, mistake of law or fraud, or under section 3406, subdivision 2 of the Civil Code for an unlawful purpose in which the plaintiffs are not in pari delicto with defendants, it is in any event, when tested for the bar of the statute of limitations, an action for relief on the ground of fraud or mistake within the meaning of section 338, subdivision 4, of the Code of Civil Procedure. And when so tested the complaint on its face is barred by said statute as the allegations of the pleading show no facts constituting the fraud or mistake discovered by them within three years next prior to commencement of the action. This requirement and the nature of the showing that must be made have recently had the attention of this court and need not be further developed at this point. Consolidated Reservoir, etc., Co. v. Scarborough (Cal. Sup.) 16 P.(2d) 268.

[2] It is our conclusion also that the facts disclosed by the complaint are such that it can be clearly seen that plaintiffs cannot at this time allege a cause of action not barred by the statute. The gravamen of the charge is that the defendants represented that they knew ore in place existed on this claim when they in fact had no such knowledge. Plaintiffs, for approximately sixteen years, have been actively assisting in doing the assessment work required by law on the property. Means of ascertaining the truth of this statement to them have therefore been in their possession at all times since the making of the contract. The further contention that both parties believed the law would permit the location of a mining claim and the perfecting of a patent thereto when it was at all times their exclusive intention to use the ground for other than mining purposes, is also without strength. No concealment or even direct fraud is pleaded. Certainly during this long period it must have occurred to plaintiffs to take some steps to ascertain the correctness of such an assumption. Ordinary concern for one's own rights would have prompted such an investigation.

[3] Plaintiffs' claim is not only outlawed, but it is plainly one where laches too would forbid relief. At an early date the Supreme Court of the United States gave this utterance: "The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject." Case of Broderick's Will, 88 U. S. (21 Wall.) 503, 519, 22 L. Ed. 599. Notwithstanding the ingenious efforts of plaintiff's counsel to state a present cause of action, it is clear that the decision of the court below that they have not done so, was correct.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; TYLER, Justice pro tem.

128 Cal.App. 295

MILLER et al. v. CITIZENS' TRUST & SAVINGS BANK et al.

Civ. 4737.

District Court of Appeal, Third District, California.

Dec. 20, 1932.

Mortgages ⇐151(3).

Deed of trust *held* lien inferior to mechanic's lien for work and materials furnished before deed was recorded, and without knowledge thereof (Code Civ. Proc. § 1186).

Code Civ. Proc. § 1186, provides in substance that a mechanic's lien is a prior claim to liens, mortgages, or incumbrances which are not recorded until after labor and materials are furnished by the mechanic.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Edwin L. Miller, sometimes known as E. L. Miller, and another, against the Citizens' Trust & Savings Bank, now known as the Citizens' National Trust & Savings Bank, and others. Judgment for the plaintiffs, and the defendants appeal.

Affirmed.

Lorrin Andrews, of Los Angeles, for appellants.

Root, Bettin & Painter, of Los Angeles, for respondents.

KING, Justice pro tem., delivered the opinion of the court.

This action is to quiet title.

J. W. Roman and Quida Roman, his wife, on May 21, 1925, executed a deed of trust to a bank later merged into defendant Citizens' Trust & Savings Bank, as trustee for Charles Stone, beneficiary. June 26, 1925, Stone assigned to defendant Brian K. Welch. Defendant John D. Beyer, as trustee in bankruptcy for Beverly Ridge Company, a copartnership, received a grant deed from J. W. Roman and wife dated January 29, 1927. The deed of trust from Roman and wife was recorded June 29, 1925.

One E. P. Erwen brought an action to foreclose a claim of lien against the property involved, and, after default by the above-named Citizens' Bank, J. W. Roman and his wife, and Charles Stone, a judgment was entered in the action foreclosing his claim of lien against all of these named defendants. The property was sold by the sheriff under a writ of enforcement in this last-mentioned action, and said E. P. Erwen, plaintiff therein, became the purchaser. Thereafter, on May 3, 1926, the certificate of this sheriff's sale was recorded. On April 19, 1927, plaintiffs redeemed the property from said sale, and thereafter, no redemption having been made by any defendant, the sheriff executed to plaintiffs a deed for the property.

Judgment in the instant case was for plaintiffs, and defendants appealed.

Appellants urge three grounds for a reversal: (1) That the trust deed was executed prior to the accrual of the mechanic's lien, and takes precedence over the mechanic's lien; (2) that section 1186, Code of Civil Procedure, does not apply to trust deeds; and, (3) that, the complaint in the case of Erwen v. Roman et al., filed more than three months after the recording of the deed of trust, having failed to specifically set forth the nature of the claim of the defendants in said action, being the appellants herein, the judgment rendered therein was not binding upon the defaulting defendants.

It will be noticed that grounds 2 and 3 above rather overlap.

Appellants expressly admit in the opening brief (no reply brief having been filed) that the lien of Erwen took effect the moment he commenced to furnish labor and materials, on June 2, 1925, and that on that date Erwen did not know of the deed of trust executed May 21, 1925. They assert, however, that the deed of trust became effective as of its date—which is true as between the parties to it.

Appellants then argue that a deed of trust is "not a lien, mortgage or incumbrance, but the legal title itself," and therefore not subject to the provisions of section 1186, Code of Civil Procedure, which provides that a mechanic's lien is a prior claim to liens, mortgages, or incumbrances which are not recorded until after labor and materials are furnished by the mechanics.

In the case of Sax v. Clark, 180 Cal. 287, 180 P. 821, the plaintiff respondent held title under a trust deed given as security for a loan, bearing date October 21, 1912. Appellant's title was based on a sheriff's deed given on foreclosure of mechanics' liens on claims recorded in March and in April of 1913. The construction of the building for which lien claimants furnished materials was begun September 15, 1912, and the materials were furnished from October 1, 1912, to January 15, 1913. The court held that the judgment adjudging the lien claims superior to the claim of the trustee was binding upon plaintiff Sax, and reversed a judgment in her favor.

In the decision of MacLeod v. Moran, 153 Cal. 99, 94 P. 604, 605, Chief Justice Angellotti discusses the interest conveyed to a trustee by a deed of trust given to secure a loan, and says: "* * * Such a deed, though in form a grant, is really only a mortgage, and does not convey the fee. A trust deed of the kind here involved differs from such a deed only in that it conveys the legal title to the trustees so far as may be necessary to the execution of the trust. It carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in the payment of his debt. The nature of such an instrument has been extensively discussed by this court, and the sum and substance of such discussion is that while the legal title passes thereunder, and the trustees cannot be held to hold a mere 'lien' on the property, it is practically and substantially only a mortgage with power of sale. [Citing cases.] The legal title is conveyed solely for the purpose of security, leaving in the trustor or his successors a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them. Sections 865, 866, Civ. Code. Except as to the trustees and those holding under them, the trustor or his successor is treated by our law as the holder of the legal title. King v. Gotz, 70 Cal. 236, 11 P. 656. The legal estate thus left in the trustor or his successors entitles them to the possession of the property until their rights have been fully divested by a conveyance made by the trustees in the lawful execution of their trust, and entitles them to exercise all the ordinary incidents of ownership, in regard to the property, subject always, of course, to the execution of the trust."

These cases, and many others, justify a holding that the deed of trust constituted only a lien on the property, that it was subsequent and subject to the mechanic's lien claim of Erwen for work done and materials furnished which Erwen began to furnish before the recordation of the trust deed, and

that the rights of holders of the trust deed were duly foreclosed in the action on the Erwen lien.

Defendant Beyer's title, based on a grant deed after the foreclosure of the mechanic's lien, was also foreclosed in that action.

The judgment should be, and is, affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

128 Cal.App. 235

G. W. WOO v. LOW CHEW et al.

WILTON WOO v. SAME.

Civ. 8472.

District Court of Appeal, First District, Division 1, California.

Dec. 17, 1932.

1. Automobiles ⇐245(8).

Evidence of negligence in backing truck to curb in such manner that toy wagon propelled by child along sidewalk was struck *held* sufficient for jury.

2. Negligence ⇐136(30).

Contributory negligence of father in permitting 4 year old child to ride on sidewalk on toy wagon with protruding wings *held* for jury.

3. New trial ⇐6.

In granting new trial, much is committed to trial court's discretion.

4. New trial ⇐70.

Order granting new trial after verdict for defendants in actions for child's injuries sustained when toy wagon propelled on sidewalk was struck by backing truck *held* not abuse of discretion.

Appeals from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Actions by G. W. Woo and by Wilton Woo, a minor, by his guardian ad litem, G. W. Woo, against Low Chew and John Doe Lum, copartners doing business under the firm name of the Italian Market Lum Company, and another. Verdict was returned for defendants, and, from an order granting a new trial, defendants appeal.

Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellants.

Carlton D. Dethlefsen and Bush Finnell, both of San Francisco (Thomas F. McCue, of San Francisco, of counsel), for respondent.

PER CURIAM.

The first of the above actions was brought by the father of Wilton Woo, a minor, to recover the expense incurred in connection with injuries alleged to have been suffered by the minor; and the second was for the recovery by the minor of damages due to the same injuries.

It was alleged that the injuries resulted from the negligence of defendants. The cases were consolidated for trial and tried by a jury. It returned a verdict in favor of the defendants. A motion for a new trial was made and granted on the ground that the verdict was not justified by the evidence.

The appeal is from this order, it being defendants' claim that there was no substantial evidence of negligence on their part proximately causing the injuries, and that, as to the action brought by the minor's father, the evidence shows as a matter of law that the father was guilty of contributory negligence.

[1] The injuries occurred in the Chinese quarter of San Francisco on a street known as Beckett street, which is a one-way thoroughfare 12 feet 3 inches in width between the curbs. The father of the minor operates a store upon this street. At the time his injuries were received, he was a little less than 4 years of age, and was riding to and fro on a foot-propelled toy wagon along the sidewalk near his father's store. The wagon was shaped to resemble an aeroplane. It had a propeller in front, with wings which protruded about 18 inches on each side. Defendant Wong Kow was in the employ of his codefendants, who conducted a market on the street named. On September 30, 1930, he drove a truck along this street; it being his intention to park in front of the market. Finding the parking space occupied he proceeded further and backed the truck to the curb. While this was being done the minor was propelling his wagon along the sidewalk, and one of the wings mentioned was struck by the rear end of the truck, throwing the boy to the ground and causing his injuries. As to whether the driver gave a warning signal as he approached the curb, the evidence is conflicting. It appears that the body of the truck extended about 18 inches beyond its rear wheels; and it was testified that the truck mounted the sidewalk, thus striking the vehicle upon which the child was riding. As is usual in cases of this kind, the testimony as to how the injuries occurred and the care used is conflicting; and, while it is the rule that, if there be no sufficient material evidence upon which a contrary verdict could be based, an order granting a new trial cannot be sustained (Empire Investment Co. v. Mort, 169 Cal. 732, 147 P. 960; Springer v. Pacific Fruit Exchange, 92 Cal. App. 732, 268 P. 951), here the child was not in the street

when struck, as was the fact in cases cited by defendants, but upon the sidewalk, and there was sufficient evidence which, if believed by the jury, would support a finding that in backing the truck in the manner shown the driver was wanting in due care.

[2-4] We find no merit in the contention that the father of the minor was guilty of contributory negligence. In the case of Muller v. Standard Oil Co., 180 Cal. 260, 180 P. 605, relied upon by defendants, an ordinance prohibited the use of tricycles on the sidewalk. The plaintiff permitted his child to violate this ordinance. As a consequence, the child was injured by a truck which was proceeding from an alley into the street. It was held that the plaintiff could not recover. In the present case no statute or ordinance was shown, and it does not conclusively appear that there was any want of care on the part of either the father or the child. The question was one of fact for the jury. Daly v. Hinz, 113 Cal. 366, 45 P. 693; Fox v. Oakland Cons. St. Ry., 118 Cal. 55, 50 P. 25, 62 Am. St. Rep. 216; Seperman v. Lyon Fire Proof Storage Co., 97 Cal. App. 654, 275 P. 980. In granting a new trial, much is committed to the discretion of the trial court (Sheets v. Southern Pacific Co., 212 Cal. 509, 209 P. 71), and we cannot say that its conclusions in the present instance are unsupported.

The order is affirmed.

128 Cal.App. 262

KREIDER v. CALIFORNIA THORN CORDAGE, Inc.

Civ. 7264.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1932.

Pledges ⇐38.

Party loaning bonds to be used as collateral for note could not, on assignment of note with collateral to him, convert bonds to his own use and reassign note without collateral; hence subsequent assignee was not entitled to attachment (Code Civ. Proc. §§ 537, 538).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by John S. Kreider against the California Thorn Cordage, Inc. From an order granting a motion to dissolve an attachment, plaintiff appeals.

Affirmed.

Lorrin Andrews, of Los Angeles, for appellant.

George I. Devor, of Los Angeles, for respondent.

STEPHENS, Justice pro tem.

One John C. Thorn borrowed $5.000 from the defendant, California Thorn Cordage, Inc., depositing as security for the loan bonds of the Central Counties Gas Company, having an aggregate value of $5,000. The loan was evidenced by the promissory note of said John C. Thorn, made payable to the order of the defendant California Thorn Cordage, Inc. The latter took the promissory note and itself borrowed $5,000 from the Citizens' National Bank of Los Angeles, evidenced by its promissory note, depositing as security for such loan the Thorn note and the bonds deposited by him to secure his note. The note of defendant, California Thorn Cordage, Inc., was assigned by the bank to Dr. Wilbur Smith, who, according to the affidavit on attachment, had loaned the bonds to Thorn for the purpose to which they were put. Smith, it appears, kept the bonds and assigned the note "without recourse" to plaintiff, who brought suit on the note and caused the property of defendant to be attached. The defendant moved the court, under section 556 of the Code of Civil Procedure, for its order discharging the writ of attachment. The motion was made on two grounds: "1. That the said writ of attachment was improperly and irregularly issued in that it was issued contrary to the express provisions of sections 537 and 538 of the Code of Civil Procedure of the state of California. 2. That the said writ of attachment was improperly and irregularly issued in that the complaint filed in this action affirmatively shows that the contract and/or obligation sued upon is secured by (a) a lien upon personal property and (b) by a pledge of personal property." The attachment was dissolved, and plaintiff appeals from the order.

No assignment and no number of assignments of the note sued upon could act to separate the note from the collateral security which accompanied it. No relation between the maker of the note that was assigned to the bank as a part of the collateral and the owner of the bonds that were part of the collateral could affect the right of the maker of the note sued upon. Even if Smith did merely loan the bonds to Thorn to be used as security to borrow money from California Thorn Cordage, Inc., he had no right to convert the bonds back to his own use, thereby depriving the cordage corporation of its right to them as security for money it loaned Thorn. The contention that Thorn's note, together with the bonds as its security, is not personal property under section 537 of the Code of Civil Procedure is wholly without merit. The plaintiff below, as the ultimate assignee, holds the

obligation so far as the maker is concerned in exactly the same way the bank held it. Under section 537, the bank, having valuable security for this loan, was not entitled to an attachment, and the assignee is not.

It may be that the trial of the case will develop undisclosed interests, but they of course are not now before us.

Order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

128 Cal.App. 340

FEINSTEIN v. BLUM et al.

Civ. 691.

District Court of Appeal, Fourth District, California.

Dec. 22, 1932.

Appeal and error ⊜554(2).

Motion to dismiss appeal should be granted where no printed bill of exceptions was filed within period of extension allowed for filing (Rules of District Courts of Appeal, Rule I, § 1).

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by Louis Feinstein against I. Blum and others. From the judgment, plaintiff appeals.

Appeal dismissed.

W. C. Dalzell, of Los Angeles, for appellant.

Brittan & Brittan, of Bakersfield, for respondent.

JENNINGS, J.

This is a motion by respondent to dismiss the appeal herein on the ground that the printed transcript of the record has not been served and filed within the time provided by section 1, rule I, of the Rules of this court. By the affidavit of counsel for respondent, and by the certificate of the county clerk made pursuant to the provisions of rule VI of the Rules of this court, it is made to appear that a bill of exceptions was settled by the trial judge on July 16, 1932, and notice of settling said bill of exceptions was thereupon given by mail. This motion was originally noticed for hearing in this court on October 11, 1932. On October 3, 1932, counsel for appellant made an affidavit in support of his application for an extension of time within which to file the printed transcript of the record. By this affidavit it is made to appear that the bill of exceptions was settled on July 26, 1932. By order of the Presiding Justice of this court made on October 4, 1932, appellant was allowed an extension of time, until November 3, 1932, in which to serve and file the printed bill of exceptions. On October 11, 1932, hearing of this motion to dismiss the appeal was continued to November 4, 1932. On the last-mentioned date the motion came on regularly for hearing, at which time counsel for respondent appeared and argued that the motion be granted. No appearance was made by appellant. Our records show that at this time no printed bill of exceptions has been filed with this court. It follows, therefore, that respondent's motion to dismiss the appeal should be granted. Raisch Improvement Co. v. Arata, 193 Cal. 573, 226 P. 399.

The appeal is dismissed.

We concur: BARNARD, P. J.; MARKS, J.

128 Cal.App. 111

PEOPLE v. LINDSTROM.

Cr. 2263.

District Court of Appeal, Second District, Division 2, California.

Dec. 9, 1932.

Hearing Denied by Supreme Court Jan. 5, 1933.

Criminal law ⊜739(1).

In kidnapping prosecution evidence made jury case whether accused acted under compulsion and under reasonable cause to believe his life was in danger (Pen. Code, § 26).

Appeal from Superior Court, Los Angeles County; Benjamin C. Jones and Thomas P. White, Judges.

George Victor Lindstrom was convicted of kidnapping, and he appeals.

Affirmed.

Thomas W. Cochran, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

WORKS, P. J.

Defendant was charged with the commission of crime in three counts, two of kidnapping and one of assault with a deadly weapon. He was acquitted under the latter count but was convicted under the other two. He appeals from the judgment of conviction and from an order of the trial court denying his motion for a new trial.

The sole point made by appellant is that the evidence was insufficient to support the verdict, this for the reason that he committed,

under coercion, the acts upon which the kidnapping charges were based. That he so acted, he says is shown by undisputed evidence.

"All persons are capable of committing crimes except those belonging to the following classes: * * * Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused." Pen. Code, § 26. See, also, as defining the import of this language of the section, People v. Sanders, 82 Cal. App. 778, 256 P. 251. In the present case the trial judge gave the jury this very proper statement of the law: "You are instructed that if you believe that the defendant in this case committed the act as charged in the information under a threat or menace sufficient to show that he had reasonable cause to and did believe that his life would be endangered if he refused to commit such act as charged, then you must acquit him."

The question whether there was a conflict in the evidence may largely be solved upon the testimony of appellant himself. He said that for some time he had known one Miller and one Criter; that on a certain morning Miller asked him over the telephone whether he could get Miller five cans of alcohol, appellant then being engaged in bootlegging, and he said he could. He then arranged over the telephone to get the product from one Joe and arranged to meet the latter in front of a certain hotel in Los Angeles at a certain time, and did meet him at 11 o'clock of the morning Miller had called. Joe then borrowed appellant's car and returned with the alcohol in about half an hour. Appellant agreed to pay $100 for the alcohol and did pay Joe $50 down, leaving fifty unpaid. He later took the product to Compton for delivery to Miller, arriving there at 4:30 or 4:45 in the afternoon, but Miller was not at home. He parked his car near Miller's house with the alcohol in it and remained about the place for some time, leaving the car twice, however, in an endeavor to find Miller in the neighborhood. After returning the second time he found the alcohol was not in the car. He then drove to Los Angeles, where he had agreed to meet Joe at 7:30 and pay him the $50 yet due on the alcohol, and told Joe that he could not pay—that the alcohol, instead of being delivered to Miller, had been stolen. Joe said, "Lindstrom, what are you trying to pull on me?" Lindstrom replied, "Nothing. I had this alcohol sold, but somebody just took it away from me." Joe said, "Where did you take this stuff?" Lindstrom testified, "I told him where I took it, and he told me to get in the car and go down there and show him where I had taken it." The two then drove to Miller's house in Compton, arriving there at "10:30 or 11 o'clock" that night. Joe and Miller were introduced and Joe asked Miller if he knew anything about the alcohol. Joe then asked Lindstrom, "Where was the car sitting when you had it parked this afternoon?" Lindstrom answered, "Just across the street." Criter had been present during this conversation and the four then went over to where the car had been parked. The following questions and answers appear in the record at this point:

"Q. Up to that time had you seen any gun in the possession of this man Joe? A. Yes, sir. * * * When he told me to get in the car in front of the * * * hotel.

"Q. Did he take his gun out of his pocket? A. No, he did not; he had it in his belt, and he said—when he told me—he says, 'I am afraid you are trying to pull something on me; be careful.'"

Lindstrom testified that when the quartet arrived at the place where the car had been parked: "I tried to show them where there was some [footprints]—there is a vacant lot across the street, and it showed where there were some tracks, and I had the flashlight in the car, and I got that and was looking around trying to—well, I was trying to see how—what had happened." Joe then said, "These are not your tracks, Miller, are they?" Miller answered that they were not. "Q. Then what occurred? A. Well, [Joe] said, 'You boys get in the front seat.' He had his revolver by then and motioned—he said, 'You boys get in the front seat.' * * * Well, he said [to Lindstrom], 'You get in the car and drive.'" To this Lindstrom replied nothing, nor did either he, Miller or Criter say anything to Joe during a ride which followed, and during which Joe occupied the back seat. Miller and Lindstrom "tried to start up a conversation or something," apparently between themselves, when Joe said, "You guys shut up; this is no picnic." After a ride of some duration—whither the record does not show—Joe said, "You boys get to hell out of this car," having a pistol in his hand at the time, and the three complied. Lindstrom testified that he was then in fear of his life. When all were out of the car Joe said, "Now, where is that alcohol?" After stating this question Lindstrom added, "They naturally didn't know anything about it."

Then followed questions and answers, thus:

"Q. Well, what did they say? * * * A. They said they didn't know.

"Q. Did he say anything to you? A. Well, not at that time, he didn't. He shot a couple of times; tried to scare everybody, I suppose." (It should be observed here that these shots were discharged toward the ground, one of them striking Miller in the foot. This was shown by other testimony.)

"Q. Well, were you scared? A. I was.

"Q. Did he say anything when he shot? A. He said, 'Now, do you know where it is at?'

Right after he had shot. * * * Well, Mr. Miller said, no, he did not know and he [Joe] told me—he said, 'Have you got a robe in your car?' I told him, 'No.' He said, 'Tear a couple of strips off that damned blanket and tie those boys up.'

"Q. You just moved your right hand then. What was that for? A. Well, he moved his right hand with this revolver in it.

"Q. Was the revolver pointed at you? A. Well, it was pointed at me; he motioned with it, pointed at me just as much as—well, just like you motion with that paper, just the same as if this was a revolver. * * *

"Q. Then what did you do? A. I done that; I tore strips off the blanket, and I tied the boys' hands with it. * * *

"Q. What was Joe doing while you were tying them up? * * * A. He was standing right there, over us, watching all three of us."

Lindstrom then testified that the night was dark, but light enough to "see what was going on"; that there were no city lights or street lights; that the party was not close to any houses; and that "it was open country."

"Q. Now, did he go on with his shooting? A. Yes, he did.

"Q. Did he shoot at you? A. Well, no, he didn't exactly shoot [sic] me. * * *

"Q. Did you make any statement to him at all during this period? A. No.

"Q. Or tell him not to do anything? A. I told him that this is going pretty far, isn't it? And he said, 'Never mind.'

"Q. Was that before or after you tied up these boys' hands? A. It was while I was tying them up."

Lindstrom further testified that they all remained at this secluded spot about forty-five minutes; that they then returned to Miller's house, all being seated in the car in the same positions they had occupied before. Appellant and Miller remained at the latter's house while Joe and Criter went to procure a physician to attend Miller's wounded foot. When Joe and Criter returned appellant drove Joe to Los Angeles, where appellant borrowed $50 from a friend and paid it over to Joe, thus satisfying the account of that strenuous bill collector.

On cross-examination appellant testified that he and Joe left the hotel in Los Angeles for Compton at about 8:30; that they drove directly to Compton, without stop, a distance, so Lindstrom said, of eighteen or twenty miles. The witness gave the course over which the trip was taken. The arrival at Compton was at about 11 or 11:30. Appellant had never seen Joe before that night, and became acquainted with him only that morning by telephone call from Joe. The witness said that soon after Miller ordered the alcohol from him he received a call from Joe, who said he had heard that appellant was sometimes in need of alcohol and that he had some to sell. Appellant then arranged to meet Joe in front of the Los Angeles hotel, Joe giving a description of himself for purposes of identification at the proposed meeting place. "Q. I believe you stated that you were standing in the front of Joe when he fired the gun. Wasn't that your testimony on direct examination? A. Well, I was—there was three or four men standing there, and I would be, natuarally, in front of him. * * * They were all in front of him, practically. Q. The three of you were lined up there, is that it? A. Practically so, yes."

After appellant left the stand a witness for the people testified that the distance from the hotel in Los Angeles to Compton, over the route traveled by appellant and Joe, is fourteen miles. Appellant took the stand again and, despite his previous testimony to the effect that the ride taken by him and Joe to Compton was continuous, swore that they stopped at Huntington Park for sandwiches.

We think there was enough testimony of appellant's guilt, furnished by himself, to give rise to a conflict in the evidence. There was nothing in the conduct of Joe, as exhibited toward himself and shown without conflict, which gave appellant reasonable cause to believe that his life was in danger because of the bluster of Joe. In other words, from appellant's testimony the jury was justified in finding that Joe's belligerent attitude was adopted only in an attempt to ascertain whether Miller, and perhaps Criter, had purloined the missing alcohol. We think this remark is justified by the general trend of appellant's testimony. In particular, however, the jury must have regarded with suspicion the testimony of appellant to the effect that on the drive to Compton he and Joe stopped at Huntington Park to eat, after he had very positively stated that no stops were made on the way. He could not have failed to remember, when he first spoke on the subject, whether they had stopped or not. Also, not only does the record of appellant's testimony fail to show any spirited remonstrance directed by appellant against Joe's conduct at any time, but there was an entire absence of showing as to what occurred between the two during the excessively long time spent on the ride to Compton, whether they stopped for sandwiches or not.

Judgment and order affirmed.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

128 Cal.App. 70

McINTOSH et al. v. FUNGE.

SMITH LUMBER CO. OF SAN FRANCISCO v. FUNGE et al.

MASSAGLI et al. v. SAME.

Civ. 8574.

District Court of Appeal, First District, Division 1, California.

Dec. 6, 1932.

Contribution ⇐4.

Where contractor was awarded damages for owner's breach of contract and subcontractors procured decree providing for deficiency judgment against contractor if owner's lot was insufficient to satisfy liens, owner was not entitled to contribution from contractor upon payment of subcontractors (Code Civ. Proc. §§ 709, 1193).

Appeals from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Separate actions by William McIntosh and D. McIntosh, copartners, against Katherine C. Funge, as executrix of the estate of W. W. Funge, Jr., deceased, substituted as defendant in the place and stead of W. W. Funge, Jr., deceased, wherein the defendant filed a cross-complaint; by the Smith Lumber Company of San Francisco, and by Eugenia Massagli and Albert Massagli, against Katherine C. Funge, as such executrix and substituted defendant, and others, which were consolidated for trial. From an order denying motion of Katherine C. Funge, as executrix and substituted defendant, to offset judgment and issue execution, such defendant appeals.

Affirmed.

W. W. Funge, Jr., of San Francisco (Leo A. Cunningham, of San Francisco, E. V. Knauf, of Los Angeles, of counsel), for appellant.

Hartley F. Peart and Sylvester J. McAtee, both of San Francisco, for respondents McIntosh Bros.

KNIGHT, J.

This appeal was taken by the defendant W. W. Funge, Jr., now deceased, from an order denying his motion to offset judgment and issue execution for an amount claimed to be due as repayment and contribution. Section 709, Code Civ. Proc.

The controversy arises out of the following facts: Appellant entered into a contract with the respondents McIntosh Bros. for the construction of a building on appellant's lot, and after the work had progressed to a certain stage differences arose between appellant and the contractors, as a result of which appellant refused to allow the contractors to proceed further with the construction of the building; whereupon the contractors filed an action for damages against appellant for alleged breach of contract. In the meantime two subcontractors, Smith Lumber Company and G. Massagli & Co., filed liens against the property for materials furnished and work performed, and later brought actions to foreclose said liens. Besides answering the complaint of McIntosh Bros., appellant filed a cross-complaint against them for damages for alleged breach of the building contract. The three actions were consolidated for trial, and the determinative issue presented and tried in the main action, between the contractors and the owner, was whether the building contract was breached by the contractors, or by appellant. The trial court found that it had been breached by appellant and rendered judgment accordingly, awarding McIntosh Bros. damages and directing foreclosure sale of appellant's property to satisfy the liens of the subcontractors. Appellant took an appeal, but the Supreme Court affirmed the judgment (McIntosh v. Funge, 210 Cal. 592, 292 P. 960, 74 A. L. R. 420), holding that the trial court's finding on the determinative issue above mentioned was sustained by the evidence. Thereafter appellant paid and discharged the liens, and after having done so obtained from the trial court under the authority of said section 709 of the Code of Civil Procedure an ex parte order directing the clerk to enter upon the docket appellant's claim against the McIntosh Bros. for contribution and repayment, and to issue execution therefor. Later, on the same day, the trial court nullified said order, presumably upon the ground that the parties against whom it operated were entitled to notice of motion. Clark v. Austin, 96 Cal. 283, 31 P. 293. Subsequently, upon due notice, the motion was renewed, and after a hearing was denied. The present appeal involves the question of the validity of the adverse order made in that behalf.

The provisions of the judgment rendered by the trial court and affirmed by the Supreme Court, necessary to be considered here, decreed: First, that McIntosh Bros. recover damages against appellant in the sum of $877 with interest and costs; second, that appellant take nothing by his cross-complaint; third, that Smith Lumber Company have judgment against McIntosh Bros. for $731.20 and a lien on appellant's property for the sum of $674; fourth, that G. Massagli & Co. have judgment against McIntosh Bros. for $476.80 and a lien against appellant's property for that amount. The decree then followed the usual form of a foreclosure decree, directing foreclosure sale of the property covered by

said liens, and that out of the proceeds received from the sale the amount of said liens, costs, etc., be paid, and that the surplus, if any, be paid to appellant; that in the event the proceeds from the sale were not sufficient to pay the liens in full then the net proceeds derived therefrom be prorated between the two lienors and a deficiency judgment docketed against McIntosh Bros. for the balance due; and that the lienors have execution against McIntosh Bros. for the amount of said deficiency.

Section 709 of the Code of Civil Procedure, upon which appellant mainly relies in support of his motion, provides: "When property, liable to an execution against several persons, is sold thereon, and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of the property of one of them, or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several, and is upon an obligation of one of them, as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal. In such case the person so paying or contributing is entitled to the benefit of the judgment, to enforce contribution or repayment, if, within ten days after his payment, he file with the clerk of the court where the judgment was rendered, notice of his payment and claim to contribution or repayment. Upon a filing of such notice, the clerk must make an entry thereof in the margin of the docket." In interpreting the purpose of said section it has been held that the same was enacted for the benefit of sureties and joint debtors in order to enable them, without bringing an action, to use the judgment and the writs of the court for the purpose of compelling, in case of sureties, the repayment from their principal, or contribution from cosureties, and, in the case of judgment debtors, contribution from their codebtors (Williams v. Riehl, 127 Cal. 365, 59 P. 762, 78 Am. St. Rep. 60); moreover, that said section does not change the substantive law (Dow v. Sunset Tel. & Tel. Co., 162 Cal. 136, 121 P. 379; Forsythe v. Los Angeles Ry. Co., 149 Cal. 569, 87 P. 24; San Joaquin Valley Bank v. Gate City Oil Co., 36 Cal. App. 791, 173 P. 781; but simply provides a convenient method of enforcing contribution by a judgment debtor who has paid a judgment, as against a codefendant or codefendants liable for a proportion of the debt. Dow v. Sunset Tel. & Tel. Co., supra.

In the present case the terms of the judgment and the findings upon which the judgment is based clearly show that the legal relationship of joint debtors or principal and surety never existed between McIntosh Bros. and appellant, and was never intended to be created thereby; and it follows that appellant was not entitled to repayment or contribution. On the contrary, as declared by the judgment rendered by the trial court and the decision of the Supreme Court affirming said judgment, it was appellant's breach of the building contract that gave rise to the entire controversy; and the findings expressly declare that the amount of damages awarded McIntosh Bros. ($877) as the result of such breach did not include the amounts due said lienors. In other words, the judgment and findings were to the effect that since appellant's property received the full and exclusive benefit of the work done and materials furnished by said lienors, his property was primarily liable for the payment thereof, and that the liability of McIntosh Bros. was secondary only, in the event of a deficiency arising in the sale of appellant's property.

Nor are the provisions of section 1193 of the Code of Civil Procedure available to appellant for the reason that by its terms said section applies to actions brought by contractors to recover upon liens filed by them; and here the action filed by the contractors was one for damages based upon the alleged illegal termination of the contract by the owner.

For the reasons stated we are of the opinion that the trial court's order denying appellant's motion should be affirmed, and it is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

128 Cal.App. 117

MENJOU v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 8665.

District Court of Appeal, Second District, Division 2, California.

Dec. 9, 1932.

I. Mandamus ⊂⇒49.

Accused *held* entitled to writ of mandate requiring clerk to record verdict received by judge, notwithstanding verdict violated court's instructions (Pen. Code, § 1164).

Accused was entitled to writ of mandate requiring recordation of verdict, notwithstanding the trial judge should not have received the verdict, since it was not in any of the forms which he told the jury might be used, in view of Pen. Code, § 1164, providing that, when the verdict given is "such as the court may receive,"

⊂⇒For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

the clerk must immediately record it in full on the minutes. The clause "such as the court may receive" not justifying the clerk's refusal to record the verdict, since the verdict was actually received by the court, and, even if the judge had acted erroneously, he had decided for the court of which the clerk was but a part, that the verdict was such as the court might receive.

2. Criminal law ⇐199.

Where court accepted verdict of not guilty of murder from jury instructed to find accused guilty of second degree murder or manslaughter or generally not guilty, accused was once in jeopardy on manslaughter charge, notwithstanding jury had not agreed on his guilt thereof and judge set trial on issue of manslaughter (Pen. Code, § 1023).

3. Mandamus ⇐154(1).

Petition showing respondent court threatened to try petitioner on manslaughter charge, entitled petitioner to writ of mandate requiring clerk to record received verdict precluding such trial, as against contention that motion to require clerk to record verdict was adequate remedy (Pen. Code, §§ 1023, 1164).

Application by Harold L. Menjou for writ of mandate prayed to be directed to the Superior Court in and for the County of Los Angeles, L. E. Lampton, County Clerk of Los Angeles County and ex-officio Clerk of such court, and E. A. Miller, Deputy County Clerk of Los Angeles County and ex-officio Deputy Clerk of such court, to require recording of a certain verdict, and discharge of petitioner.

Writ granted.

A. L. Abrahams, Frank H. Love, and Claude Morton, all of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondents.

WORKS, P. J.

Petitioner was tried upon a charge of the commission of crime under an information in two counts. The nature of the first count need not be stated, as nothing connected with it is material to the present controversy. The second count charged murder. Under this count petitioner could have been convicted, upon evidence satisfactory to the jury and under the theory of the prosecution, either of murder in the second degree or of manslaughter, or upon a failure of evidence satisfying the jury of his guilt of either crime he could have been acquitted. The jury was so instructed by respondent court and three forms of verdict, drawn in accordance with the instruction, were handed to the trial body upon its retirement for a consideration of the cause. Despite the very plain course thus outlined to its members, the jury used neither of the forms submitted to it but prepared a verdict of its own. This verdict read: "We, the jury in the above-entitled action, find the defendant not guilty of murder, a felony, as charged in count two of the information." The jury brought this verdict into open court and the foreman was asked by the trial judge whether the jury had agreed upon a verdict as to the second count. The foreman answered, "That is what we are uncertain about." This reply precipitated a lengthy colloquy, in which the judge, counsel on both sides, the foreman, and one other juror participated. From the colloquy it developed that the jury had agreed, as stated in the verdict, that petitioner was not guilty of murder. Its members then proceeded to discuss and vote upon the question whether he was guilty or innocent of the crime of manslaughter, with the result that, upon returning to the courtroom, they stood on that question eight for acquittal and four for conviction. Upon statement that an agreement upon the mooted question was not likely, the trial judge set the cause for trial upon a particular date, the sole issue to be tried being whether petitioner is guilty of manslaughter. The verdict finding him not guilty of murder was filed by the clerk but was not recorded, and the jury was discharged.

This proceeding was instituted for the purpose of procuring an order commanding respondent clerk to record the verdict and requiring respondent court to order the discharge of petitioner.

[1] We are thus confronted with a question as to which counsel agree there exists no exact precedent, and we shall be compelled to unravel the tangled skein mainly by an inspection of the statutes, together with a consideration of such decided cases as may cast any ray of light upon the subject.

It is provided by section 1164 of the Penal Code: "When the verdict given is such as the court may receive, the clerk must immediately record it in full upon the minutes, read it to the jury, and inquire of them whether it is their verdict. * * *" The portion of this section that at once impresses itself upon the mind is that which precedes the first comma, but we think a little reflection will convince that the clause "such as the court may receive" does not stand in the way of the relief which petitioner prays. Unquestionably the trial judge should not have received the verdict, as it was presented in disobedience of his instructions, not being in any of the forms which alone he told the jury might be used. Under his instructions the only "not guilty" verdict which could

properly have been returned was a general verdict of not guilty. This the judge seemed in part to realize, for during the colloquy to which we have referred he said to the jury that "whether or not you have agreed that the defendant did not commit second degree murder, you haven't as yet apparently agreed upon what you are going to do with that second count. It doesn't matter why you haven't agreed; the fact is that you have not come to a common agreement, and therefore there should not be any form of verdict signed upon that second count at all; you are simply disagreed as to that." The judge made other remarks to the same general effect. But he did finally receive the verdict, and not only so, but he also gave effect to it, although, as will hereafter appear, the effect was but partial. He said, on this head, after referring to the first count of the information: "The other matter will have to be threshed out again. That is, purely as a manslaughter charge. I take it that the verdict of the jury and the statements made must be regarded as an acquittal of the defendant on the charge of murder, still leaving the question of whether he was guilty of manslaughter to be determined. The jury will be discharged from further consideration of the case, with the thanks of the court. When do you want to try the case again? We had better fix the date now." The judge, after a discussion as to dates, then set the cause down for trial, and, as he said, "solely upon the question of the guilt or innocence of the defendant as to the crime of manslaughter."

Returning to section 1164 of the Penal Code, we think the clause "such as the court may receive" falls to the ground if invoked as a justification of the clerk in his refusal to record the verdict. The verdict was actually received by the court, and, so far as the clause in question is concerned, the duty of the clerk under the section became fixed. Even if the judge had acted erroneously, he had decided for the court, of which the clerk is but a part, that the verdict was such as the court might receive.

[2] This disposition having been made of the clause in section 1164, we must next inquire how the recording of the verdict will affect the rights of petitioner; for, if the act will not operate beneficially in his favor, he is not entitled to the writ he seeks. Section 1023 of the Penal Code reads: "When the defendant is convicted or acquitted, or has been once placed in jeopardy upon an indictment or information, the conviction, acquittal, or jeopardy is a bar to another indictment or information for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment or information." Is this plain language affected by the fact that the trial judge received the verdict when he should not have received it? Can it be said, because of this action of the judge, that petitioner has not been in jeopardy of the charge of manslaughter, a charge necessarily included in the charge of murder, of which latter charge the verdict received expressly declares him not guilty?

The following statement of the rule that one charged with crime may not twice be put in jeopardy is to be found in an early case: "We are * * * of opinion that under our Constitution, which protects a party from a second jeopardy of life, limb, liberty or property, for the same public offense, whatever its grade, a person once placed upon his trial before a competent Court and jury, charged with his case upon a valid indictment, is in jeopardy, in the sense of the Constitution, unless such jury be discharged without rendering a verdict. from a legal necessity, or for cause beyond the control of the Court, such as death, sickness or insanity of some one of the jury, the prisoner or the Court, or by consent of the prisoner; and if such jury render a verdict or be discharged before a verdict, without such legal necessity, controlling cause or consent, the prisoner is forever protected from a re-trial upon the same or any other indictment for the same offense, unless, at his instance, the verdict be set aside or judgment be reversed. * * *" People v. Webb, 38 Cal. 467. This language, in substance, has been employed in later opinions. People v. Hunckeler, 48 Cal. 331; People v. Smalling, 94 Cal. 112, 29 P. 421; People v. Ammerman, 118 Cal. 23, 50 P. 15; People v. Young, 100 Cal. App. 18, 279 P. 824.

Leaving this general statement of the law concerning second jeopardy, let us now come nearer to the specific question under the glass, that is, does respondent court's improper reception of the verdict deprive petitioner of the claim that he has been once in jeopardy of the charge of manslaughter? In a concurring opinion in People v. Webb, supra, Justice Sawyer quoted the following from Bishop: "If, through misdirection of the Judge in matter of law, or mistake of the jury or their refusal to obey the instruction of the Court, or any other like cause, a verdict of acquittal is improperly rendered, it can never afterward, on application of the prosecutor in any form of proceeding, be set aside and a new trial granted." This paragraph, which contains a proper summary of a portion of the opinion in Ex parte Hartman, 44 Cal. 32, is to be found in the syllabus preceding the case: "The trial of a party for a crime, under a sufficient indictment, and by a jury duly impaneled, sworn, and charged with the case, nothing having been done upon his part which amounts to a voluntary waiver of his rights, is a complete defense as against any future indictment for

the same offense, even if the judgment was arrested by the Court." In People v. Horn, 70 Cal. 17, 11 P. 470, the Supreme Court approved a part of the language of Bishop which was quoted by Justice Sawyer in his concurring opinion in People v. Webb, supra. People v. Roberts, 114 Cal. 67, 45 P. 1016, is to the effect that an erroneous acquittal furnishes a basis for the plea of once in jeopardy, and the same is to be said of People v. Terrill, 132 Cal. 497, 64 P. 894. Further citation of authority on the point would be superfluous. We conclude that petitioner has been once in jeopardy of the charge of manslaughter. Respondent court is therefore without jurisdiction to try him again. In re Harron, 191 Cal. 457, 217 P. 728; In re O'Connor, 80 Cal. App. 647, 252 P. 730.

[3] Respondent makes the point that petitioner has an adequate remedy in respondent court by way of motion to require the clerk to record the verdict and cannot therefore have the writ of mandate. There are several allegations in the petition for the writ which, taken together, show a threat upon the part of respondent court to try petitioner upon a charge of manslaughter and thus to exercise a jurisdiction which it does not possess. The point is not well taken.

A peremptory writ of mandate will issue as prayed.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

[illegible] Cal.App. 138

FIRST NAT. BANK OF TUSTIN v. LANDRETH.

Civ. 646.

District Court of Appeal, Fourth District, California.

Dec. 9, 1932.

Rehearing Denied Dec. 23, 1932.

Hearing Denied by Supreme Court Feb. 6, 1933.

1. Pledges ⇐41.

In action on pledged notes where rights of pledgor were not involved, defense of lack of notice of sale of pledged notes was not open to maker (Civ. Code, §§ 3002–3005).

2. Pledges ⇐41.

Maker of pledged note cannot take advantage of statute prohibiting sale thereof by pledgee which was passed solely for pledgor's benefit (Civ. Code, § 3006).

3. Pledges ⇐56(4).

Constable's auction sale without notice of notes pledged to bank before maturity for value without notice passed good title to purchaser bank where pledgor had waived notice (Civ. Code, § 3003).

4. Bills and notes ⇐357.

Where notes had been pledged to bank before maturity for value without notice, maker is liable to bank, irrespective of validity of sale of pledged notes and purchase by bank.

5. Bills and notes ⇐362.

Bank which purchased pledged notes at its own sale after maturity took free from all defenses where notes had been pledged to it for value before maturity without notice (Civ. Code, § 3139).

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by the First National Bank of Tustin against Clayton H. Landreth, doing business as the Capistrano Rock & Sand Company. From judgment for plaintiff, defendant appeals.

Affirmed.

Charles D. Swanner, of Santa Ana, for appellant.

Head, Wellington & Jacobs, of Santa Ana, for respondent.

AMES, Justice pro tem.

This is an action based upon two negotiable promissory notes. The first cause of action alleges the execution of a promissory note on the 20th day of October, 1929, by defendant to one William W. Ross in the sum of $1,065.84, payable six months after date. It is then alleged that subsequently thereto said promissory note was duly assigned and delivered to the plaintiff, and that plaintiff is now the owner and holder thereof, and that the said note is due and unpaid. The second cause of action, which was filed as an amendment to the complaint by and with the consent of defendant after the case was at issue, counts upon another promissory note executed by appellant in the sum of $4,072, bearing the same date as that borne by the promissory note in the first cause of action, made payable to the same payee and due at the same time. It is then alleged that subsequently thereto on April 21, 1930, said promissory note was duly assigned to plaintiff, and that plaintiff was the owner and holder thereof, and that the same was due and remained unpaid.

In his answer the defendant admits the execution and delivery of the promissory notes sued on to Ross; denies that the notes have not been paid and that the plaintiff is the owner and holder of the notes. Defendant pleads affirmatively that the two notes sued on, together with other promissory notes and securities, were pledged to plaintiff by Wil-

liam W. Ross as security for the payment of a promissory note executed by Ross to the plaintiff, and that subsequent to the maturity of the notes plaintiff purchased the same at a sale thereof as pledged property of Ross. The answer further alleges that on the 4th day of April, 1930, prior to the maturity of the notes, and while they were held by plaintiff as pledgee, by an instrument in writing, Ross, the payee named therein, canceled the same, and that the consideration for said notes, consisting of certain motor trucks, was returned to Ross; and that at the time plaintiff acquired title to the notes there was nothing due or owing from defendant to Ross, and that the consideration for said notes had failed.

The court found in favor of the plaintiff, and further found that the promissory notes sued on, together with other promissory notes and securities, were pledged to the plaintiff on or about the 18th day of March, 1930, prior to the date of their maturity, that plaintiff had received the promissory notes as collateral security without notice of any rights and equities between Ross and the defendant, and that they were sold and delivered to plaintiff on the 21st day of April, 1930, under and in accordance with the terms, powers, and authorities set forth in the collateral agreements under which Ross had delivered the notes to plaintiff, and that at that time Ross was indebted to plaintiff in the sum of approximately $21,159.76, including the notes sued on and other items of indebtedness. Judgment in favor of plaintiff was entered in accordance with the findings of fact.

At the trial the president of the plaintiff bank testified that the plaintiff held a note of Ross in the sum of $10,000, which was a renewal of a former note; that on the 18th day of March, 1930, Ross executed to the plaintiff a written agreement in which he pledged to the plaintiff the two notes sued on, together with other promissory notes and certain shares of corporate stock as security for the payment of such notes. The pledge agreement contained the following provisions: "* * * The undersigned on default in payment of this note at maturity hereby authorize and empower said bank, its successors or assigns, to sell, in whole or in part, without any previous demand on or notice to the undersigned, through brokers' board or at public or private sale, with the rights to said bank, its successors or assigns to become purchaser at any such sale of the whole or any part of such collaterals."

Plaintiff also introduced in evidence a so-called "General Pledge Agreement" executed by Ross to plaintiff on the 19th day of July, 1929, which provided, among other things, for the future delivery by Ross, as pledgor, to plaintiff, as pledgee, of personal property as security for indebtedness then existing or which might be thereafter created. This agreement expressly vested in plaintiff, as pledgee, the power of sale of all such security, including negotiable instruments, and authorized plaintiff to sell the same without notice and at either public or private sale.

It further appears from the evidence that on the 21st day of April, 1930, the constable of the township where plaintiff bank was located conducted an auction sale, at his office, of the notes sued on and the other promissory notes and securities which Ross had pledged to the plaintiff. At the time of the sale Ross was indebted to plaintiff in the sum in excess of $21,000, including the $10,000 note and other items. No notice had been given of the time or place of such sale, defendant had not been notified thereof, and at the sale the notes sued on, together with five other promissory notes, were bid in by and sold to the plaintiff for the sum of $1,000, and certain corporate stock which plaintiff held as pledgee to secure the payment of the notes was sold separately to plaintiff at the same time, for $10,000, which amounts were credited on Ross' account with plaintiff.

Appellant first contends that the sale was void as a pledgee's sale because the same was not given pursuant to notice to the public, and that the provisions of the statute with reference to sales of that character were not complied with. The provisions of the Civil Code with respect to notice of such sale are contained in sections 3002 and 3005, which are respectively as follows:

"§ 3002. A pledgee must give actual notice to the pledgor of the time and place at which the property pledged will be sold, at such a reasonable time before the sale as will enable the pledgor to attend."

"§ 3005. The sale by pledgee, of property pledged, must be made by public auction, in the manner and upon the notice of sale of personal property under execution."

None of the foregoing provisions of the Code was complied with in this action. However, the Code itself, in section 3004, provides that a demand of performance may be waived by the pledgor by contract, and it is expressly provided by section 3003 that notice of sale may be waived by the pledgor at any time.

[1] In the case of Williams v. Hahn, 113 Cal. 475, 45 P. 815, 816, a quantity of wine was pledged to secure the payment of a note to the payee. The language of the agreement, under which the wine was pledged, was similar to that contained in the agreement in the instant case, and provided, as follows: "I hereby waive demand of payment of said note, and irrevocably authorize and empower said W. B. Bourn, or his assigns, to sell and dispose of the above-described property, or any part thereof, at public or private sale, with or without notice to me of any such

sale. * * *" Upon the maturity of the note, the wine was sold without notice, but the court held that such notice to the pledgor had been expressly waived, and authorized a private sale by the provisions of the agreement itself. "The sale by the plaintiff," says the court, "under the authority given by the defendant in the note itself has the same effect as though it had been made under the provisions of the Civil Code." The same rule is announced in Williams v. Parker, 30 Cal. App. 71, 157 P. 550, and Williams v. Youtz, 178 Cal. 107, 172 P. 383.

Appellant relies upon the case of Lowe v. Ozmun, 3 Cal. App. 387, 86 P. 729, which was an action brought by the pledgor for conversion of certain corporate stock which had been pledged by defendant's testator to secure the performance of an obligation under an agreement authorizing the pledgee to sell the same at public or private sale without advertising, demanding payment, or giving notice of such sale, and authorizing the pledgee to become the purchaser. In that case the Court of Appeal affirmed a judgment in favor of plaintiff upon the ground that the private sale authorized by the contract should have been conducted in the manner usually and ordinarily followed in relation to private sales of property, and that the sale as it had been conducted constituted a mere taking over of the property without any agreement with another competent to contract. That was an action brought by the pledgor for the unlawful conversion of his property. In this case the rights of Ross, the pledgor, are not involved, and this defense which might have been available to Ross cannot be invoked by defendant.

[2] Appellant further contends that the sale of the notes sued on was void for the further reason that a pledgee cannot sell any evidence of debt pledged to him except the obligations of government, states, or corporations, as provided by section 3006 of the Civil Code. This contention is answered by the decision in the case of Woolf v. Clarke, 17 Cal. App. 696, 121 P. 407. That case holds that that section of the Civil Code was enacted for the benefit of the pledgor; that a sale of a promissory note as to him is unauthorized; but, says the court: "The maker of the note not being shown to be in any way prejudiced by the transfer and sale of the note cannot be heard to complain." In that case, as in this, the pledgee received the note in due course before maturity for value and without notice of any infirmities, actual or constructive, or any equities that may have existed between the pledgor and the pledgee.

Appellant contends that the case of Woolf v. Clarke, supra, was reversed in the case of Evans v. Robert Marsh & Co., Inc., 116 Cal. App. 441, 2 P.(2d) 882. That case merely holds that, where the maker of a negotiable promissory note has a defense not available as a bar to a recovery by the pledgee, but good as against the pledgor, the pledgee will be allowed to recover only to the extent of the debt for which the collateral is held as security. But the extent of the debt for which the collateral was held as security in this case was in excess of $21,000, and plaintiff is therefore not barred from a recovery of the entire sum due on defendant's notes.

[3] We think that the auction sale by the constable without notice was sufficient to transfer the title of the notes to the plaintiff and to support the finding of the trial court that the notes were sold and delivered by plaintiff to itself on the 21st day of April, 1930.

[4] But, assuming that the sale was for any reason advanced by appellant invalid, still the plaintiff is not prejudiced by such void sale. If it did not acquire title to the notes by virtue of the auction sale of April 21, 1930, it still held the title to the notes as a holder in due course. It has been held that, where a note is taken as collateral security for a pre-existing debt owing to the pledgee by the indorser on the note so hypothecated, without notice of any infirmities in the note or any defenses thereto, the indorsee is the holder for value in the usual course of business (Williams v. Walker, 66 Cal. App. 672, 226 P. 939; Evans v. Robert Marsh & Co., Inc., supra), and it is immaterial in this case whether plaintiff acquired its title to the notes as purchaser at a pledgee's sale, or whether it was a holder in due course and before maturity.

[5] Nor is the fact that it acquired title as a purchaser at the pledgee's sale after the maturity of the note of any value to appellant. If it acquired title from itself as such pledgee, and as such pledgee was a holder in due course before maturity, it acquired the notes free from any defenses which would have been available in an action brought by the payee. Civ. Code, § 3139.

The judgment appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

128 Cal.App. 166

CALLAWAY v. NOVOTNY.

Civ. 926.

District Court of Appeal, Fourth District, California.

Dec. 12, 1932.

Rehearing Denied Jan. 11, 1933.

Hearing Denied by Supreme Court Feb. 9, 1933.

1. Mortgages ⇐300.

Tender of check, indorsed "interest in full to Apr. 22, 1928, on all notes and mortgages," as payment of interest on mortgage notes left with bank for collection, *held* not to obviate default in interest payments, since indorsement imposed condition which debtor had no right to demand (Civ. Code, § 1494).

2. Pleading ⇐428(3).

Excluding evidence supporting counterclaim *held* proper, notwithstanding failure to demur thereto, where practically every allegation in counterclaim was pure legal conclusion unsupported by averments of fact.

3. Costs ⇐206.

Appellant's motion to strike from respondent's cost bill item for service of process on himself and other defendants *held* not supported by affidavit that other defendants, who filed disclaimers or defaulted, were not necessary or proper parties.

Allegation that defendants other than appellant, who were served with process and defaulted, were not necessary or proper parties, was allegation of purely legal conclusion, and that other defendants filed disclaimers after the trial had commenced and after they had joined with appellant in filing answer did not show that they were not proper parties, and allegation in affidavit that appellant had voluntarily appeared in the actions and had demanded that copies of all papers be given to his attorney indicated that service of process upon appellant was in fact demanded by him.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Five separate actions by H. E. Callaway, as administrator of the estate of W. J. Callaway, deceased, against C. J. Novotny, wherein defendant filed cross-complaints and counterclaims, which actions were consolidated for trial purposes. Judgment for plaintiff, and defendant appeals.

Affirmed.

C. J. Novotny, of San Diego, in pro. per.

Liggett & Liggett, of San Diego, for respondent.

JENNINGS, J.

Plaintiff instituted five separate actions to foreclose five different mortgages on real property executed by defendant to secure payment of a like number of promissory notes each of which was for the principal sum of $2,250. On plaintiff's motion the five suits were consolidated for trial purposes, and at the conclusion of the trial a single decree was rendered ordering the sale of the various parcels for the purpose of satisfying the indebtedness found to be due from defendant to plaintiff on the aforesaid notes. On this appeal from the judgment thus rendered, defendant presents three contentions which will herein receive consideration.

[1] Appellant's first contention is that the court's finding that each of the notes had become due by reason of nonpayment of interest was not supported by the evidence produced at the trial, and that the court's conclusion of the law that, at the time the actions were commenced, appellant was in default by reason of his failure to pay the last installment of interest was therefore erroneous. The record shows that each note provided for quarterly payment of interest, and further provided that, if the interest were not paid when due, the whole sum of principal and interest should become immediately due and payable at the option of the holder. The notes were left by respondent for collection at a certain bank in the city of San Diego, and prior to April 22, 1928, payment of various interest installments had been made quarterly by appellant at said bank. On April 22, 1928, quarterly interest on the notes amounting to the sum of $196.87 became due. On April 21 appellant drew his check for said sum payable to respondent and caused it to be taken to the collecting bank for the purpose of paying the interest which would become due on the following day. The bank declined to accept the check. Two days later another check for a like amount drawn to the order of respondent was offered to the bank, and acceptance was again refused. Each of said checks bore the following indorsement: "Interest in full to Apr. 22, 1928, on all notes and mortgages." The evidence shows that the appearance of this indorsement was one of the reasons stated by the officers of the bank for refusing to accept the checks. This reason alone was amply sufficient. For all that appeared, any number of notes and mortgages executed by appellant in respondent's favor, in addition to the five in the bank's possession, may have been in existence and interest due thereon. As a matter of fact, the testimony of appellant showed that there was a sixth note with its accompanying mortgage and that procedure to foreclose this sixth mortgage had been instituted. The bank would not have been justified in accepting a check bearing so broad an indorsement. The presence of the indorsement amounted to the imposition of a condition which the debtor had no right to demand. Cassriel v. McIn-

tyre, 46 Cal. App. 644, 189 P. 801; Civ. Code, § 1494.

[2] Appellant's second contention is that the court erred in refusing to receive certain evidence in support of his counterclaims and cross-complaints. In his answer filed in each of the five actions, appellant alleged an affirmative defense in the following language: "Further answering said complaint and by way of cross-complaint and counterclaim he alleges on information and belief that the plaintiff at the time of the execution of said note falsely, fraudulently, and with intent to deceive defendant, misrepresented the amount for which said note should have been made and falsely deceived defendant and induced him to execute said note for an amount greater than it should have been; that plaintiff ever since the giving of said mortgage has attempted to cheat and defraud defendant out of the property described in said mortgage and is now trying to do so; that plaintiff has by threats and false representations induced and compelled defendant's tenants to vacate defendant's properties covered by mortgages held by plaintiff; that plaintiff knowing that defendant was ill and compelled to go to a sanitarium, attempted to illegally and fraudulently cheat and defraud defendant out of his said properties while defendant was unable to attend to business and commenced this action to foreclose said mortgage without any right to do so, all to the damage of this defendant in the sum of $10,000.00."

The evidence which was offered by appellant in support of his counterclaim consisted of the testimony of three witnesses who were former tenants of appellant in three of the houses owned by appellant which were mortgaged by him to respondent. Appellant offered to prove by this testimony that each of these tenants had been called upon by respondent on a number of occasions; that respondent had abused appellant and had stated that appellant did not own the property but that it was respondent's property, and that, if the tenants desired to remain, they must pay the rent to respondent; that this conduct on respondent's part caused much annoyance to the tenants, and as a result of such conduct and of respondent's institution of the foreclosure suits these tenants left the premises which they had formerly occupied. To the offer thus made, respondent objected. The objection was properly sustained. The so-called counterclaim or cross-complaint was wholly insufficient to raise a defense. Practically every allegation contained in it is a statement purely of legal conclusion, unsupported by any averment of fact. It was clearly demurrable, but respondent was not required so to attack it. He was entitled to rest until appellant should attempt to introduce evidence in its support and then to object to the reception of the evidence. Metropolis, etc., Sav. Bank v. Monnier, 169 Cal. 592, 147 P. 265; Bandy v. Westover, 200 Cal. 222, 252 P. 593. In arriving at this conclusion, we have given no consideration to the question of whether, in an action to foreclose a mortgage, a counterclaim or cross-complaint of the character here attempted to be pleaded may properly be filed.

[3] Appellant's final contention is that the court erred in denying his motion to strike from respondent's cost bill an item of $25.50 for the service of process on himself and a number of other defendants in the various suits. Appellant's motion was supported by his own affidavit alone. This affidavit alleged that appellant was the only defendant in the actions who presented a defense thereto and the only proper or necessary defendant therein and the only defendant who did not default or disclaim; that the defendants who defaulted had no right, title, interest, or claim in the mortgaged premises; that appellant voluntarily appeared in all of said actions and demanded that copies of all papers be given to his attorney. It is at once evident that the affidavit is insufficient. The allegation that the defendants other than appellant who were served with process and defaulted were not necessary or proper parties is an allegation of a purely legal conclusion. With reference to disclaiming defendants, examination of the record shows that certain defendants in one of the actions were served with process and joined with appellant in filing an answer therein, and that, after the actions had proceeded to trial, these defendants filed disclaimers. The filing of such disclaimers after the trial had commenced did not show that these defendants were not proper parties, and the allegation of the affidavit that appellant was the only necessary or proper defendant in the actions is the statement of a purely legal conclusion. The fact alleged in the affidavit that appellant had voluntarily appeared in the actions and had demanded that copies of all papers be given to his attorney indicates that service of process upon appellant was in fact demanded by him. It is apparent that there was no abuse of discretion by the trial court in its determination of the various items allowed for costs. Puppo v. Larosa, 194 Cal. 721, 230 P. 440; Murphy v. F. D. Cornell Co., 110 Cal. App. 452, 294 P. 490.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

128 Cal.App. 226

PEOPLE v. BURNS.

Cr. 71.

District Court of Appeal, Fourth District, California.

Dec. 15, 1932.

1. Criminal law ⇐576(2).

Existence of good cause for failing to bring accused to trial within 60 days after indictment found is matter resting largely in trial court's discretion (Pen. Code, § 1382).

2. Criminal law ⇐576(1).

Statutory provision for bringing imprisoned accused before court *held* for convenience of court and not for benefit of prisoners (Pen. Code, § 1567).

3. Criminal law ⇐576(4).

In prosecution for grand theft, determination that good cause existed for delay in bringing accused to trial after indictment found *held* not abuse of discretion (Pen. Code, § 1382).

Indictment for grand theft was found on November 25, 1931. At that time the accused was confined in the county jail of another county, and continued to be confined therein until January 7, 1932, at which time he was placed in the psychopathic ward of county hospital and from there transferred to a state hospital. The accused was confined in the state hospital continuously until April 11, 1932, when he was returned to the county hospital and there remained until April 22, 1932, at which time he was released on bail. It further appeared that accused was not brought to the county in which the indictment was found and arraignment had until June 3, 1932.

4. False pretenses ⇐49(1).

In prosecution for grand theft based on obtaining of stock and cash in return for worthless stock through false representations, evidence *held* to support conviction.

5. False pretenses ⇐42.

In prosecution for grand theft, admitting in evidence permit to sell worthless stock *held* not error.

Permit to sell alleged worthless stock at certain price per share was properly admitted in evidence as material on question of value and as showing intent on the part of the defendant.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Carl F. Burns was convicted of grand theft, and he appeals.

Judgment and order denying motion for a new trial affirmed.

Head, Wellington & Jacobs, of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

BARNARD, P. J.

The defendant was accused of the crime of grand theft in separate counts of an indictment. In the first count it was charged that on or about December 21, 1928, the defendant took from Pauline Weide thirty-five shares of stock in the Southern California Edison Company of the value of $1,019.38, and $273.96 in cash. In a second count it was charged that on or about November 30, 1928, the defendant took from Henry Weide and Justine Weide one hundred and thirty shares of stock in this same corporation, of the value of $3,510. A trial by jury resulted in his conviction, and from the ensuing judgment and from an order denying a motion for a new trial, the defendant has appealed.

[1-3] It is first contended that the court erred in denying a motion to dismiss the indictment, made under section 1382 of the Penal Code, on the ground that the appellant was not brought to trial within sixty days after indictment found. On the hearing of this motion it was stipulated: That Burns was indicted by the grand jury of Orange county on November 25, 1931, at which time a bench warrant was issued by the superior court of that county; that on that date he was confined in the county jail in Los Angeles county upon a charge of assault with a deady weapon with intent to commit murder; that, immediately after it was issued, the bench warrant, together with a hold order, were sent to the authorities of Los Angeles county; that he was confined in the county jail of Los Angeles continuously from the time the bench warrant was issued until January 7, 1932, at which time he was placed in the psychopathic ward of the Los Angeles County General Hospital; that on the following day, January 8, 1932, he was transferred from this psychopathic ward to the Norwalk State Hospital and confined there continuously until April 11, 1932; that on that date he was returned to the Los Angeles County General Hospital; that he remained in custody in Los Angeles until April 22, 1932, at which time he was released on bail; that three days later he appeared in response to the bench warrant above referred to and furnished bond in the sum of $10,000; that on May 10, 1932, he was surrendered to the Los Angeles county authorities by the bondsmen upon the bond furnished in that county; that he was then confined in the Los Angeles jail until May 27, 1932; and that on May 20, 1932, another bench warrant was issued out of the superior court of Orange county and a hold order was placed with the authorities of Los Angeles county. It further appears that the

appellant was brought up for arraignment in Orange county on June 3, 1932, at which time the motion to dismiss was made; that the motion was partially heard on that day and continued by the court to June 10, 1932; that on that day the hearing was completed, the motion denied, and the time for arraignment continued to June 10th, at the request of the appellant; that he was arraigned on June 10th and the case set for trial on July 6th; and that the trial proceeded on July 7, 1932.

The appellant concedes that, during the time from January 7, 1932, to April 11, 1932, good cause existed for not bringing him to trial and that this period may be excluded from consideration. It is contended, however, that the fact that he was confined in the Los Angeles county jail upon another charge is not a sufficient showing of good cause for delay during that portion of the time, since it was possible for the prosecution, under section 1567 of the Penal Code, to secure his presence in Orange county for the purpose of trying him upon the charge here involved and that, for this reason, the court's finding that good cause was shown for the delay is not supported by the evidence.

The general rule applicable here is thus set forth in 8 California Jurisprudence, page 204: "What is good cause for delay, within the meaning of section 1382 of the Penal Code, may be difficult to define with precision, since it must, in a great measure, be determined by reference to the particular circumstances appearing in each case. The matter rests largely in the discretion of the trial court. However, this discretion is not arbitrary, but should proceed upon such knowledge or information as will enable the court to determine for itself whether public justice requires further detention of the prisoner notwithstanding delay on the part of the prosecution."

As illustrating the varying circumstances which have been held sufficient to excuse such a delay, we may cite the following cases: In People v. Brock, 87 Cal. App. 601, 262 P. 309, 263 P. 544, and in People v. O'Connor, 88 Cal. App. 568, 263 P. 866, it was held that good cause had been sufficiently shown where the disqualification of the district attorney had resulted in a loss of time in securing a substitute for him, and where the regular judge was away on assignment by the judicial council. In People v. Farrington, 140 Cal. 656, 74 P. 288, a short delay caused by a mistake in a date through an error made by another was held to be a sufficient showing. In a number of cases a showing that the court was during most of the time engaged in the trial of other cases was held sufficient. Murphy v. Superior Court, 53 Cal. App. 6, 200 P. 483; People v. Vasalo, 120 Cal. 168, 52 P. 305; People v. Benc, 130 Cal. 159, 62 P. 404; People v. Clayton, 89 Cal. App. 405, 264 P. 1105. Unsuccessful efforts on the part of the prosecution to locate the defendant were held a sufficient showing in Ex parte Gere, 64 Cal. App. 418, 221 P. 689. In Re Venable, 86 Cal. App. 585, 261 P. 731, the court stated that it could not be said that the prevalence of an epidemic did not constitute good cause for delaying a trial beyond the sixty-day limit.

While no case involving facts exactly similar to those now before us has been called to our attention, we think the reasoning underlying the cases we have just cited, and a reasonable interpretation of the statute itself, lead to the conclusion that the trial court did not abuse its discretion in holding that good cause for delay was here shown. Excluding the time the appellant was confined in the Norwalk State Hospital no great delay was shown, and during most of the remaining time he was confined in the Los Angeles county jail awaiting trial and during his trial on a serious charge, of which that county had jurisdiction. The provisions of section 1567 of the Penal Code, relied on by the appellant, have been held to be for the convenience of the court and not for the benefit of persons imprisoned. People v. Willard, 92 Cal. 482, 28 P. 585; Willard v. Superior Court, 82 Cal. 456, 22 P. 1120; People v. Meyers & Berger (Cal. App.) 300 P. 880. Whether or not the authorities of Orange county possessed the power to demand that the authorities of Los Angeles county turn the appellant over to them for the purpose of trial on the charge here involved before the charge in Los Angeles county was disposed of, it certainly cannot be held that section 1382 requires that such a power be exercised in any event. While this statute provides for the dismissal of a prosecution when a defendant is not brought to trial within sixty days "unless good cause to the contrary is shown," the statute does not pretend to define what will constitute good cause, and, necessarily, much is left to the discretion of the court. While such discretion must not be abused nor arbitrarily used, nothing in the statute prevents the use of reason and common sense in determining whether or not good cause appears. In our opinion, the question as to whether the authorities of Orange county should have attempted to take this prisoner from other authorities already having him in custody, for the purpose of trying him before such other authorities had exhausted their remedy against him, is, to say the least, one resting in the sound discretion of the trial court. No abuse of that discretion appears from any showing here made.

[4] The next point raised is that the evidence is not sufficient to sustain the judgment of conviction. This case was prosecuted upon the theory that the appellant, by means of false representations, obtained the stock and cash referred to in the indictment, for which he gave nothing in return. It is here argued that there is no evidence of any misrepresentation and no evidence that the appellant at

the time knew that any representations made were false. It appears from the evidence that one Seamans had five hundred shares of stock in the Associated Petroleum Corporation, which purported to be of the par value of $10 per share; that this stock had been sold by Roth & Co. of Los Angeles; that Seamans, believing the appellant had formerly worked for Roth & Co., told him that this stock was not what it had been represented to be, and asked him to go to Los Angeles and tell Roth & Co. that, unless they would take back the stock and pay him $2,000 therefor, he would prosecute them for misrepresentation; that Seamans paid the appellant $25 to go and tell this to Roth & Co.; that the appellant phoned Seamans that night informing him that he had done this and that Roth & Co. would have a man there the next day; that the next morning a man, representing himself to be Roth, and the appellant came to Seamans in Santa Ana and offered him a check for $2,000; that he refused to accept the check, and a little later they returned and paid him $2,000 in $20 bills; and that he then turned over the stock to Roth & Co. While the appellant in one part of his testimony claims to have been acting for Seamans in selling his stock to the complaining witnesses, in another part of his testimony he stated that he himself paid the $2,000 to Seamans and became the owner of the stock. In any event, it appears that about this same time he approached Mr. and Mrs. Weide, an elderly couple, and their daughter who worked in a laundry, with whom he was acquainted, knowing that they were the owners of certain Southern California Edison Company stock. He represented to them that the Associated Petroleum stock was good; that he would buy it himself if he had the money; that it belonged to Seamans, who needed the money, and for that reason had to sell the same; and that, while their Edison stock was only paying 6 per cent. dividends, this other stock would pay 8 per cent. As a result of these representations he immediately obtained Edison stock from the elderly couple, which is stipulated to have been worth $3,719, in exchange for three hundred and fifty shares of this Associated Petroleum stock. He agreed to have this latter stock transferred for the couple and to deliver the new stock at a later date. At the same time he started a deal with the daughter, Pauline Weide, to sell her the remaining one hundred and fifty shares of Associated Petroleum stock. This transaction was not completed until three weeks later, at which time he agreed to give her one hundred and fifty shares of Associated Petroleum stock in return for certain Edison stock she held, of the stipulated value of $1,019, together with $273 in cash and an assignment of $200 interest which she had coming from another source. This exchange was procured under the same representations as the other. In each instance the appellant immediately sold the Edison stock received, through a bank, receiving altogether $5,000 in cash. No stock was delivered to the Weides until about April 1, 1929, at which time the appellant delivered to them a certificate for one hundred and seventy-fives shares of "Transcontinental Petroleum" stock in lieu of the three hundred and fifty shares of "Associated Petroleum" stock agreed on, and seventy-five shares of "Transcontinental Petroleum" stock in lieu of the one hundred and fifty shares of the "Associated Petroleum" stock. He testified that upon their protest he told them he would investigate this substituted stock; that he went to Los Angeles to see Roth & Co.; and that they told him they were reorganizing the company and exchanging one share of Transcontinental Petroleum Company stock for every two shares of Associated Petroleum stock. Later, when he was asked by the Weides about the stock, he told them that he had nothing to do with it since they had bought it and that they must do with it the best they could. The Weides testified that they received no dividends on the stock and that the stock delivered to them was worth nothing. The Transcontinental Petroleum shares were issued as of no par value and it appears that in November, 1928, a corporation commissioner's permit was issued authorizing them to be sold at 50 cents per share. Two experts testified that they had had much experience in buying and selling stocks; that they had investigated Associated Petroleum stock and Transcontinental Petroleum stock; and that there was no known market value for either stock in November, 1928, in December, 1928, or in April, 1929, when the stock was delivered. The record contains ample evidence of misrepresentation by the appellant and also of the appellant's knowledge of the untruth of the representations made by him.

[5] The only other point raised is that the court erred in admitting certain testimony as to the value of the stock delivered by the appellant in exchange for the Edison stock and the cash. It is first contended that the court erred in permitting one of the experts to give his opinion as to the market value of the stock, on the ground that his qualification was not sufficiently shown and that he could not have known of all the sales taking place in the United States. The witness was sufficiently qualified and the objection made went only to the weight of his evidence. It is further objected that the court erred in admitting in evidence the permit to sell the "Transcontinental" stock at 50 cents a share. While this evidence in itself may not have been conclusive, under the circumstances shown by the record it was admissible in evidence. As a matter of fact, it was offered only for the purpose of showing intent on the part of the appellant. As was said in Peck v. Steinberg, 163 Cal. 127, 124 P. 834, 836:

"Where there is no established market val-

ue for shares, the inquiry into the actual or intrinsic value should not be closely restricted. 'This value may depend on many facts and circumstances, such as the value of the property and assets owned, the dividends paid, the character and permanency of the business, the control of the stock, the management, the markets for articles produced if a manufacturing concern, and other facts. The evidence would necessarily take a broad range, and would properly be admissible to prove any fact calculated to affect the value.'"

The then owners of the stock testified that it was of no value, which is itself sufficient to support the implied finding of the jury to that effect. In addition to the testimony above referred to, there are many portions of the evidence which justify the inference that this stock was worthless, and support the verdict of the jury. It may be further observed that the testimony of the appellant himself, with the reasonable inferences therefrom, substantiates every element of the charges necessary to be proved and furnishes further corroboration, if more be needed. If any technical error could be found, a reading of the entire record discloses that no miscarriage of justice has occurred.

The judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.

128 Cal.App. 75

BANK OF AMERICA OF CALIFORNIA v. RIES et al.

Civ. 4579.

District Court of Appeal, Third District, California.

Dec. 7, 1932.

Rehearing Denied Jan. 6, 1933.

1. Vendor and purchaser ⇐97, 303.

Vendor's tender of deed *held* condition precedent to vendor's declaration of forfeiture or to suit for whole purchase price which had wholly matured.

2. Vendor and purchaser ⇐299(3).

Where contract obligated purchaser to pay taxes on property purchased, fact that vendor paid them *held* no evidence of forfeiture.

3. Vendor and purchaser ⇐299(3).

That vendor remained in possession *held* no evidence of breach or abandonment of contract by purchaser, where contract did not provide for possession by purchaser.

4. Contracts ⇐318.

Forfeitures are not favored, and forfeiture provisions are construed favorably to holder of estate and strictly against enforcement of forfeiture.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action to quiet title by the Bank of America of California against Gene Ries and others. From the judgment for plaintiff, defendants appeal.

Reversed.

Benjamin W. Shipman, of Los Angeles, for appellants.

Freston & Files, of Los Angeles, for respondent.

TUTTLE, Justice pro tem., delivered the opinion of the court.

This is an appeal from a judgment quieting plaintiff's title to real property.

On March 5, 1924, plaintiff's predecessor in interest agreed in writing to sell a certain lot in Los Angeles county to defendants Gene Ries and Mae Laurel. The latter assigned her interest in the contract to defendant Stan Laurel. The total purchase price was $4,500, payable as follows: $1,125 upon the execution of the agreement, and the balance in installments of $1,125 each, due in six, twelve and eighteen months from the date of the contract. The buyer agreed to pay all taxes levied against the property. Time was of the essence of the agreement, and in the event the buyer failed to comply with any of the terms, the seller could declare all rights forfeited and retain any money paid thereon. With the exception of the initial payment, no further payments were made upon the contract. On September 12, 1925, and subsequent to the date of the maturity of the contract, defendant Stan Laurel executed an assignment on the back thereof to plaintiff's predecessor, with the proviso that it was not to take effect until the sum of $360 had been deposited to the credit of Laurel. On September 18, 1925, defendant Ries executed a similar assignment. These assignments were executed upon the premises of the bank (plaintiff's predecessor) and were left with the bank. There is no evidence in the record that the bank ever accepted them. On the contrary, an officer of the bank testified that the assignments were not accepted nor were any payments ever deposited to the credit of the assignors. The court so found.

The trial court found that defendants had no right, title, or interest in the property and a decree was entered quieting the title of plaintiff.

The complaint is in the usual and ordinary

form of a quiet title action. The answer contains only one denial—"that the claim and interest asserted by them (defendants) in and to the property recited in plaintiff's complaint is without right." It is then alleged that defendants have a right and title to said property by reason of said agreement. It is further alleged that plaintiff's predecessor agreed to purchase the interest of defendants in said property for the sum of money paid in by defendants upon the purchase price, and until said sum was so paid, defendants were to have their right to said property.

It is contended that there is no evidence to support the finding that plaintiff was the owner of the property. This fact is admitted by the answer. The contention is without merit.

The court found that all the right, title, and interest which the purchasers may have acquired by reason of the execution of the contract was forfeited by reason of default in the performance of the terms thereof. It is contended that the evidence shows that defendants were not in default and had not forfeited their rights under the contract.

There is no evidence in the record that respondents ever declared a forfeiture, prior to the filing of the complaint herein. Neither is there any evidence that a demand was made by respondent for the balance of the purchase price and a tender made of a deed to the property.

[1] The trial court found and concluded that defendants had no right, title, or interest in the real property, and that all rights of defendants under the contract had been forfeited. Was the contract a live and subsisting obligation at the time the complaint was filed herein, or had it been discharged? The only evidence presented by plaintiff was the contract and proof that only one payment had been made thereunder and no more. The salient portions of the contract read as follows: "It is Understood and Agreed that time is the essence of this Agreement and that such provision shall not be waived if the Seller accept payments herein after the same have become delinquent or to give extensions of time to the Buyer. If the Buyer fails to make any of the payments at the times and in the manner above provided, or fails to comply with any of the terms hereof on his part to be done or performed, then the Seller may declare all moneys provided to be paid hereunder immediately due and payable, and may forthwith proceed to collect the same or endorse the terms of this Agreement by appropriate action, or at the Seller's option the Buyer shall be deemed to have forfeited all rights hereunder and all right to the money theretofore paid upon this agreement, which money may be retained by the Seller, and the Seller shall be relieved from all obligations in law or equity to convey said property; but the Seller, on receiving the full payments at the times and in the manner above provided, agrees to deliver to the Buyer a good and sufficient deed of conveyance of said premises, and to deliver a Guarantee of Title showing the title to be vested in the Seller free and clear of encumbrance suffered or done by it except as herein mentioned."

The facts in this case bring it directly within the principle laid down in Boone v. Templeman, 158 Cal. 297, 110 P. 947, 950, 139 Am. St. Rep. 126: "Where in a contract for the sale of land the price is made payable in installments at different times and the deed is to be made when the whole is paid, the vendor may, upon failure to pay any intermediate installment, forthwith sue for its recovery. But, if he allows the whole to become due, the payment of the price then becomes a dependent and concurrent condition. Nonpayment alone does not put the vendee in default. The vendor must tender a deed as a condition to demanding payment of the price, and he cannot, without such tender, declare a forfeiture, or maintain a suit either for the whole price, or for an intermediate installment." (Citing numerous authorities.) The foregoing rule is cited with approval in Lemle v. Barry, 181 Cal. 6, 183 P. 148.

Respondent attempts to distinguish the instant case from the Templeman Case upon the ground that in the former the action is one to quiet title, while in the latter the action is for specific performance. Respondent states that "in appellants' cases (including Boone v. Templeman, supra) the plaintiff is asking for something, and moreover asked without taking the prior step of a tender, which step alone would put the plaintiff in a position of being able to ask for anything. In the present case nothing is requested from the other parties, nor does the plaintiff assert that it is in a position to make any such request."

We cannot agree that the form of action renders the rule quoted inapplicable. In the Boone Case the sole question presented was whether or not the contract was a subsisting obligation. The court held that under the facts of the complaint the contract had not been discharged. It held that "upon the face of the complaint * * * the contract is still subsisting." In the instant case plaintiff is requesting something of the other party. He is seeking to take away all rights of defendants arising out of the contract. This is something very substantial.

[2] It is contended that the payment of taxes by the owner alters the rule—no authorities are cited. While the contract obligated the vendee to pay all taxes, the fact that the vendor paid them is no evidence of forfeiture.

[3] It is an admitted fact that respondent was in possession of the property when the complaint was filed and had been for a long time prior thereto. It is argued by respondent that the contract contemplated that vendee should have possession. The contract does

not so provide. No obligation of taking possession rested upon the vendee, hence the fact that vendor remained in possession is no evidence of a breach or abandonment of the contract upon the part of the vendee.

[4] Throughout this opinion we have also been guided by the general rule that "forfeitures are not favored in law, and conditions providing for the forfeiture of an estate are to be construed liberally in favor of the holder of the estate and strictly against an enforcement of the forfeiture." Behlow v. Southern Pacific Co., 130 Cal. 16, 62 P. 295.

We conclude therefore that the undisputed evidence shows that the contract between these parties is still a subsisting obligation. The entire amount due under the contract had matured, and the duty of tendering a deed and paying the price arose out of mutual and concurrent conditions. No forfeiture could be declared until the vendor made a tender of a deed. The finding that there was a forfeiture is not supported by the evidence.

The judgment is reversed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

PEOPLE v. LIPPNER.*

Cr. 2247.

District Court of Appeal, Second District, Division 2, California.

Dec. 17, 1932.

Hearing Granted by Supreme Court Jan. 16, 1933.

1. Criminal law ⇐982.

Court granting probation had continuing right to examine into probationer's effort to conform to terms of probation and to modify them or revoke probation (Pen. Code, § 1203).

2. Criminal law ⇐982.

Court's discretion to grant probation is very broad, but does not authorize arbitrary action (Pen. Code, § 1203).

3. Criminal law ⇐982.

Probation should be granted by court only after mature consideration and conclusion that guilty party will not again forfeit right to freedom (Pen. Code, § 1203).

4. Criminal law ⇐982.

Phrase "ends of justice" in statute authorizing court to grant probation if ends of justice would be served thereby does not justify probation and revocation thereof on sole basis of financial reimbursement of defendant's victims (Pen. Code, § 1203).

[Ed. Note.—For other definitions of "Ends of Justice," see Words and Phrases.]

5. Criminal law ⇐982.

Court's power to revoke probation is as much legal discretionary power as granting thereof (Pen. Code, § 1203).

6. Criminal law ⇐982.

Revocation of probation, granted one pleading guilty of violating Corporate Securities Act, shortly before expiration of time allowed him by probation order to reimburse investors, solely because restitution had not been made, *held* abuse of court's discretion (Pen. Code, § 1203; St. 1917, p. 673, as amended).

7. Criminal law ⇐1216(6).

Judgment and sentence to 2 years imprisonment in county jail on plea of guilty of violating Corporate Securities Act after revocation of probation shortly before expiration of 4 years allowed him to reimburse investors *held* erroneous; offense being mere misdemeanor (Pen. Code, § 1203; St. 1917, p. 673, as amended).

8. Criminal law ⇐1141(1).

Appellate Court must uphold grant of probation, if possible, even against assault thereon by judge who made it (Pen. Code, § 1203).

9. Criminal law ⇐982.

Order granting probation to one pleading guilty of violating Corporate Securities Act on condition that he reimburse investors within four years *held* to require only that he make every feasible, honest, and strenuous endeavor within his power to make restitution (Pen. Code, § 1203; St. 1917, p. 673, as amended).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

M. Lippner was convicted of violating the Corporate Securities Act, and he appeals.

Reversed.

A. Brigham Rose, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

STEPHENS, Justice pro tem.

Appellant, defendant below, was charged with several violations of the Corporate Securities Act (St. 1917, p. 673, as amended). He pleaded guilty to three counts and the others were put off calendar. Sentence was not pronounced but probation was granted in the following terms: "It is ordered that proceedings be suspended and defendant granted probation for five years under the following conditions: Defendant must reimburse the investors within one year and comply with such other terms as shall be set forth by the probation officer." This order was made June 16,

1928. On January 21, 1930, the court made the following order: "Terms of probation are modified as follows: Defendant is allowed 4 years to reimburse investors. All other terms of probation are to remain the same." On June 16, 1932, after taking testimony, the order of probation was revoked and defendant sentenced to two years in the county jail.

Appellant's first contention: "The trial court had no jurisdiction to revoke the probation."

[1] It may be noticed that the order of probation provided that the probationer (appellant) should be "allowed 4 years to reimburse investors," and that the order revoking the probation was made eight days prior to the expiration of the four-year period. Appellant claims that he had the full four years and that the court was without jurisdiction to revoke the probation until the expiration of the period mentioned. However, assuming the terms of the probation legal in all respects, the court had an undoubted continuing right to examine into the efforts of the probationer to conform to the terms of his probation, and to modify the terms or to revoke the probation in its discretion. There is no merit to this point.

Appellant's second contention: "The action of the trial court was arbitrary, and conceded to be so by that court itself, and was in excess of and contrary to accepted principles of the exercise of judicial discretion."

The testimony at the hearing on the question of revocation was directed solely to the matter of reimbursement. It was all one way to the effect that the probationer had paid all that he could pay and had turned over or had offered to turn over all of the property in which he had any interest, for the benefit of the investors. He does not claim that he has reimbursed the investors in full. We may say parenthetically that there is nothing before us from which the amount required for reimbursement can be ascertained. The testimony is uncontradicted that the probationer at the time of the hearing was in his 69th year and under the disability of a double hernia which would prevent him from hard manual labor; that he was a real estate dealer, but had been unable to make his own living at that or by any other means since the granting of the probation; and that he had, in fact, been partially dependent upon a relative during that period. The court's plain statements, however, made at the time of the entry of the order of revocation, compel us to conclude that it considered all testimony beside the point and immaterial except that which was to the effect that probationer had not reimbursed the investors. Mr. Bisher, formerly attorney for and a friend of probationer, was making a statement as to the latter's condition and inability to make money. The court stopped him and remarked: "The only purpose of granting probation was to give him the opportunity to reimburse the people. That was the only purpose for probation, and he has not made any. The only alternative is to make good. * * * The only purpose of granting probation was to give him an opportunity to make good. If he cannot, he should take punishment." Mr. Bisher: "Your Honor knows the real estate business. Real estate dealers cannot make enough money to pay for their licenses." The Court: "Then let the law take its course and I will sentence him." Whereupon the probation was revoked and sentence was pronounced. The Attorney General understands the lower court's attitude as we do. We quote from the brief: "It appears from the things that transpired upon the hearing that probation was not granted to this appellant in order to rehabilitate him, or to mitigate his punishment. * * * It was admitted at the hearing that he could not pay the investors. * * * Defendant obtained no vested rights by reason of the terms of the probation. The order was in the nature of a conditional agreement; defendant retained his freedom upon continuing to promise to reimburse investors. *Upon his admission in open court that he could not pay investors the condition failed, and it cannot be said that the court in revoking probation upon failure of the condition abused its discretion.* [Italics ours.] Defendant argues that the action of the trial court was arbitrary because defendant was financially unable to reimburse investors. We again call this court's attention to the fact that probation was not here granted for the benefit of the defendant, *but for the benefit of the investors.* [Italics theirs.] The ends of justice were best served by defendant being at large, because he could thereby earn money enough to repay those whom he had defrauded. This becoming impossible, the ends of justice were best served by defendant serving his sentence."

Throughout the history of probation and further back in the history of our jurisprudence, when various methods were invoked to lessen the severity of punishment for crime, the idea of mercy and rehabilitation has been uppermost. The idea of reimbursement has never been other than incidental to the main purpose. We shall note several methods used by the courts to modify the harshness of lawfully provided punishment.

During the seventeenth century in England, when many comparatively slight offenses were punishable by death, the judicial conscience was so shocked that the doctrine of benefit of clergy was construed far beyond its statutory intention; and under the guise of determining the prisoner's right to a palpable fiction was practiced. By the statute only the clergy, peers, and clerks were favored; but as education was almost wholly confined to these classes, the ability to read was sufficient to demonstrate its applicability to any prisoner. Accordingly, even if the

prisoner was not of the elect, if he could read, and the judge thought he deserved mercy, his punishment was softened or suspended. Indeed, even the question of his ability to read was often decided by fiction. When the inquiry was put to the clerk, the reply was in the affirmative if the court desired such answer. At times the very proof in open court was had through artifice; the prisoner would hold the test book before him and repeat what the clerk had taught him before session of court. Observations on the Criminal Law of England [Romilly] (3rd Ed.) 103. This judicial extension of the benefit of clergy was brought to America and survived the independence in some states, being rejected in others. See State v. Carroll, 24 N. C. 257, and Id., 27 N. C. 139, where it was applied, and Fuller v. State, 1 Blackf. (Ind.) 63, where it was rejected.

Later another fiction was invented whereby the mercy of the court was given practical application. If there were extenuating circumstances present in a trial or relating to a crime that appealed to the court's conscience, the sentence was "placed on file" and not pronounced. The prisoner was released on a bond of little or no recoverable value. The bondsmen were rather selected by reason of their good standing and their probable good influence upon the released person. State v. Crook, 115 N. C. 760, 20 S. E. 513, 29 L. R. A. 260. This practice is described and held illegal so far as federal courts are concerned in Ex parte United States, Petitioner, 242 U. S. 27, 37 S. Ct. 72, 61 L. Ed. 129, L. R. A. 1917E, 1178, Ann. Cas. 1917B, 355. The full right of federal courts to suspend sentence was, however, established by the Federal Probation Act of 1925 (18 USCA §§ 724–727).

The doctrine of "approvement" was of very early use. An "approver" was an accomplice who pleaded guilty and revealed the full details of the crime. Lord Mansfield expressed it in this manner: "A kind of hope that accomplices who behave fairly and disclose the whole truth, and bring others to justice, should themselves escape punishment and be pardoned." Since the *pardoning* was a judicial act, it would seem to conflict with the executive function; but it has been held otherwise. People v. Court of Sessions of Monroe County, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856. Incidentally it is interesting to note that the immunity provisions of our statutes probably grew from this old practice. For its application in the United States see In re Wells, 18 How. 307, 15 L. Ed. 421.

Another method of relieving the convicted person from harsh punishment was to "quash after verdict." The indictments were minutely examined for the slightest error upon which the conviction could be set aside.

The earliest case we have found wherein practical probation was allowed with suspended sentence and sentence had after its revocation is Commonwealth v. Chase, reported in Thacher Cr. Cas. (Mun. Ct. Boston) at page 267. See Commonwealth v. Dowdican's Bail, 115 Mass. 133.

[2] Thus it will be seen that the courts, having been brought face to face with the inflexible severities of the law, gradually assumed the power to lessen the prescribed punishment or avoided it altogether where its strict enforcement would be unconscionable. Upon the foundation of these judicial practices the more frank, substantial, and more evenly administered doctrine of probation was erected. In more recent years this doctrine has been the subject of legislation resulting in a fundamental change. Whereas sentences have heretofore been tempered by a sort of gratuitous act of the judge, it is now effected, under modern probation, as a very substantial right of the defendant. The court must apply its discretion to the matter. This discretion is very broad, but it does not authorize arbitrary action. People v. Jones, 87 Cal. App. 482, at page 496 et seq., 262 P. 361.

[3] It may be said with the utmost assurance that by precedent and by practice the basic reason for every probation is mercy to the defendant and the probability of rehabilitation of an individual to good standing in society. It should be granted only after mature consideration and after a conclusion by the court that the guilty one will not again forfeit his right to freedom but will in the end be salvaged from the wreck that crime has brought upon him. "It (probation) is the last remedy suggested by humanitarians, sociologists, penologists and criminologists, and disinterested people generally, in an effort to make salvage of at least a fair percentage of those convicted of crime." Chief City Magistrate McAdoo, in Chicago Legal News, vol. 44, p. 364.

[4] The practice of the courts in the matter of alleviating the harshness of criminal law punishment in deserving cases, including the practice of suspending sentence, has culminated in California by the enactment of section 1203 of the Penal Code. In this section the court is given the assistance of probation officers to acquaint itself with (quoting therefrom) "the circumstances surrounding the crime and concerning the defendant and his prior record, which may be taken into consideration either in aggravation or mitigation of punishment; * * * and if it shall determine that there are circumstances in mitigation of punishment provided by law, or that the ends of justice would be subserved by granting probation to the defendant," it may do so. It is also provided by the section that the court may "revoke and terminate such probation, if the interests of justice so require, and if the court in its judgment, shall have reason to believe * * * that the person so placed upon probation is violating

any of the conditions of his probation, or engaging in criminal practices, or has become abandoned to improper associates or a vicious life." It will be seen from these excerpts that the basis of granting as well as revoking probation is the same as it was throughout the years of judicial softening of harsh punishment. Respondent construes the phrase "ends of justice" as justifying the granting and revoking of probation upon the sole basis of reimbursement. Neither the history of probation, the reason for probation, nor the context of the section in which the phrase is found (section 1203, Pen. Code) support this contention. It is a general phrase covering all of the elements arising out of probation, but it is not so general as to apply solely to any one element that is not an essential of probation. People v. Jones, supra, 87 Cal. App. page 497, 262 P. 361.

[5] That the power of the court to revoke probation under this section is as much a legal discretionary power as the granting of probation cannot be doubted. It is said in People v. Brahm, 98 Cal. App. 733, 277 P. 896, 898: "* * * That question [probation] rests with the sound discretion of the trial court. Since no abuse of discretion appears in the instant case, the decision * * * is necessarily conclusive." The following quotation is used with approval in Ex parte Young, 121 Cal. App. 711, 10 P.(2d) 154, at page 158: "It [revocation of probation] was a matter to be determined by the sound discretion of the court, and the exercise of that discretion, in the absence of gross abuse, cannot be reviewed here." In the instant case the trial judge wholly ignores the merciful and rehabilitation bases for probation and considers alone the reimbursement of those who lost money through the crime. The consideration of reimbursement is an important part of the terms of probation in cases of this nature, it is true, but we have found no authority for the proposition that probation may be based wholly upon the good it will do financial losers. This seems to us to be getting too near the theory of enforced labor for a debt. This doctrine is clearly analyzed and strangely justified by the Attorney General in respondent's brief herein in the coldest and most heartless conclusions as to the purposes of probation that we have encountered in our rather extensive reading upon the subject. On the other hand, when a court approaches the matter in a just and considerate manner, with the true principles underlying it, probation constitutes the most enlightened, practical and hopeful progress in our criminal administration. See United States v. Maisel (D. C.) 26 F.(2d) 275, a comprehensive case in which the purposes of probation are clearly set out by a judge learned in the remedial and social sides of criminology.

[6] Applying the ordinary rules of construction to the order of probation as granted in the instant case, one would be justified in arriving at the conclusion that the probation was to rest upon the good behavior of the probationer and upon his making all reasonable efforts toward reimbursement. As such it was a valid order. But when the court rules that the terms of the probation had been violated and should be revoked upon the one restricted finding that restitution had not been made, excluding the elements of possibility, as well as the exemplary conduct of the probationer, we think the discretion granted to the court by the above-quoted portion of section 1203 was not properly exercised. If appellant was legally under the restraint of probation at the time the order of revocation was made, we are of the opinion that the order affected his substantial rights, and, since the judgment sentencing him could not have been pronounced with such order, in effect, it should be reversed. However, the matter of doubt as to whether or not appellant was under any legal unexpired probation order is an element in and subject to our determination of the next contention.

[7] Appellant's third contention: "The appellant did not plead guilty to the commission of a felony. The court could only require defendant to remain on probation for a period of two years in this particular case."

Appellant's argument under this caption is to the end that the sentence, after revocation of probation, being imprisonment in the county jail, constitutes the offense a misdemeanor and not a felony; that as he had already been under the probation restraint for almost four years, he could not be sentenced for an additional length of time. In fact, that the moment that the court pronounced the offense as a misdemeanor it lost jurisdiction to further restrain appellant of his liberty. We shall proceed to examine this contention.

It appears that each one of the charges to which the defendant pleaded guilty was set out as a violation of the Corporate Securities Act, a felony. The act itself does not use the term felony, but states that any one who violates it is "guilty of a public offense." The late case of Doble v. Superior Court, 197 Cal. 576, 241 P. 852, 860, states the following conclusion: "A fair construction of section 17 [Pen. Code], in order to give effect to every part thereof, requires us to hold, and we do so hold, that in prosecutions within the contemplation of that section the charge stands as a felony for every purpose up to judgment, and if the judgment be felonious [sic], in that event, it is a felony after as well as before judgment; but if the judgment is for a misdemeanor it is deemed a misdemeanor for all purposes thereafter—the judgment not to have a retroactive effect so far as the statute of limitations is concerned." And the Supreme Court also says, In re Rosencrantz, 211 Cal. 749, at page 751, 297 P. 15, 16: "The main point urged in the petition [habeas cor-

pus] is that the judgment and commitment under section 644 of the Penal Code was improper because, it is contended, petitioner had not previously been convicted of *three prior felonies*. It is asserted that the alleged first conviction never occurred. The record shows that she was charged on January 12, 1920, in the county of San Diego, with the violation of the same statute as in her later convictions. She pleaded guilty and was granted probation for a period of two years. No judgment of conviction was pronounced by the court. The question is whether this constitutes the *conviction of a felony* within the meaning of Penal Code, § 644. It is established in this state, both by statute and judicial decision, that whether a crime is a misdemeanor or a felony it is to be determined by the punishment; and where a crime is punishable either by incarceration in the state prison or the county jail, the sentence actually given determines the nature of the offense. Cal. Pen. Code, § 17; People v. Bigelow, 94 Cal. App. 28, 270 P. 460. Hence if petitioner had been sentenced to the state prison, she would have been convicted of a felony; and had she been sentenced to the county jail, she would have been convicted of a misdemeanor. However, she was not sentenced at all, nor was any judgment of conviction pronounced; and this appears to us to be decisive of the problem. There being no conviction, there is nothing to bring this first case within the provisions of section 644." It was held in Ex parte Slattery, 163 Cal. 176, 124 P. 856, 857, that "by the provisions of the probation law, when a defendant has fulfilled the conditions of his probation for the entire * * * term of such sentence, the power of the court to enforce its original judgment is at an end. Pen. Code, § 1203, subd. 5."

It seems clear to us that appellant has never been held guilty of any offense other than a misdemeanor, and that, since he suffered restraint therefor under an order of probation for a longer period than the law permits for such an offense, the judgment and sentence was error. We think the judgment should be reversed because the revocation of the probation was an abuse of discretion and because at the time of judgment and sentence appellant had already been under the restraint of probation for a longer time than the offense justified.

Judgment reversed.

WORKS, P. J.

I concur, but I think something may be added to Justice STEPHENS' analysis of the basic principles of the law of probation. Section 1203 of the Penal Code, in stating the many conditions which a judge may impose in granting probation, reads in part that he "may provide for reparation in proper cases." Taking the analysis made by Justice STEPHENS as a foundation upon which to build, it is to be asserted that the mere requirement that a guilty defendant shall make restitution, without more, is not a proper condition. The law never intended that such an unfortunate, by holdups on the highways or by slick practices in sumptuously outfitted offices, could despoil new victims in order to reimburse old ones; and yet, if appellant had obtained money by such means and with it had made the restitution required by the trial judge, he would have complied, exactly, with the letter of the probation order. The idea of a rehabilitation of the moral fiber of appellant was totally absent from the order of probation, in its letter. We are, however, made "ministers * * * not of the letter, but of the spirit, because the letter killeth, but the spirit giveth life," to quote the stately phrase of 2 Corinthians.

[8] The trial judge, before allowing probation, necessarily had concluded that appellant was entitled to the grant, but if we take the order, as the judge construed it when he attempted to revoke it, this conclusion is utterly set at naught and the order of probation is made an absurdity. It is our duty, if possible, to uphold the grant even against an assault upon it by the judge himself—an assault which completely nullifies and annihilates it if the true purpose of probation is kept in mind. If the order of revocation is to stand, the result is that the original order, taking its mere letter, amounted to nothing within the true meaning of section 1203 and the punishment of appellant was but postponed, whether at the end of the prescribed season he were a better man or not. His offense was neither condoned nor was it palliated, nor was he really admitted to probation.

[9] But the judge, as I have said, had concluded that appellant should be granted probation. How may we give effect to that conclusion and intent? By reading the order according to its proper spirit under the law and not by its letter. Thus read the order, in my opinion, means that appellant should engage in every feasible, honest, and strenuous endeavor within his power to make restitution to those whom he had despoiled, and that, if he exerted that endeavor, whether he failed to make the mere monetary reparation or not, either in whole or in part, he should depart unwhipped of justice further. If read in any other manner, the order seems twin to the demand for the pound of flesh from an harassed Antonio, and as such it could not have stood, if assailed.

It is trite to say that the law does not require impossibilities. It must be equally true that a judge cannot justly require impossibilities as a condition upon which probation is to be granted. The judge having made the grant, and the record showing as it does that appellant found, after commendable effort, that the condition was impossible of performance, ap-

pellant should not be deprived of the grant. This special reason demands that a spirit be found behind the letter of the grant.

IRA F. THOMPSON, J.

I concur in the opinion of Justice STEPHENS and also in the concurring opinion of Presiding Justice WORKS.

128 Cal.App. 212

PEOPLE v. HARSHAW.

Cr. 1235.

District Court of Appeal, Third District, California.

Dec. 15, 1932.

Rehearing Denied Dec. 30, 1932.

Hearing Denied by Supreme Court Jan. 12, 1933.

1. Homicide ⇐244(1).

Evidence *held* to establish self-defense, and hence insufficient to support conviction of second-degree murder.

2. Criminal law ⇐1188.

Appellate court may modify judgment in criminal case and direct trial court to sentence defendant for lesser offense contained within crime for which he was convicted, if adequately supported by evidence (Pen. Code, § 1260).

3. Homicide ⇐348.

Evidence *held* not to warrant appellate court in finding defendant, erroneously convicted of second degree murder, guilty of manslaughter, as required to authorize direction of sentence for latter offense (Pen. Code, § 1260).

4. Criminal law ⇐768(1).

Instruction that jury must consider people's right to proper execution of laws and that they might as well be stricken from statute books, unless jurors did duty, *held* erroneous as unduly emphasizing enforcement of law and in nature of warning which jurors might misconstrue.

5. Criminal law ⇐570(2).

Burden is on accused pleading insanity as defense to prove it by preponderance of evidence.

6. Homicide ⇐237.

Evidence *held* sufficient to support jury's verdict that defendant was sane at time of alleged homicide (Pen. Code, § 1027).

Two expert alienists, appointed by court pursuant to Pen. Code, § 1027, testified positively that defendant was sane after thorough investigation of his family history, physical and mental condition, traits of character, habits and conduct, including facts involved in alleged crime.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

H. H. Harshaw was convicted of second-degree murder, and he appeals.

Reversed.

U. W. Brown and Alva A. King, both of Colusa, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant was charged with the murder of Pearl Frederick Harshaw with whom he had lived twenty years without the formality of marriage. He entered a plea of not guilty of the crime charged and also not guilty by reason of insanity. Separate trials occurred upon these issues. A jury found him to be sane at the time of the homicide. Another jury convicted him of the crime of murder of the second degree. He was sentenced to imprisonment at San Quentin state prison for the term prescribed by law. From this judgment the defendant has appealed.

It is contended that neither verdict is supported by the evidence, and that the court erred in giving to the jury a certain instruction warning them against failure to perform their duty.

[1] The defendant and Pearl Frederick Harshaw lived together as husband and wife for twenty years without the ceremony of a marriage. Both of them had been previously married. It appears that neither of them had been divorced from their respective spouses. They moved from place to place seeking a living. They were employed chiefly in stock raising and farming. They engaged in frequent quarrels. About two years prior to the homicide they had a settlement of property rights and thereupon separated. At this time Pearl Harshaw was given a ranch which was afterwards sold for $3,000. The defendant received about $700 from the proceeds of this sale. Several months prior to the homicide they resumed their former relationship, living at the Senator Gun Club, which is situated on a game preserve near Colusa. When the money which she received from the sale of the ranch was expended, Pearl "sent her belongings and moved out" to the clubhouse without an invitation from or consent of the defendant. George Main, Jr., lived with them. He is a nephew of Pearl Harshaw, aged eleven years, of whom she was very fond. He is an intelligent boy. The defendant owned some stock consisting of horses, hogs, and a span of mules. The deceased possessed a violent temper. Three times prior to the homicide, she assaulted the defendant with a butcher knife. On one occasion she inflicted a severe scalp wound upon him with a butcher knife. Once she fired at him with a rifle. The bullet

passed through the crown of his hat. No provocation for these assaults appears in evidence. She frequently became enraged and used vile language toward him. She often threatened to kill him. She told others she would kill him. She accused him of associating with other women. She was jealous of him. Her threats to kill him were communicated to him. He feared her.

The defendant, Pearl Harshaw, and the boy slept in separate beds on a screened porch of the clubhouse adjacent to the kitchen thereof. The defendant kept a loaded revolver in a stand near the head of his bed. He explained the presence of this revolver by saying that an unknown prowler had attempted to enter the house in the night time several weeks prior to the homicide. The defendant was away from home during the night prior to the occasion of the fatal shooting. He arrived at home about 6 o'clock in the afternoon. A quarrel immediately ensued over his absence during the night. He insisted that he remained at a ranch where he was trying to purchase some hogs. He also aroused the ire of Pearl Harshaw by suggesting that he intended to sell the mules. They quarreled at the dinner table and throughout the evening. She refused to permit the sale of the mules and she charged him with staying all night with another woman. She cursed and threatened him. He testified that she said: "'You s—— of a b——, you have been laying out (with a woman) all night.' I said, 'No Pearl, I have been up at the other ranch, stayed all night up there and aimed to get here in time for breakfast.' She said, 'You are a g—d liar, you s—— of a b——, you have been laying out all night and I am going to kill you.'" Mr. McCullough, who was called as a witness for the prosecution, corroborated this theory that Pearl Harshaw was jealous of another woman. He testified regarding a conversation which occurred with the defendant, as follows: "Well, he told about * * * staying with some woman, staying at some woman's ranch." No further evidence of his asserted disloyalty appears in the record.

It appears that Pearl Harshaw continued to rave at the defendant after they had retired. They were sleeping in separate beds. The boy had gone to sleep. The defendant testified, "I thought she must be terrible unreasonable if I couldn't reconcile her." He then arose and going to the boy's bed shook and aroused him, asking that he remain awake. He explained this act by saying he thought the boy might help pacify his aunt. The defendant then returned to his own bed. Pearl Harshaw was in a rage. She cursed him, demanding that he "leave that kid alone and get back to bed." She got up, turned on the lights, and hurried into the kitchen mumbling, talking to herself, and threatening to kill him. Both the boy and the defendant saw her seize a butcher knife from the table and hasten back to the sleeping porch. George Main, Jr., testified: "Mr. Harshaw woke me up, I should say, about 10 o'clock. * * * Mrs. Harshaw came out on the back porch and told him to 'leave that kid alone and get back to bed.' * * * I don't know what made me sit up in bed, but (I) happened to sit up and saw Mrs. Harshaw go through the dining room—watched her until she went through the door into the living room—then (I) looked at Mr. Harshaw and he was kneeling on his bed looking in the window, and he told Mrs. Harshaw not to come out, and she said, 'You s—— of a b——, I am not stopping; I am coming on.' Then she opened the door and took one step out * * * and he shot. * * *

"Q. Now, when you saw her coming out of the living room, did she have a butcher knife in her hands? A. She did. * * * She came through the room holding it like that (indicating point forward) and then she let it go back like that (holding it pointed backward and to the right). * * *

"Q. When she came through the door from the living room onto the porch, you mean? A. Yes."

It is apparent the defendant did not plan to kill his companion. His evident purpose in firing at her was prevent her from attacking him with the knife. She had often threatened to kill him. She had made several previous assaults upon him with deadly weapons. From the actual slashing of his scalp with a butcher knife and firing upon him with a rifle, he had cause to fear her. She was enraged. She had been quarreling and threatening him throughout the evening. She charged him with laying out with another woman. She suddenly got out of bed, turned on the lights, hastened into the living room where she armed herself with a butcher knife, and returned directly to him cursing and threatening him with the upraised knife. There is no evidence that the defendant previously inflicted injury upon or threatened violence toward her. He had never struck her. He lay quietly in bed watching her through the window. When she reached the porch, knife in hand, he seized the revolver and raising upon his left elbow he warned her against the threatened attack. He claims to have pleaded with her not to attack him. To this entreaty she replied with an oath: "I am not stopping. I am coming on." Her conduct confirmed this threat. He then fired. The circumstances indicate that he did not even then intend to kill her. There were five loaded cartridges in the revolver. He fired but once. He did not aim at the most vital portion of her body. The bullet entered her left side above the pelvis. He evidently did not realize he had shot her. As she stood for a moment after the shot was fired, without advancing, he said, "Don't come any further." If he had intended to kill her he would have fired again. She backed up and leaned for

an instant against the door jamb. Then she slumped to the floor, still clinging to the butcher knife. Her nephew sprang from his bed. He turned her body over and took the knife from her hand. The defendant called to him to leave everything as it was. The boy then threw the knife upon the floor. At the request of the defendant George immediately went for a doctor. Within a brief period of time he returned with the sheriff and a doctor. They found the body of the deceased lying upon the floor where she fell. She was dead. The defendant lay by her side upon his face with one arm about her. He seemed to be trying to talk with her. The knife lay close by upon the floor. The revolver was on the foot of the bed. The sheriff testified as follows: "He seemed to be talking to Mrs. Harshaw, * * * he recognized me; we have known one another for a long time, and he (the defendant) said, 'I think you are too late.'" The sheriff then added: "I asked him how it had happened, and he said, 'She was after me with a knife and I shot her;' he says, 'There is the knife and there is the gun.' The knife was laying near the body of Mrs. Harshaw, and the gun was on the bed near the foot."

The defendant's story of the tragedy does not sound unreasonable. It has no perceptible flaws. Every essential circumstance of the affair, including the cursing, the threatening, and the arming of the deceased with a butcher knife, were corroborated by her own nephew, of whom she was very fond. It is natural to expect the boy to have related everything which would be favorable to the conduct of his aunt. The former attacks and threats of Pearl Harshaw which were related by the defendant are also corroborated by disinterested witnesses. Doctor Salter, who was called to treat the defendant for the scalp wound caused by her slashing him with a butcher knife, testified that he found him with a serious infected scalp wound penetrating to the skull. He met Pearl Harshaw at that time and testified she admitted cutting him with the knife and that:

"She said she would kill the s—— of a b—— if he came at her again.

"Q. Did she show you the knife? A. She did."

Mrs. Look, who lived near the home of the Harshaws while they resided near Meridian, testified that while she was keeping house for them during Pearl's illness, the deceased told her that once when the defendant was called "to the telephone, and was going through the dining room, she threw a small butcher knife at him and it went through his shirt under his right arm. * * * She told me at the same time she shot at him as he was going around the garage. * * * She told me a number of times she would kill the s—— of a b——." When Mrs. Look warned her against attacking the defendant, she replied, "Don't you worry Lora, if there is anybody going to get killed it will be Harshaw, the s—— of a b—— hasn't got guts enough to kill me." Mrs. Cressa Main the sister of the deceased, and the mother of the boy, George Main, Jr., who had lived with the Harshaws for a period of time, testified that her sister Pearl "had a high temper, she ran over all of us. * * * On more than one occasion she told me that she would kill him (the defendant), * * * cut him to pieces; she would cut his heart out." She admitted that she had heard them quarreling; that Harshaw had driven her frantic with nagging; and that, in shooting her sister, he had killed the best friend he had. But she also said that he was a good man and had treated her sister with kindness.

All of these numerous threats of the deceased were communicated to the defendant prior to the homicide. There is ample evidence to indicate that he feared her. He was fifty-eight years of age, and in poor health.

The evidence of the defendant and George Main, Jr., regarding the circumstances of the homicide, stands uncontradicted and unimpeached. Their testimony is quite convincing. If they told the truth, then the defendant acted only in necessary self-defense. The effort to contradict some of the other corroborating witnesses was a failure. In an attempt to prove a premeditated design on the part of the defendant to kill his companion, Roy Tyler was asked: "Q. Did he (the defendant) tell you * * * that he wanted to get rid of his wife?" To this question he replied, "He said: 'I wish to God I was rid of her;' he didn't say he was going to kill her though." The defendant explains this expression, and it is evident Mr. Tyler did not understand the defendant to mean he wished she were dead so that he might be "rid of her." Upon the contrary this statement reasonably means the defendant was annoyed by his association with her, and would like to secure a separation to relieve him from his financial troubles and frequent quarrels. No other effort was made to prove he proposed to kill her.

Only one other circumstance which was offered in the nature of impeachment is worthy of comment. In response to a question propounded to Mrs. Look as to who were present when Pearl Harshaw told her about throwing the knife at the defendant, the witness replied that the story was told in the presence of her husband and George Main, Jr. When the boy was called by the prosecution in rebuttal, he merely said he did not remember the occurrence.

In a careful reading of the entire record we are impressed with the conviction that a very strong case of self-defense was established. There is no conflict regarding the essential circumstances surrounding the homicide. Every important fact indicates that the

defendant acted in self-defense. There is no substantial evidence to the contrary. Circumstances which are vital in the establishment of justifiable self-defense on the part of the defendant were satisfactorily corroborated. There was no effort to prove the defendant ever inflicted or threatened the deceased or any other person with physical violence. There is no evidence that he ever struck her or that he was the aggressor in this affair. His general reputation as a peaceful and law-abiding citizen was not successfully challenged. We are unable to perceive how the jury could have found him guilty. There is no substantial evidence to support that verdict.

[2, 3] An appellate court is authorized to modify a judgment which is rendered in a criminal case, and may direct the trial court to sentence a defendant for a lesser offense contained within the crime for which he was convicted, provided the evidence adequately supports the lesser offense. Section 1260, Pen. Code; People v. Kelley, 208 Cal. 387, 281 P. 609; People v. McIntyre, 213 Cal. 50, 1 P. (2d) 443. There is no evidence in the present case warranting this court in finding the defendant guilty of manslaughter. The undisputed evidence of the defendant and George Main, Jr., is either manufactured, and false, which is inconceivable, or he is innocent of the crime. We are convinced of his innocence.

[4] The appellant challenges an instruction as erroneous which was given to the jury regarding the weight, sufficiency and manner of considering the evidence. This instruction informs the jury they are the sole judges of the weight and sufficiency of the evidence and of the credibility of witnesses. After charging them that they are not to be governed by passion, prejudice or sympathy, the following language is employed: "The importance of your duties requires that you consider the right of the people of the state of California to have the laws properly executed, and that it is with you, citizens selected from the county, that finally rests the duty of determining the guilt or innocence of those accused of crime, and unless you do your duty, laws may as well be stricken from the statute books."

The jury was elsewhere fully and fairly instructed regarding the law of the case. This challenged instruction also contains a clear and impartial statement of general principles of law respecting the weight, sufficiency and manner of considering the evidence, in view of which it is quite likely the jury was not misled by the warning language above quoted. People v. Stevens, 78 Cal. App. 395, 409, 248 P. 696. However, that language does unduly emphasize the enforcement of the law as the only proper fulfillment of the duty of a jury, with the final warning that "unless you do your duty, laws may as well be stricken from the statute books." This language is misleading. It is in the nature of a warning. It may be misconstrued by jurors. In the interest of clarity and justice, it should be omitted.

In the case of People v. Travers, 88 Cal. 233, 26 P. 88, 90, an instruction containing a similar warning to the jury was criticized as erroneous, and a judgment convicting the defendant of murder was reversed. That instruction contained the following language: "The guilt or innocence of this defendant must be determined from the evidence admitted in the case, and not from sympathy or prejudice. If all criminals must go free because there is a possibility of jurors making mistakes, society might as well disband." The court said that this language was objectionable "on account of its apparent hostility to the defendant."

[5, 6] The verdict which determines the sanity of the defendant is adequately supported by the evidence. There is some conflict regarding this issue, but the evidence in support of his sanity is very satisfactory. The court appointed two expert alienists, pursuant to section 1027 of the Penal Code, one of whom was a member of the medical staff of the Napa state hospital. After a thorough investigation of the family history, physical and mental condition, traits of character, habits and conduct of the defendant, including the facts involved in the alleged crime of murder with which he was charged, both medical experts testified positively that he was sane. The burden is upon one who pleads insanity as a defense to an alleged crime to prove it by a preponderance of evidence. 8 Cal. Jur. 368, § 403. This burden was not sustained by the defendant in the present case. The verdict determining that he was sane at the time of the homicide is amply supported by the evidence.

The judgment of the defendant's sanity at the time of the homicide is therefore affirmed.

For the reason that the verdict and judgment convicting the defendant of murder of the second degree are not supported by the evidence, the judgment and the order are reversed.

We concur: PULLEN, P. J.; PLUMMER, J.

REGAN v. ALBIN et al.*

GOLDEN EAGLE MILLING CO. v. SAME.

Civ. 8109, 8117.

District Court of Appeal, Second District, Division 1, California.

Dec. 19, 1932.

Rehearing Denied Jan. 16, 1933.

Hearing Granted by Supreme Court Feb. 16, 1933.

1. Licenses ⇐25.

Copy of corporation commissioner's permit printed on back of stock subscription blanks amounted to "exhibition of permit" required.

2. Corporations ⇐243(5).

Stockholders not attempting to rescind and having received benefits *held* estopped to set up invalidity of subscription contract as against corporation's creditors relying upon contract.

Appeals from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Two actions by Edward Regan (substituted for John C. Hodge), and by the Golden Eagle Milling Company against Alice T. Albin and others. The cases were consolidated, and, from a judgment in favor of defendants, plaintiffs appeal.

Reversed.

Hibbard & Kleindienst, of Los Angeles, for appellant Regan.

Patterson, Bailey & Montgomery and Frederick I. Richman, all of Los Angeles, for appellant Golden Eagle Milling Co.

Smith & Breslin, of Los Angeles, for respondent.

YORK, J.

These two actions upon stockholders' liability, brought by creditors of the Pasadena Milling Company, Inc., to recover for goods, wares, and merchandise consisting of grain, feed, and milling products furnished by plaintiffs to said Pasadena Milling Company, Inc., were consolidated and tried upon an agreed statement of facts, and judgment was rendered by the court in favor of the respondents herein.

The trial court found that the Pasadena Milling Company, Inc., prepared and had for use in taking and obtaining subscriptions to its capital stock certain subscription blanks or agreements, which blanks bore the following statement underneath the subscriber's signature: "(For Copy of Corporation Commissioner's Permit, See Reverse Side.)" The court also found that on the reverse side of said blanks there was printed and contained a true copy of the permit so issued by the commissioner of corporations of California. Among other things, this permit provided: "This permit is issued upon the condition that a true copy of said permit be exhibited and delivered to each prospective subscriber for, or purchaser of, said securities before his subscription therefor shall be taken or any sale thereof made."

The court further found that neither the Pasadena Milling Company, Inc., nor any one else, whether for or on behalf of said company or otherwise, did at any time either exhibit or deliver to, or in any wise call to the attention of, twelve defendants named in said two actions, as aforesaid, a true copy, or any copy, of the permit so issued to said Pasadena Milling Company, Inc., and that all of the capital stock issued to the twelve defendants named, as stated in and shown by said agreed statement of facts, was at all times and now is invalid and void, and such defendants never at any time became, and are not now, stockholders of said corporation, and never were and are not now debtors of said plaintiffs, or either of them, or of any of the creditors of said Pasadena Milling Company, Inc., mentioned in the complaints of plaintiffs.

[1, 2] Appellants maintain that the point involved in this appeal is whether nonconformity with a provision in a valid permit will render the stock sold and issued thereunder void as regards the claims of creditors of the corporation who have advanced goods, wares, and merchandise to the corporation in reliance upon the paid-in capital of the corporation.

It appears to be the law that, as between the corporation and its stockholders, a sale of corporate stock made contrary to the terms of a permit issued by the commissioner of corporations, in that a true copy of the permit was not exhibited to the purchaser of the stock, is illegal and void, and that such purchasers are entitled to recover the purchase price paid upon tendering the return of the stock. Otten v. Riesener Chocolate Co., 82 Cal. App. 83, 254 P. 942; Brewis v. Toffelmier, 97 Cal. App. 329, 275 P. 819; Castle v. Acme Ice Cream Co., 101 Cal. App. 94, 281 P. 396. However, in the instant case, the defendants, in effect, are seeking to repudiate the consequences of their purchase three years after the same had been made, after they had received dividends from the corporation under the now claimed void contracts, and after innocent third parties had extended credit to the corporation, relying upon the status of the defendants as stockholders. Under the circumstances here presented, we believe the doctrine of estoppel may be invoked in order to protect the rights of the plaintiffs.

"It is well settled in California that, while estoppel is unavailable as a plea in an action between parties to a void stock subscription contract, this rule has an exception that per-

*For subsequent opinion see 26 P.2d 475.

mits innocent creditors to invoke the conduct of the parties to the void contract as an estoppel and barrier against their asserting the invalidity of their contract, so as to defeat just claims of innocent creditors. Reno v. American Ice Machine Co., 72 Cal. App. 409, 237 P. 784; Moore v. Moffatt, 188 Cal. 1, 204 P. 220." In re American Aluminum Metal Products Co. (D. C. S. D. Cal.) 15 F.(2d) 234, 235. "But it seems that a party to an illegal contract may under some circumstances be estopped to set up the illegality as against third persons who relied thereon." 6 R. C. L., p. 820, § 215. This principle is, we think, illustrated in the present action.

In the case of Michell v. Grass Valley Gold Mines Co., 206 Cal. 609, page 617, 275 P. 418, 421, which was an action in rescission on the ground of fraud on the part of the corporation, the court said: "But as between the plaintiffs and others whose rights have intervened the plaintiffs may not be heard to say that they were uninformed as to a matter of law when knowledge or the means of knowledge of the true situation was presumptively possessed by them. When the rights of others have intervened, and the circumstances have so far changed that rescission may not be decreed without injury to those parties and their rights, rescission will be denied and the complaining parties left to their action at law."

As to whether or not the printing of the permit on the back of the stock subscription agreement amounted to an exhibition of such permit, see Gridley v. Tilson, 202 Cal. 748, 262 P. 322, in which case defendant testified that he did not have his glasses with him at the time he signed the subscription contract and therefore did not read the contract nor the provision referred to. In that case it was held that (page 752 of 202 Cal., 262 P. 322, 323):

"This cannot afford him an excuse, in the absence of a showing that he was prevented by the agent from reading the limiting clause, or was otherwise tricked into signing the document without reading it. He made no request to have the contract read to him. In addition, it was in evidence that he had previously signed similar contracts with the same company in subscribing for 3,000 shares of its stock.

"The plaintiff contends that the finding of the court that a true copy of the permit was not exhibited and delivered to defendant is without support in the evidence. There was no issue in the pleadings on this point, and, as a copy of the permit was printed on the back of the subscription contract, the finding of the court appears to be unsupported."

We are therefore constrained to hold that the copy of the permit printed on the back of the subscription blanks amounted to an exhibition of said permit, despite the fact that some of the defendants deny they read the same, and also that, said defendants having made no attempt to rescind, and having received benefits in the way of dividends accruing by means of their status as stockholders, they are now estopped to set up the invalidity of their subscription contracts as against innocent third parties, who furnished materials to the corporation, relying upon such contracts.

The judgment is reversed.

CONREY, P. J.

I concur in the judgment of reversal. There is, however one other point which I think should have attention, for the reason that, if decided in favor of the respondents, it would require affirmance of the judgment. The proposition of respondents is stated as follows: "Since the people of California on November 4, 1930, by vote at the general election held on that day, repealed without a saving clause section 3, article 12 of the Constitution of California, which alone created and authorized a stockholder's liability, appellant's alleged cause of action based thereon, became thereafter unauthorized, unwarranted and unenforceable." Stated in another way, the proposition is that section 3, article 12, of the Constitution, having been repealed without a saving clause before appellant's right created thereby was reduced to final judgment, appellant's remedy provided by section 322 of the Civil Code is destroyed. Said section 3 as in force at the time of its repeal was as follows: "Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association. The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association, during the term of office of such director or trustee. * * *" The omitted portion contains nothing pertinent to this case. The answer to the question thus presented has been definitely made in Coombes v. Getz, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866, decided on April 11th of this year. In that decision the Supreme Court of the United States reversed a judgment of the Supreme Court of California dismissing an appeal in an action by creditors of a corporation to enforce a liability of its directors on the ground that the cause of action had abated by reason of the repeal of the constitutional provision imposing such liability. Coombes v. Franklin, 213 Cal. 164, 1 P.(2d) 992, 4 P.(2d) 157. The reasoning and authority of the decision of the United States Supreme Court in that case are equally applicable to an action

to recover upon a stockholder's liability. The record in that case, as in the case at bar, showed that the plaintiff's claim arose upon a liability created prior to the repeal of said section 3, article 12, of the Constitution of California. It was held that the liability was contractual in its nature, and that the right to enforce it, having become vested, stood within the protection both of the contract impairment clause in article 1, § 10, and the due process of law clause in the Fourteenth Amendment of the Federal Constitution.

For the foregoing reason I am satisfied that the repeal of said section 3, article 12, of the Constitution of California, has not deprived appellants of their right of action herein.

HOUSER, J., deeming himself disqualified, takes no part in this decision.

128 Cal.App. 222

HOWLAND v. LEONARD et al.

Civ. 998.

District Court of Appeal, Fourth District, California.

Dec. 15, 1932.

Bills and notes ⇐525.

Evidence sustained finding that payee's pre-existing indebtedness to assignee, who gave payee his note for difference between indebtedness and assigned note, constituted valuable consideration for assignment (Civ. Code, § 3106).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by C. D. Howland against Ida Leonard and others, wherein defendant Malcolm Harmon filed a cross-complaint. From an adverse judgment in favor of cross-complainant, plaintiff appeals.

Affirmed.

Nathan M. Dicker, of Los Angeles, for appellant.

Ernest M. Torchia, of Los Angeles, for respondent.

JENNINGS, J.

Plaintiff originally instituted this action against the defendants Ida Leonard, John Doe Leonard, her husband, and Charles Leonard, to rescind, on the ground of fraud, a certain contract entered into between him and defendants Ida Leonard and Charles Leonard. The contract whose rescission was sought was one whereby plaintiff had agreed to exchange an interest in a confectionery store which he owned in the city of Los Angeles for the lease, equipment, and furnishings of a motion picture theater in the same city owned by said defendants. As consideration for the transfer to him of the theater and its equipment, plaintiff, in addition to turning over to said defendants his interest in the confectionery establishment, also executed his promissory note for $2,700 in favor of defendant Ida Leonard and as security for its payment executed in her favor a mortgage upon certain real property owned by him. In the original complaint for rescission of the agreement of exchange it was alleged that the defendants had not transferred the note and mortgage and as part of the relief demanded, return of these instruments was sought. It appears, however, that at some time subsequent to the filing of the original complaint plaintiff discovered that the defendant had transferred the before-mentioned note and mortgage to one Malcolm Harmon. Plaintiff thereupon, by permission of court, amended the complaint by inserting the name of said transferee as a defendant in said action in place of a fictitious defendant. Thereafter, plaintiff filed an amended complaint in which said Malcolm Harmon was named as a defendant. This amended complaint alleged that the before-mentioned note and mortgage had been transferred and assigned by defendants Ida Leonard and Charles Leonard to the defendant Malcolm Harmon and that said transfer and assignment was made without consideration and for the purpose of preventing recovery thereof by plaintiff and as a part of a scheme and plan by all said defendants to consummate a fraud upon plaintiff. The amended complaint also sought rescission and cancellation of the agreement of exchange and return of the note and mortgage. To this amended complaint defendant Malcolm Harmon filed an answer admitting that plaintiff's note and mortgage had been sold and assigned to him on the date specified in the amended complaint, alleging that he was the owner and holder of said instruments, and denying that the assignment to him was made without consideration or as part of a scheme or plan to defraud plaintiff. The answer also contained denials, on information and belief, of the various allegations in the amended complaint relative to the agreement between plaintiff and defendants Leonard, for exchange of properties and the fraud alleged to have been perpetrated by said defendants upon plaintiff. The defendant Malcolm Harmon also filed a cross-complaint whereby he sought to foreclose the mortgage given by plaintiff as aforesaid to secure payment of plaintiff's note. To this cross-complaint plaintiff filed an answer. The defendants Leonard were

served with process by publication and the record contains no showing of any appearance by them in the action. The case was tried on the issues framed by the cross-complaint of defendant Malcolm Harmon and plaintiff's answer thereto. Upon conclusion of the trial judgment was rendered in favor of said defendant and cross-complainant ordering foreclosure of the mortgage. From the judgment thus rendered plaintiff appeals.

The single question presented by this appeal is whether the court's finding that the defendant Ida Leonard, before maturity of the note, for a valuable consideration, indorsed the note, and assigned the note and mortgage to respondent, is supported by the evidence which was produced at the trial. There is no dispute that the note and mortgage were transferred and that they were assigned and transferred to respondent prior to maturity of the note. The note was executed on December 18, 1928, and was payable three years after date. The mortgage bore the same date. The instruments were assigned and transferred to respondent on January 15, 1929. The record contains no evidence that respondent had notice at the time he took the instruments of any claim by appellant that he had been defrauded by the Leonards. The sole question remaining therefore is whether the court was justified in finding that the transfer and assignment of the instruments was made for a valuable consideration. The only evidence regarding this feature of the case consists of the testimony of respondent. His testimony was not entirely consistent and is to some extent contradictory. At one point he testified that Ida Leonard, the payee in the note, who owed him a pre-existing debt for moneys advanced for maintenance of herself and members of her immediate family, assigned the note and mortgage to him with the direction that, if possible, he should sell the note and if it could not be sold he should keep it and retain the interest paid thereon in discharge of her indebtedness to him and when the note was paid he should, from the proceeds, first retain a sufficient amount to satisfy whatever balance of her debt to him might remain unpaid and transmit the remainder to her. If this was the arrangement and understanding upon which the note was transferred and assigned to respondent we should feel impelled to the conclusion that the court's finding that the note was transferred to respondent for a valuable consideration was not sustained by the evidence. Pacific Acceptance Corp. v. Goodman, 72 Cal. App. 143, 236 P. 964; Bank of Italy v. Welbilt Auto Body Co., 101 Cal. App. 526, 281 P. 1060; People's F. & T. Co. v. Matthews F. Co., 104 Cal. App. 630, 286 P. 710. However, the respondent also testified that he accepted the note in discharge of a pre-existing indebtedness of the defendants Leonard to him amounting to $1,307.15 and that, in addition, he also executed and gave to defendant Ida Leonard or one of her sons, with her consent, his promissory note for $747.85. Section 3106, Civil Code, provides that an antecedent or pre-existing debt constitutes value. This section is found under title 15 of the Code and the subject-matter there treated is "Negotiable Instruments." Article 2 of said title under which the above-mentioned section occurs is entitled "Consideration." This section therefore is specifically applicable to the question here presented. Furthermore, as above noted, there was positive, uncontradicted evidence that, at the time the note was transferred to respondent, the latter executed and delivered either to Ida Leonard, payee of said note, or to her son, at her direction, his own promissory note for an amount which he testified represented the difference between the amount of the pre-existing indebtedness of the defendants Leonard to him and the amount for which appellant's note was drawn. The trial judge was in a position to gauge properly the testimony of respondent and we should be reluctant to declare that he was misled thereby. Kopperud v. Cookson, 50 Cal. App. 180, 194 P. 748.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

128 Cal.App. 160

CARRISOSA et ux. v. SOUTHERN SERVICE CO. et al.

Civ. 638.

District Court of Appeal, Fourth District, California.

Dec. 12, 1932.

Hearing Denied by Supreme Court Feb. 9, 1933.

1. Automobiles ⇐244(6).

Evidence that parked automobiles left opening for travel on street in business district of only from 7 to 10 feet, and that motortruck striking pedestrian left skid mark of 42 feet, supported finding of truck driver's negligence (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30, and § 114, as amended by St. 1927, p. 1437, § 31).

2. Negligence ⇐136(30).

Contributory negligence of mother who accompanied son, four years old, to sidewalk and sent him on errand across street to grocery store, *held* for court sitting without jury in action for death of son struck by truck on returning from store.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Joseph Carrisosa and wife against the Southern Service Company and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Joe Crider, Jr., and Elber H. Tilson, both of Los Angeles, for appellants.

Wm. P. Webb, of Anaheim, for respondents.

BARNARD, P. J.

This is an action for damages for the death of the minor son of the plaintiffs which it is claimed resulted from his being run into by a delivery truck owned by the defendant corporation and operated at the time by one of its employees, the individual defendant.

Some of the essential facts may be briefly stated as follows: The plaintiffs resided on W. Chestnut street in the city of Anaheim, the back yard of their premises abutting upon Oak street, the next street north of Chestnut. Oak street is paved and but thirty feet wide. In the block in which the plaintiffs live the property between Oak street and the next street north is solidly built with business buildings, having their main entrance to the north with their rear doors facing Oak street. The property occupied by the plaintiffs was about the middle of the block, and nearly opposite the rear end of this property and on the north side of Oak street was the rear door of the grocery store. At the time here in question a number of automobiles were standing along the south curb of this portion of Oak street, being parked parallel to the curb. On the north side of Oak street, opposite the rear of plaintiffs' premises, a truck was parked diagonally to the north curb and protruding into the street about fifteen or eighteen feet. This left a distance of from seven to ten feet between this truck and the cars parked along the south curb of Oak street as a passageway for any automobile to travel at the time.

Around noon on the day in question, the plaintiff Ida Carrisosa accompanied her small son, age four years and three months, to the sidewalk on the south side of Oak street in the rear of her home and from there sent him across Oak street to the grocery store referred to, for the purpose of getting an article she needed in completing the family washing in which she was engaged. As soon as the boy had crossed the street the mother hurried into the house to turn off the gas under her washing. She returned almost immediately to the sidewalk at the rear of her home with the intention of watching the boy recross the street from the store, but when she arrived at the sidewalk the accident had already occurred which resulted in the death of the child. As the boy returned from the grocery store he ran in a southerly direction across the street at a point a short distance east of the truck parked diagonally to the north curb. As he crossed the narrow opening between this truck and the cars parked on the south side of this street, he either ran into or was struck by the laundry truck belonging to and driven by the respective defendants, receiving injuries which proved fatal. The laundry truck was proceeding east on Oak street at the time of the accident.

The case was tried by the court without a jury, the court finding in favor of the plaintiffs on the issues presented as to negligence on the part of the defendants and contributory negligence on the part of the plaintiffs, and defendants have appealed from the judgment rendered.

[1] The appellants' first contention is that there is no evidence to justify the finding of negligence on the part of the driver of the laundry truck. However, the record shows that this accident occurred about noon on a clear day, with the pavement dry. The street was only thirty feet in width, and at the time in question the only opening through which an automobile could pass was between seven and ten feet wide and this fact was plainly evident to an approaching driver. One witness testified that at a point about one hundred sixty-five feet from the scene of the accident the laundry truck was proceeding at a rate of thirty miles per hour, and that just an instant later he heard the crash of the collision. There is evidence that after its brakes were applied the laundry truck left a skid mark of burned rubber on the pavement for a distance of forty-two feet and five inches. This evidence alone was sufficient to support this finding. Seperman v. Lyon Fire Proof Storage Co., 97 Cal. App. 654, 275 P. 980. There was also evidence that the brakes on this truck were in good working order and in such condition that they would stop the truck while going at a rate of speed of from twenty to twenty-five miles per hour on a similar street, within a distance of about eighteen feet. The evidence shows that the street where this accident happened constituted a business district as defined in the California Vehicle Act as it then read, and the speed limit as then existing was fifteen miles per hour (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30, and section 114, as amended by St. 1927, p. 1437, § 31). The narrow opening remaining for passage through this street and the obstruction to a clear view presented by the presence and position of the parked truck, taken in connection with the other evidence produced, furnish not only further indication of a question of fact in relation to negligence on the part of the appellant driver, but additional support for the findings complained of.

[2] While the trial court found in favor of the respondents on the issue as to contributory negligence upon their part, the appel-

lants mainly rely for a reversal of this case upon their contention that under the circumstances disclosed by the evidence, the respondents must be held guilty of contributory negligence as a matter of law. It is argued that since the mother went to the sidewalk and watched the boy cross the street and intended to come back in time to safeguard his return, it is apparent that she fully realized the danger attendant upon sending a boy of that age upon such an errand and that, having done so, especially in the middle of a block, she must be held, as a matter of law, to be guilty of contributory negligence. In the case before us there was no evidence of any city ordinance forbidding the crossing of this street in the middle of the block and no question of violation of any city ordinance is presented. While a number of cases are cited by the appellants in which it has been held that parents may not recover for injuries to their children if themselves guilty of any negligence which contributed to the happening of the accident, none of these cases furnish support for the contention here made that the question of such contributory negligence in this case is one of law and not one of fact. In one of the cases cited by appellants, Fox v. Oakland Consol. St. Ry., 118 Cal. 55, 50 P. 26, 62 Am. St. Rep. 216, the court said:

"Negligence is not absolute, but is a thing which is always relative to the particular circumstances of which it is sought to be predicated. For this reason it is very rare that a set of circumstances is presented which enables a court to say as matter of law that negligence has been shown. As a very general rule, it is a question of fact for the jury, —an inference to be deduced from the circumstances; and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury. The fact that the evidence may be without conflict is not controlling nor even necessarily material. Conceded facts may as readily afford a difference of opinion as to the inferences and conclusions to be drawn therefrom as those which rest upon conflicting evidence; and, if there be room for such difference, the question must be left to the jury. Beach, Contrib. Neg. § 163; Schierhold v. North Beach, etc., R. Co., 40 Cal. 447, 453; Van Praag v. Gale, 107 Cal. 438, 40 P. 555.

"Within these principles the evidence in this case cannot be said to establish negligence per se. Parents are chargeable with the exercise of ordinary care in the protection of their minor children; and whether the conduct of the mother, for which plaintiff is to be held responsible, in permitting the deceased child to be out of her sight for a period of from 15 to 20 minutes, without satisfying herself of his whereabouts, was, under all the circumstances, a want of ordinary care, was, we think, a fairly debatable question. Schierhold v. North Beach, etc., R. Co., supra; Meeks v. Southern Pac. R. Co., 56 Cal. 513 [38 Am. Rep. 67]; Birkett v. Knickerbocker Ice Co., 110 N. Y. 504, 18 N. E. 108."

While no decision exactly in point here has been called to our attention, in a number of cases involving a similar question under somewhat different circumstances it has been held that such a question of contributory negligence is one of fact and not one of law. De Nardi v. Palanca, 120 Cal. App. 371, 8 P.(2d) 220; Seperman v. Lyon Fire Proof Storage Co., supra; Metcalf v. Romano, 83 Cal. App. 508, 257 P. 114; Wong Kit v. Crescent Creamery Co., 87 Cal. App. 563, 262 P. 481; Patania v. Yellow-Checker Cab Co., 102 Cal. App. 600, 283 P. 295; Wiezorek v. Ferris, 176 Cal. 353, 167 P. 234.

A number of circumstances lead to the conclusion that a similar rule should be applied in the present case. It can reasonably be inferred from the evidence that regardless of the fact that this was called a street, it was, in fact, merely an alley and mainly used for the purpose of loading and unloading merchandise. In view of the speed limit at that place, and the circumstances then existing, it can hardly be said that a reasonable person must have anticipated excessively fast traffic at that place and time. Reasonable minds might differ as to whether this accident was proximately caused by the mother's negligence, if any, in permitting the child to cross the street, or by excessive speed on the part of the laundry driver at a time and place when a reasonable precaution would have prevented the injury. If it could ever be held to be negligence per se for a mother to send a child of this age across a street, a closer question would still be presented by the narrowness of this street and more especially by the very narrow opening which presented the only danger from passing traffic. The appellant Raines testified he saw no other car moving in the block at the time, and our attention is called to no evidence indicating this was a busy street or one on which cars were ordinarily driven rapidly. The mother evidently realized the presence of some danger, and intended to return, but either misjudged the time or was unable to get back in time. She exercised some care, and whether this should have been sufficient under the circumstances, as well as many other questions that might be suggested, are matters about which reasonable minds might differ. In view of all of the circumstances, we feel that the question of whether or not this mother used the care that a reasonable person similarly situated would have exercised is a debatable one, to be decided, as a question of fact, upon consideration of all of the evidence and of all reasonable inferences to be drawn therefrom. We conclude, therefore, that the finding of the trial court upon this issue is conclusive upon this appeal.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

128 Cal.App. 326

BRADFORD et al. v. BROCK et al.

Civ. 8422.

District Court of Appeal, Second District, Division 2, California.

Dec. 22, 1932.

Appeal and error ⇐786.

Motion to dismiss appeal as presenting no substantial question *held* properly denied, where respondent's brief contained 21 closely typewritten pages attempting to answer appellant's brief on merits, and reporter's transcript contained over 180 pages of which more than 50 per cent. was quoted in appellant's briefs.

Appeal from Superior Court, Los Angeles County; Henry B. Neville, Judge.

Action by L. M. Bradford and others against Paul M. Brock and others. From the judgment, defendants appeal. On motion to dismiss appeal.

Motion denied.

George L. Greer, of Los Angeles, for appellants.

Sherman & Sherman, of Los Angeles, for respondents.

WORKS, P. J.

This is an action for damages. Judgment went for plaintiffs, and defendants appeal. Respondents now move to dismiss the appeal or to affirm the judgment.

The grounds of appeal presented in appellants' brief are, among others, that the evidence was insufficient to justify the verdict rendered, the trial having been by a jury, and that there was proof of contributory negligence requiring a verdict in favor of defendants. The pending motion is based upon section 3, rule V, of the Rules of the Supreme Court and District Courts of Appeal, which provides for "a dismissal of the appeal or an affirmance of the judgment on the ground that the appeal was taken for delay only or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

Respondents themselves fly in the face of the last few words of this quotation and in effect confess the inapplicability of the rule by the submission, together with the notice of motion, of a brief of twenty-one closely typewritten pages. In this brief numerous cases are cited and extensive quotations are taken from them. An attempt is made, under appropriate headings, to answer the points, of which there are six, stated in the brief of appellants on the merits.

Upon the question whether the evidence is insufficient to support the verdict it is to be observed that the reporter's transcript on appeal consists of over one hundred eighty pages. Respondents, in support of their motion, refer to but a few lines of the testimony in their brief; whereas, the brief of appellants on the merits quotes more than 50 per cent., by volume, of the contents of the transcript. While we do not now decide the question, it appears that the case is one of a mere conflict in the evidence.

There was a motion for a new trial in the lower court. One of the grounds urged in support of the motion was that the evidence was insufficient to justify the verdict. The motion was denied.

For all these reasons we think the present motion is without merit. The effort of respondents in presenting the motion amounts to an attempt, whether willful or not, to procure an advance on the calendar of a possibly meritorious appeal.

Motion denied.

We concur: IRA F. THOMPSON, J.; STEPHENS, Justice pro tem.

128 Cal.App. 284

HILL et al. v. GENERAL PETROLEUM CORPORATION et al.

Civ. 4538.

District Court of Appeal, Third District, California.

Dec. 20, 1932.

1. Mines and minerals ⇐78(7).

In lessor's action to have it adjudged that covenant preventing lessor's drilling well on leased land quitclaimed by lessee nearer than 400 feet to well on leased lands retained was inoperative, trial court's finding that well on premises retained was producing oil in paying quantities *held* conclusive.

> Oil and gas lease involved provided that lessee could any time, at his option, deliver to lessor quitclaim deed quitclaiming all or any portion of leased land, whereupon land quitclaimed should be released from effect of lease, but lease provided that lessor should not drill on quitclaimed land at any place nearer than 400 feet to any well on land retained by lessee during life of such well.

2. Mines and minerals ⇐78(1).

Covenant restricting lessor's drilling well on leased land which lessee quitclaimed did not permit lessor to extract oil drawn below oil zone being developed by lessee.

3. Mines and minerals ⇐78(1).

Discovery of new oil zones and production of oil therefrom by lessees on land in which lessors had no interest *held* not "change of conditions" making enforcement of restrictive covenant against lessors' drilling wells on land quitclaimed by lessee within 400 feet of lessee's well inequitable.

[Ed. Note.—For other definitions of "Change," see Words and Phrases.]

4. Mines and minerals ⇐57.

Lessee's promises to drill wells and pay royalties and taxes *held* consideration for lessor's agreement to demise premises and refrain from drilling any portion thereof which lessee might quitclaim (Civ. Code, § 1605).

5. Mines and minerals ⇐58.

Whole of promises of lessee under mining lease are consideration for whole of promises of lessor.

6. Mines and minerals ⇐78(7).

Provision of specific performance statute respecting no remedy, unless mutual, *held* inapplicable in action to have restrictive covenant of oil lease adjudged inoperative; specific performance not being sought (Civ. Code, § 3386).

7. Contracts ⇐143.

Court cannot alter contract by construction or make new contract for parties; its duty being confined to interpretation of one which parties made for themselves.

8. Mines and minerals ⇐58.

Clause of oil lease restricting lessor from drilling on leased land quitclaimed by lessee nearer than 400 feet to well on leased land retained by lessee *held* valid.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Mabel D. Hill and husband against the General Petroleum Corporation and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Chandler, Wright & Ward, of Los Angeles, for appellants.

A. L. Weil, of San Francisco, and W. L. Appleford, of Los Angeles, for respondents.

TUTTLE, Justice pro tem., delivered the opinion of the court.

The purpose of this action is to have it adjudged that a certain restrictive covenant in an oil lease is inoperative and unenforceable and to remove said covenant as a cloud upon the title to real property belonging to plaintiffs.

The complaint contains seven counts. Demurrers were sustained to the last four counts, and upon failure to amend the cause was tried upon the first three counts. The trial court found for defendants upon the issues raised, and judgment was entered that plaintiff take nothing. The appeal is prosecuted from the judgment.

The only contention made upon this appeal is in respect to the sufficiency of the complaint, and the several causes of action therein set forth. The sufficiency of the evidence to support the findings is not questioned, nor is any ruling of the court upon matters of evidence attacked.

The plaintiffs entered into an oil and gas lease with defendant Midway Gas Company, on February 1, 1922, covering certain property in the Santa Fé Springs oil fields in Los Angeles county.

The first cause of action is one to remove a cloud on the title to lands owned by plaintiff, described as lot 21, block 77, township of Santa Fé Springs, and included originally in said lease. It alleges the ownership of the lands by the plaintiffs, the execution of an oil and gas lease thereon by the plaintiffs in favor of the defendants, including a recital of the history of the transfer of the lease, and also alleges that the oil and gas lease contained, among other provisions, this language:

"Right of Oil Company to Quitclaim.

"At any time or times after the date of this lease, the Oil Company may, at its option, execute and either deliver to the owner or cause to be recorded in the office of the county recorder of said county a quitclaim deed or deeds or other necessary legal instrument, duly acknowledged so as to be ready for recordation, quitclaiming all or any portion of the leased lands, as the Oil Company may select, and upon the delivery or filing for record of any such deed the land so quitclaimed thereby shall forthwith be released from the effect of this lease, and none of the rights and obligations of the parties hereto shall thereafter apply to said quitclaimed lands except as follows, viz.: * * *

"(2) The owner shall not drill nor excavate for or otherwise seek or take oil, gas or other hydrocarbons upon said quitclaimed lands at any place thereon nearer than four hundred (400) feet to any well upon lands retained by the Oil Company, during the life of such well. * * *"

The first cause of action further alleges that the defendant General Petroleum Corporation executed and caused to be recorded a quitclaim deed, quitclaiming the property described in the complaint, with one other parcel to the plaintiffs, and that the quitclaim deed contained the language above set forth as subdivision "(2)" of paragraph "XII" of the lease. The complaint further alleges that, on the date of the recording of the quitclaim deed, the only well existing on lands retained by the defendants or any of them under said well within 400 feet of any part of lot 21 was the well known as "General Petroleum H-M No. 1" or "Hill-Midway No. 1," then producing from the Bell Sand. The complaint then recites that the development of the field, in which the premises are located,

has resulted in the discovery of seven separate and distinct zones, and the complaint describes these zones, their various thicknesses, and depth from the surface, and also sets forth a map showing these zones. The complaint further alleges that the defendants have drilled ten wells within 400 feet of lot 21 described in the complaint, to the Bell, Meyer, Nordstrom, and Buckbee zones, on lands in which plaintiffs have no right, title, or interest, and the complaint sets forth the productivity of these various zones as measured in barrels of oil extracted to date from the wells within 400 feet of lot 21 drilled by defendants and on lands in which these plaintiffs have no right, title, or interest. The complaint then alleges that the Hill-Midway No. 1 well ceased to produce oil in commercially paying quantities before September, 1928, and was finally abandoned on the 20th day of February, 1929.

The complaint further alleges that the defendants are producing large quantities of oil within 400 feet from lot 21, and were producing this oil prior to the time the well known as Hill-Midway No. 1 ceased to produce oil in commercial quantities, and have been and now are producing large quantities of oil therefrom, and that this oil being so produced is being drained from beneath the premises known as lot 21; that the plaintiffs have no interest in the lands upon which the wells of the defendants are being operated, and the defendants do not intend to pay the plaintiffs any royalties for oil taken from beneath lot 21.

Plaintiffs then allege that the defendants will continue to produce oil from wells adjoining lot 21 and will continue pumping oil in large quantities from all productive zones thereunder, to plaintiffs' great and irreparable injury and damage.

Plaintiffs allege that, by reason of the facts above set forth, the defendants have no further right, title, or interest in and to lot 21 under subdivision "(2)" of paragraph "XII" of the said oil and gas lease, or otherwise.

Plaintiffs then allege that the terms of the quitclaim deed from defendants to plaintiffs constitute a cloud upon the title of plaintiffs to the real property described in the complaint, and that this cloud is preventing the plaintiffs from making an advantageous and highly profitable oil and gas lease thereunder, for the extraction of oil and gas therefrom; and that, unless this cloud is removed, the plaintiffs will be unable to enjoy the property and other rights owned by them in the same, and will be deprived of the full use thereof.

The complaint further alleges that the plaintiffs have had a bona fide offer from oil producing companies to lease the premises on a 20 per cent. royalty basis, all of which will not affect or injure the defendants or any of them, in any way, in their operations on any of the premises described in the oil and gas lease attached to the complaint.

The second count contains most of the allegations of the first, and, in addition, alleges that there was no consideration for the covenant.

The third count is almost identical with the first, and contains the additional allegation that the consideration for the covenant wholly failed.

The property covered by the lease has been subdivided into blocks and lots and streets laid out. These lots are grouped in the lease into four parcels, A, B, C, and D. Parcel D, or lot 21, described in the quitclaim deed mentioned in the complaint, is a lot with a 50-foot frontage and a depth of 150 feet. Within the 400-foot radius mentioned in subdivision (2) of paragraph XII of the lease, there were, at the time of the filing of the complaint, numerous producing oil wells operated by defendant General Petroleum Corporation, and producing oil at a profit. Within this area the latter company, at the time the complaint was filed, also owned and operated profitably oil wells upon the lands of other parties, and in which plaintiffs had no interest.

On October 23, 1923, General Petroleum Company, one of the defendants herein, executed and recorded a quitclaim deed to plaintiffs, covering said lot 21. This deed recited that it was executed subject to paragraph XII, subdivision 2, of the lease. It is admitted that at the time said deed was executed the only well existing on lands retained by said defendants under said lease, and within 400 feet of said lot 21, was the well known as "General Petroleum H-M No. 1." It is also admitted that this well was at said time producing gas and oil in commercially paying quantities. No drilling operations have ever been conducted upon lot 21. Since the date of said deed, defendant petroleum corporation has drilled four wells within the said 400 feet radius, some of which were producing at the time of the trial, while others were being deepened to lower sand. The undisputed evidence shows that the oil from these fields exists in distinct zones, lying one under the other. These zones vary in thickness and in productivity, and are seven in number. They are designated by different names. The one nearest the surface is the Foix zone. Then, following in order as the drilling proceeds downward, are the Bell, Meyer, Nordstrom, Buckbee, O'Connell, and Clark zones. The last-named zone is reached at a depth of some 8,500 feet. At the time the "H-M No. 1" well was drilled, and when the deed was executed, only two of these zones were known to exist in this oil field, to wit, the Foix and Bell. The others were discovered subsequently. Each of these seven zones is an entirely separate unit or pool of oil. Well "H-M—

No. 1" was, at the time the deed was executed, producing oil in paying quantities from the Bell zone, and it has never been extended beyond that zone. The court found that this well was producing oil in paying quantities at the time of the trial, and this finding is supported by substantial evidence. The court found that, since the execution of the deed, defendants had drilled four wells within 400 feet of the surrendered lot; that they had drilled a total of nine wells on plaintiffs' property at a cost exceeding $1,600,000, and had paid in royalties up to June 1, 1929, in excess of $507,328.26. Of this amount plaintiffs received $375.587.99.

The position of appellants upon this appeal is indicated by the statement made in their opening brief in the following language: "The theory upon which plaintiffs maintain this action is, First: That at the time of the recording and delivery of the quitclaim deed there was only one well on the demised premises within four hundred (400) feet of lot 21, and that this well at the time of the commencement of this action was not producing oil in paying quantities, and, Second: That even though there was on October 23, 1923, a producing well upon the demised premises within four hundred (400) feet of lot 21, which is still producing oil in paying quantities, nevertheless, upon the discovery of new and deeper zones beneath the demised premises, and beneath lot 21, plaintiffs have the right to drill to these new zones and produce oil therefrom unless the defendants are producing from these new zones on lands retained by them subject to the lease. Plaintiffs' theory being that the new zones are entirely separate and distinct from the so-called Bell zone from which the well retained by the lessee was producing oil on October 23, 1923, and that the purpose of the language in the quitclaim deed and in the lease was to prevent the plaintiffs from drilling on lot 21 in competition with the well retained by lessee on the demised premises, and was not designed to prevent plaintiffs from producing from independent zones. If plaintiffs drilled a well on lot 21 which did not compete with a well on lands retained by defendants, there could be no competition, and plaintiffs should be allowed to drill such a well and produce oil and gas therefrom."

[1] As to the first contention, the trial court found that this well, known as "H-M No. 1," was producing oil in paying quantities at the time of the commencement of the action. We have examined the record and find that witness McClaine, for defendant, testified that he was production manager for defendant General Petroleum Corporation. The following questions and answers appear in his testimony:

"Q. Now, in the months of September, October, November and December, 1928, and January and February, 1929, did Hill-Midway No. 1 produce oil in paying quantities? A. Yes.

"Q. Is Hill-Midway producing oil in paying quantities at this time? A. Yes."

During the course of the trial, counsel for appellants summarized the situation as follows: "Now, this defendant retained a well at that time (when the quitclaim deed was executed) known as Hill-Midway No. 1 that was within 400 feet of lot 21. This is the only well that could affect our rights in lot 21. If that well is not producing oil in paying quantities that well cannot restrict us from developing lot 21. If it is producing oil in paying quantities that theory of our case, of course, falls. The finding upon this question of fact is a conclusive answer to the first contention of appellants, and, as counsel aptly remarked, 'the theory of course, falls.'"

[2] The second theory upon which appellants rely, in seeking nullification of the lease provision in question, is the failure of respondents to develop each of the oil zones underlying the 400-foot radius, and the refusal of respondents to permit them to develop a well upon lot 21, which was quitclaimed as we have stated. As the well "H-M No. 1," at the time the deed was executed, was extracting oil from the second or "Bell" zone, it is argued that inhibition to drill upon lot 21 does not apply to the other five oil zones beneath the "Bell" zone, and that appellants are therefore at liberty to sink a well upon this lot so long as they do not extract oil from a zone which is being developed by defendants. We cannot acquiesce in this construction of the lease. It does not say that plaintiffs shall not drill to any sand from which defendants are producing, but it says that they "shall not drill nor exacate for or otherwise seek or take oil, gas or other hydrocarbons upon said quitclaimed lands at any place thereon nearer than 400 feet to any well upon lands retained by the oil company, during the life of such well." No authorities are cited by appellants to uphold their contention. They simply complain and point out that defendants, under a literal interpretation of the lease, could sink and operate a number of other wells within the 400-foot radius and upon lands in which appellants have no interest, and thus drain the oil from underneath their lot 21, while appellants must stand by without any right to sink their own well upon that lot. This is a contingency which would reasonably have been foreseen and anticipated by appellants when they executed the lease. At that time two oil zones had already been discovered in the district, and it is reasonable to suppose that deeper drilling might penetrate additional zones. We are constrained to hold that, as long as defendants are operating a well producing oil in paying quantities and within the 400-foot radius, appellants are bound by the prohibition, and this irrespective of the zone from

which the oil is being abstracted by defendants.

[3] In connection with the foregoing theory, appellants seek to invoke the rule that restrictive covenants will not be enforced where changed conditions in respect to the property render their enforcement inequitable, citing Downs v. Kroeger, 200 Cal. 743, 254 P. 1101, and similar cases. While the lease was fair and equitable when made, they state, subsequent events consisting of the discovery of new oil zones and the production of oil therefrom by defendants on lands in which plaintiffs have no interest, justify the court in releasing them from performance, due to the great hardship which would be imposed upon them. The distinction between the Downs Case and the instant case is obvious. Here we have no changing conditions which have altered the situation. The physical conditions have never changed. The oil zones were always there. It is true some of them were not known, but, as two of them had already been discovered, it is reasonable to presume that there might be others. There must be a change of conditions to justify the application of the rule. There is no change of conditions here. The contention is without merit.

[4, 5] Recovery upon the second and third counts is based upon the contention that there was no consideration for the covenant in the lease relating to restrictions, and that there was also a failure of consideration for such covenants. The court found against appellants upon each theory, and we believe acted correctly in so doing. It appears from the lease itself that the consideration was the promise of defendants to drill wells and pay royalties and taxes. Therefore, when defendants made these promises, it was ample consideration for the agreement of plaintiff to demise the premises, and to refrain from drilling any portion thereof which might be quitclaimed. Civ. Code, § 1605. Appellants urge that the restrictive covenant was supported by no consideration because it was inserted solely for the benefit of the lessee and was of no benefit at all to the lessor. They state that the lessee parted with nothing of value for it and the lessors received nothing of value therefor. Under this lease we do not believe it is permissible to segregate the various promises of defendants against the various promises of plaintiffs, and to say that certain promises were in consideration of certain other promises. The rule of law is that the whole of the promises of the lessee are consideration for the whole of the promises of the lessor. "The single consideration of paying a specified sum of money by one party to a contract is sufficient to support several distinct stipulations by the other party to do, or refrain from doing, certain things, and it is unnecessary to repeat in every paragraph of the contract that such stipulations are entered into for the consideration once expressed." 6 R. C. L. p. 654, citing numerous authorities. The law of implied covenants invoked by appellants has no application to this case, for here the measure of diligence required by the lessee is fully defined. Becker v. Submarine Oil Co., 55 Cal. App. 698, at page 701, 204 P. 245. It must be borne in mind that appellants are not, by this action, seeking to attack the entire lease, which is still in full force and effect between the parties. They are simply seeking to eliminate the restrictive covenant under which lot 21 was quitclaimed by defendants.

[6] The fourth count is based upon the lack of mutuality, the authorities cited being section 3386 of the Civil Code relating to specific performance of contracts and cases arising out of said actions. This action is not one involving specific performance, and such relief is not prayed for. The rule laid down in the Code was enacted solely with reference to the remedy available where specific performance of a contract is sought. The demurrer to this count was properly sustained.

The fifth count is for declaratory relief, and seeks a construction of the restrictive clause which we have discussed under the first count. Change of conditions under a restrictive clause is relied upon, and we have taken up and disposed of that theory. The demurrer to this count was also properly sustained.

The sixth count, involving the matter of damages, involves issues tried under the first count. If plaintiffs cannot avoid the restrictive clause and are bound thereby, they are not entitled to damages.

The seventh count seeks an injunction in connection with the restrictive covenant. The issues involved were tried also under the first count, under which we have held the restrictive clause to be valid and binding upon appellants.

[7] In conclusion, we might observe that it is not the province of the court to alter a contract by construction or to make a new contract for the parties. Its duty is confined to the interpretation of the one which they have made for themselves, wholly without regard to its wisdom or folly. 13 C. J. p. 525.

[8] We therefore hold that the restrictive clause of the lease is not vulnerable to the attack made by appellants, and that it is a valid and subsisting obligation which must be respected by all parties.

The trial court having properly disposed of all the issues, both legal and of fact, and no error appearing in the record, it is hereby ordered that the judgment be affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

128 Cal.App. 265

LOOMIS FRUIT GROWERS' ASS'N v. CALIFORNIA FRUIT EXCHANGE.

Civ. 4592.

District Court of Appeal, Third District, California.

Dec. 19, 1932.

1. Agriculture ⇐6.

Agreement between fruit growers' association and fruit exchange for marketing of deciduous fruits *held* not to constitute exchange exclusive selling agent of association.

The marketing agreement purported to appoint the fruit exchange as the "marketing and selling agent for all deciduous fruits under" control of the fruit growers' association, except such fruit "as shall be sold for cannery purposes and ripe fruit." At the time of the execution of the marketing agreement, a by-law of the fruit exchange provided for the distribution of reserve funds and dividends accumulated by the exchange from charges against growers, to all growers "who have signed contracts and shipped consistently with this exchange during the season when this dividend has been earned. * * *" Subsequently by-law was amended so as to eliminate quoted words.

2. Agriculture ⇐6.

Fruit growers' association, under marketing agreement with fruit exchange, *held* entitled to patronage dividends on withholdings from proceeds of ripe fruits and grapes delivered to exchange.

Fruit growers' association, under agreement with fruit exchange for marketing of deciduous fruits, was entitled to dividends out of withholdings by exchange from proceeds of fruit sold through exchange on ripe fruit as well as on green fruit because custom of parties was to deduct withholdings from proceeds whether fruit was green or ripe and to treat same as withholdings and to declare installment payments out of same as might be determined from time to time, and because the contract was to be construed in accordance with the construction that the parties had placed thereon for long period of time.

3. Agriculture ⇐6.

Fruit exchange, under marketing agreement with fruit growers' association, in view of construction placed on by-law and amendments thereto, *held* estopped to assert construction of by-law which would require association to ship all deciduous fruit through exchange.

At time shipments of deciduous fruit in question were made through fruit exchange by fruit growers' association, by-law of exchange relating to reserve funds and dividends was amended so as to eliminate provision requiring growers, to be entitled to participate in dividends, to have shipped consistently with exchange during season when dividend was earned. Furthermore, consistent interpretation of amended by-law was acted on after its adoption up to and including time of cancellation of marketing agreement.

4. Contracts ⇐170(1).

Parties should be bound by construction placed on contract by long course of conduct.

5. Contracts ⇐170(1).

Where parties for long time followed particular construction of contract, one party could not thereafter insist on interpretation to contrary which would work forfeiture of rights (Civ. Code, § 3516).

6. Agriculture ⇐6.

In action by fruit growers' association against fruit exchange for accounting under marketing agreement, evidence *held* to support finding that association made all shipments as required by terms of marketing agreement.

7. Action ⇐6.

Proceeding for declaratory judgment can only be invoked to declare rights and not to determine or try issues (Code Civ. Proc. § 1060).

8. Appeal and error ⇐173(10).

Contention on appeal that action was prematurely brought in part *held* not available where not raised at trial.

9. Appeal and error ⇐1152.

Judgment directing payment of money and directing execution *held* erroneous as to unmatured installments, and was amended so as to direct execution for future installments only when such installments severally become due.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by the Loomis Fruit Growers' Association, a corporation, against the California Fruit Exchange, a corporation. Judgment for the plaintiff, and the defendant appeals.

Motion to dismiss the appeal denied, and the judgment amended, and, as amended, affirmed.

Devlin & Devlin & Diepenbrock and C. F. Kimball, all of San Francisco, and Lowell & Lowell, of Auburn, for appellant.

U. S. Webb, of San Francisco, T. L. Chamberlain, of Auburn, Arthur B. Eddy, of Woodland, and R. C. McKellips, of Auburn, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

In this action the plaintiff had judgment as hereinafter stated, from which judgment the defendant appeals.

(For convenience, the plaintiff will hereafter be referred to as "Association" and the defendant as "Exchange.")

On the 6th day of July, 1907, an agreement was entered into between the association as the party of the first part, and the exchange as party of the second part, for the marketing of deciduous fruits, which agreement, though made only for one year, was to run from year to year until notification of cancellation was given by either party to the other prior to the 31st day of December of the current year. The agreement, so far as material here, is contained in paragraphs numbered 1, 7, and 8, paragraph numbered 1 reading as follows: "The party of the first part hereby appoints said Exchange as its marketing and selling agent for all deciduous fruits under its control, (except such fruit as shall be sold for cannery purposes and ripe fruit); for which the Exchange shall deduct from the growers' account sales seven (7) per cent of the gross receipts in full compensation for such service, including Eastern brokerage, telegrams and all other expenses incurred by the Exchange in so doing."

Paragraph 7 of the agreement reads: "It is also agreed that although the crop contract to ship fruit may be made directly between the Exchange and the individual grower, yet the Exchange hereby undertakes to protect, as far as possible in its power, the interests both of the grower and the Association through which said growers' fruit may be locally handled."

Paragraph 8 is in the following words: "In consideration of the party of the first part holding stock in the Exchange, it is hereby agreed that it shall be paid any dividend based on the gross amount realized on all fruit received for marketing through party of the first part in the same manner as growers are entitled to any dividend in accordance with the last paragraph of Article XIX of the By-Laws, less any amounts that may be due to individual growers who are members of party of the first part and who are also entitled to receive direct this dividend, having carried out the provisions contained in the paragraph of Article XIX of the By-Laws referring to growers' shipments."

At the time of the execution of the agreement between the association and the exchange, article XIX of the by-laws of the exchange read: "Reserve Funds and Dividends. The net earnings of each year shall be subject, after a six per cent (6%) dividend has been paid on the paid-up stock, to a charge of twenty (20%) per cent towards a reserve fund for the first three (3) years, after which the continuance of this charge shall be left to the decision of the board of directors. When a further amount is available for distribution, it may be divided, at the discretion of the directors:—half amongst all growers who have signed contracts and shipped consistently with this Exchange during the season when this dividend has been earned, based proportionately on the gross amount realized by the fruit of such shippers, the other half to be a further dividend on the stock issued."

Article XIX of the by-laws of the exchange was amended from time to time until March 25, 1920, when the final version read as follows:

"The Corporation is to pay its members the total amounts of proceeds received by it from the sale of the products of such members in excess of the members' proportion (determined as herein provided) of the aggregate of the net cost of operation and the dividend requirement. The term 'Members', as used herein, means all persons (including individuals, corporation or associations) who have entered into contracts, as permitted by these By-laws with the Corporation covering the sale by the Corporation of deciduous fruit products for account of such persons.

"The term 'Net Cost of Operation' as herein used means the excess during each calendar year of the total of all expenses of every kind which the directors of the corporation may consider necessary or advantageous or may be obliged to incur (inclusive of depreciation, obsolescence and depletion of the physical properties of the corporation, and all losses, over all income which may accrue to the corporation from trading operations and other sources (inclusive of realized depreciation).

"The term 'Dividend Requirement' as herein used means the amount required to enable the payment of an annual dividend upon the fully paid capital stock at the rate of eight per cent (8%) per annum, computed in the same manner as interest upon borrowed money, plus the amount of income and profit taxes as have been paid during each calendar year.

"In anticipation of the annual determination of the Net Cost of Operation and of the Dividend Requirement the corporation is to withhold from the proceeds of the products of its members such percentage thereof as the directors may designate. The aggregate of the amounts so withheld during each calendar year is to be designated as 'Withholdings.'

"At the end of each calendar year the Net Cost of Operation and the Dividend Requirement shall be determined. In the event that the Withholdings shall exceed the aggregate of the Net Cost of Operation and Dividend Requirement then such excess shall be apportioned between the members in proportion to the proceeds of the products of each, and as so apportioned shall be credited to individual

Withholdings Repayable account with said members. Such Withholdings Repayable are to be paid in such installments at such times as may be determined by the directors but the Withholdings Repayable of any year must be completely paid within five years from the end of the year of the withholding. At the time of making any payment of Withholdings Repayable the Corporation may deduct from the payment then due to any member the amount of any indebtedness from such member to the Corporation or a portion of such indebtedness, but a complete statement of the amount so deducted and of the indebtedness upon which applied shall be furnished such member.

"In the event that the Withholdings shall be less than the aggregate of the Net Cost of Operation and the Dividend Requirement then such deficiency shall be apportioned between the members in proportion to the proceeds of the products of each, and as so apportioned shall be charged to individual Withholdings Deficiency Accounts with said members. Such Withholdings Deficiencies are to be collected in such installments at such times as may be determined by the directors.

"The sole source of revenue of the corporation is the deduction of the Dividend Requirement from the Withholdings."

The complaint in this action, omitting all formal parts and allegations not necessary to be considered, sets forth the following facts:

During the year 1923, the association delivered to the exchange deciduous fruits of the value of $737,876.19. From this sum the exchange withheld from the association 7 per cent. of such proceeds in the sum of $51,651.33; that thereafter, and as provided by the by-laws amended as herein stated, the exchange determined that 4 per cent. of the proceeds should be paid to the association in installments as follows: In January, 1924, 1 per cent., to wit, $7,398.76; in November, 1924, 1 per cent., to wit, $7,398.76; on November 15, 1928, 2 per cent., to wit, $14,797.52; that the installments due in January and November, 1924, have been paid; that the installment due and payable December 15, 1928, has not been paid; that during the year 1924, the association delivered to the exchange, and the exchange received for shipment, deciduous fruits upon which it received the sum of $553,012.53, from which sum the exchange withheld from the association 7 per cent. amounting to $38,710.88; thereafter the board of directors of the exchange determined that there should be paid upon the withholdings 4 per cent. of the proceeds received from the sale of fruits, and there became payable to the association from the exchange the following sums, to wit: On January 17, 1925, 1 per cent., to wit, $5,530.12; in November, 1925, 1 per cent., to wit, $5,530.12; in December, 1929, 2 per cent., to wit, $11,060.20; that the exchange has paid to the association the installments payable in January and November, 1925; that the installment payable December 19, 1929, has not been paid; that during the year 1925, the association delivered to the exchange, and the exchange received from the association for shipment, and shipped, deciduous fruits for which it received $746,502.88, withholding from the association 7 per cent. of said proceeds in the sum of $52,255.20; thereafter the exchange determined that there should be payable from the withholdings 4 per cent. in the following installments, to wit: In January, 1926, 1 per cent., to wit, $7,465.03; in November, 1926, 1 per cent., to wit, $7,465.03; in December, 1930, 2 per cent., to wit, $14,930; that there has been paid by the exchange to the association the installments provided for to be paid in January and November, 1926; that the installment of 2 per cent. due in December, 1930, has not been paid, nor any part thereof; that during the year 1926 the association delivered to, and the exchange received from the association for shipment, and shipped fruit for which it received the sum of $717,775.64, out of which sum it withheld from the association 7 per cent., to wit, $50,244.29; that thereafter the board of directors of the exchange determined that there should be paid to the association from said withholdings 3 per cent. thereof in the following installments: In January, 1927, 1 per cent., to wit, $7,177.76; in November, 1927, 1 per cent., to wit, $7,177.76; in December, 1931, 1 per cent., to wit, $7,177.76; that there has been paid to the association by the exchange the installments falling due January and November, 1927; that the installment of 1 per cent. due December, 1931, has not been paid, nor any part thereof; that during the year 1927 the association delivered to, and the exchange received from, the association for shipment, deciduous fruits for which it received the sum of $628,111.45, and withheld from the association 7 per cent. of said proceeds in the sum of $43,967.80; thereafter the board of directors of the exchange determined that there should be paid out of said withholdings to the association 3 per cent. in the following installments, to wit: In January, 1928, 1 per cent., to wit, $6,281.11; in November, 1928, 1 per cent., to wit, $6,281.11; in December, 1932, 1 per cent., to wit, $6,281.11; that the exchange has paid to the association the installments due as aforesaid in January and November, 1928; that the installment of 1 per cent. due December, 1932, has not been paid, nor any part thereof; that during the year 1928, the association delivered to the exchange deciduous fruits for shipment, and the exchange received from the association and shipped fruit for which it received the sum of $784,166.67; that out of said sum the exchange withheld from the association 7 per cent. in the sum of $54,891.67; that thereafter the board of directors determined that there should be paid to the

association from the withholdings 3¾ per cent. in the following installments, to wit: In January, 1929, 1 per cent., to wit, $7,841.67; in November, 1929, 1 per cent., to wit, $7,841.67; in December, 1933, 1¾ per cent., to wit, $13,722.93; that the exchange has paid to the association the installment due in January, 1929; that the installments due in November, 1929, and December, 1933, respectively, have not been paid, nor any part thereof. Interest also was claimed by the association on account of moneys withheld as herein stated, which moneys were due and payable from the exchange to the association.

The court found in accordance with the allegations of the complaint and entered judgment in favor of the association against the exchange in the sum of $69,315.98 and costs. The court also determined that the exchange was indebted to the association in the further sum of $30,381.14, which will become payable in installments by the exchange to the association as follows, to wit: January 11, 1932, $7,177.66; January 10, 1933, $9,421.67; January 8, 1934, $13,781.71. The judgment also provided that execution should issue for the amount of each installment as the same became due and payable.

Paragraph IX of the findings of the court, relative to the action of the exchange following each succeeding amendment of article XIX of its by-laws, is as follows: "That during the year 1907, to and including the year 1928, withholdings repayable were calculated, declared and paid by defendant-corporation to plaintiff, and to its other shippers in accordance with Article XIX as it existed during the time for which withholdings repayable were ordered; that each time said Article XIX was amended, withholdings repayable were calculated, declared and paid in accordance with the amended article in existence during the time for which withholdings repayable were declared." This finding appears to be unchallenged by appellant, and an examination of the record discloses that, after the amendment to article XIX of the by-laws of the exchange in 1920, installment payments out of withholdings were declared and paid in accordance with the terms and provisions of article XIX up to and including the termination of the agreement between the association and the exchange. The same practice was followed during all the preceding years.

The court further found that the association has performed, all and singular, the terms and conditions required by it to be kept and performed under the agreement entered into between the association and the exchange on the 6th day of July, 1907.

Upon this appeal the appellant contends that the association has forfeited all rights to refunds out of the withholdings hereinbefore mentioned, for the following reasons, to wit: First. That the association failed to ship consistently through the exchange as required by the agreement and by-laws. Second. That in no event should the judgment have included a recovery of patronage dividends based upon ripe fruits and grapes. Third. That the judgment was and is erroneous in including patronage dividends not due and payable at the time of the entry of judgment.

[1] While it may have been within the contemplation of the parties at the time of the execution of the agreement, there is nothing in its terms which makes the exchange the exclusive agent of the association, although the agreement did provide that the exchange might and should act as the agent of the association in the shipment of all deciduous fruits under the control of the association, save and except such fruit as should be sold by the association for cannery purposes and ripe fruit.

[2] It is provided further that, out of all sales made by the exchange of fruit delivered to it for shipment by the association, 7 per cent. should be deducted. No qualification appears in the agreement or exception made therein between green and ripe fruit handled by the exchange for the association. The same percentage was to be deducted for the service, and there is nothing in the agreement which indicates that there should be any difference in accounting for the 7 per cent. withholdings whether the fruit handled was green or ripe.

The record likewise shows that no distinction was made in declaring dividends out of the withholdings between green and ripe fruit. The practice, as shown by the record, was to deduct 7 per cent. from the proceeds received for the sale of fruit whether green or ripe, to treat the same as withholdings, and to declare installment payments out of the same as might be determined from time to time. This practice the record shows to have been followed, and this construction given to the contract by the parties involved during the entire period covered by this action. It follows, therefore, that the argument of the appellant that patronage dividends should not be considered or allowed for and on account of ripe fruits and grapes is contradicted by the practice of the appellant, and the construction placed upon the contract and the by-laws by the parties interested. We may therefore dismiss appellant's second contention as shown by the record to be untenable.

[3] In answer to appellant's contention that the association did not comply with all the covenants and provisions of the agreement on its part to be kept and performed, it is contended that article XIX of the by-laws of the exchange as it stood in 1907 referred only to the manner of making payment of refunds to the association, and not as to a

condition precedent; in other words, that the payment was to be made by the exchange to the association in the same manner as made to growers who had performed conditions necessary on their part to be kept and observed. However, it is not necessary to definitely determine the merits of this contention. As we have said, the record shows that, each time article XIX of the by-laws was amended for each successive year, the parties acted as though the by-laws as amended applied to such successive year. The agreement in itself provided for its continuance from year to year, and the conduct of the parties as shown by the record, read the amended by-laws into the contract as each successive amendment was adopted, and, during the period involved in this controversy, article XIX of the amended by-laws, omitted the words "who have signed contracts and shipped consistently with this Exchange during the season when this dividend has been earned." Thus, after the amendment of article XIX of the by-laws of the exchange, on March 25, 1920, there was neither condition precedent nor condition subsequent, requiring the association to ship all of the deciduous fruit under its control, by or through the exchange; nor does the record show any by-law of the exchange in which the association would or could be made subject to a forfeiture of the moneys belonging to it and withheld by the exchange pending the determination of the amount that should be withheld to cover its expenses and dividend requirements. It must be understood that article XIX of the by-laws of the exchange as amended in 1920 recognized the ownership of growers, shippers, and, as well, of this association, to the moneys withheld by the exchange. The term "withholdings" is expressly used in particularizing the portion of the 7 per cent. which should have been repaid to the owners thereof in percentage installments, as might be determined upon by the board of directors of the exchange. This interpretation of the amended by-law was acted upon after its adoption in 1920, up to and including that portion of the year 1928 until the association notified the exchange of cancellation of the agreement, as provided therein. The exchange having made yearly application of article XIX of its by-laws as amended, and having eliminated therefrom the provision relative to consistent shipment, we think the exchange is estopped to assert any other construction.

In 6 California Jurisprudence, p. 304, under the subject of "Contracts" and "Construction by Parties," the text reads: "The intention of the parties is to be ascertained by the writing alone, if possible, and not from the subsequent actions of one of them. However, it is well recognized that the terms of a contract may be manifested by conduct when not stated in words. And where the meaning is doubtful, the acts of the parties done under a contract afford one of the most reliable means of arriving at their intention. The law recognizes the practical construction of a contract as the best evidence of what was intended by its provisions. 'Contemporaneous exposition is in general the best.' Parties to a contract have a right to place such an interpretation upon its terms as they may see fit, even when such an interpretation is apparently contrary to the ordinary meaning of its provisions. It is to be assumed that they best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by them contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be."

[4] The principle that parties should be bound by the construction placed upon a contract by a long course of conduct is eminently just and fair, and, we think, amply supported by the authorities. 6 Cal. Jur. p. 306; Alexander v. Walling, 105 Cal. App. 525, 288 P. 138; Retsloff v. Smith, 79 Cal. App. 443, 249 P. 886; Kennedy v. Lee, 147 Cal. 596, 82 P. 257.

[5] Even if the construction given by the parties to the contract involved in this action, of reading into the contract article XIX of the by-laws of the exchange as amended from time to time, is not the correct construction, yet under the wording of section 3516 of the Civil Code it was too late, after 20 years of following such a construction, to insist upon an interpretation which would work a forfeiture of the rights of the association.

[6] Notwithstanding the construction given to the application of the various amendments to article XIX of the by-laws of the exchange, and the elimination of the consistent shipment which, by the way, in the original by-law affected only the particular year for which refunds were claimed, and did not otherwise affect the contract, the testimony in the record is sufficient to support the finding of the court that the association did make all shipments as required by the agreement. The computation of the packages of fruit shipped by the association through the exchange and otherwise shipped by the association is as follows: "Packages shipped by the Association through the Exchange numbered 2,718,162; packages otherwise shipped numbered 137,957." In this particular it must be remembered that the agreement excluded cannery peaches or peaches that should be sold to canneries, and also ripe fruit.

As found by the trial court, the amount of fruit shipped by the association, other than through the exchange, was less than 6 per cent., and of that 6 per cent. a considerable

quantity was "Levi" peaches, ordinarily known as "canning peaches." The opinion of the trial court, in referring to the "Levi" peaches, is as follows: "With respect to the peaches the undisputed evidence is that the peaches were cannery peaches, were not under the control of the plaintiff, but were handled through its shipping house under a 'pooling' agreement, and with respect to the juice grapes the evidence quite clearly shows that the item of juice grapes was not contemplated when the contract was entered into; that at the time of the shipments the matter was discussed with the defendant's manager, and from the discussion had it is quite apparent that neither of the contracting parties regarded juice grapes as being included in the contract, and this conclusion is supported by evidence of the acts of the defendant in connection with its dealings with other persons with whom it had similar contracts."

The evidence further shows by letters introduced in the record written on behalf of the exchange that at times there was considerable difficulty encountered in profitably marketing peaches, and that the exchange was well aware of shipments made by the association.

On behalf of the association, in addition to what we have quoted from the opinion of the trial court relative to cannery peaches and juice grapes, sufficient testimony to support the finding of the court was introduced to the effect that the shipments made by the association were of fruits properly coming under the classification of "ripe fruits."

As against the testimony on the part of the association that its shipments were of ripe fruit, a great deal of oral testimony was introduced on the part of the appellant to the effect that such shipments were not of ripe fruits, and therefore should have been shipped through the exchange. This contention is disposed of by the trial court as follows: "Further supporting the conclusion that the court was constrained to reach, there is direct testimony in connection with the ripeness or the maturity of the fruit based upon the opinions of the persons who personally handled or inspected the fruit, and all of whom were men having had years of experience in the business of fruit shipping as well as in the growing of deciduous fruits, and whose testimony was that all of the fruit that was not marketed through the defendant was either ripe fruit or fruit used for cannery purposes."

A number of witnesses for the appellant based their opinion that the fruit shipped was not ripe fruit on the theory that the destination to which it was consigned was so far away that fruit classed as "ripe fruit" in the trade would be valueless when reaching its destination. A number of the witnesses testified that Elko, Nev., was as far east of Loomis as ripe fruit could be successfully shipped. Defendant's Exhibit 28, however, shows that such contention is untenable. The heading of this exhibit is as follows: "1925—Cherry—peach—plum ripe fruit department." Examination of this exhibit shows that ripe fruit of various kinds was shipped to Pueblo, Colo.; Idaho Falls, Idaho; Ogden, Utah; Cheyenne, Wyo.; Bozeman, Billings, Butte, and Livingston, Mont.; also to Denver, Colo.; San Antonio, Tex., and Klamath Falls, Eugene, and Corvallis, Or. The number of days after shipment before the fruit would arrive at its destination is shown on Defendant's Exhibit No. 33, to wit: To Butte, Mont., five days; Billings, Mont., six days; Cheyenne, Wyo., five days; Denver, Colo., five days; Omaha, Neb., six days; Chicago, eight days; San Antonio, Texas, seven days; New York, the fruit would arrive on the eleventh day.

The testimony as appears by the exhibits introduced by and on the part of the appellant relative to the shipment of ripe fruit shows that ripe fruit was shipped to distant points, where it would not arrive prior to the fifth, sixth, and seventh days, according to the points of destination. This fact justified the trial court in disregarding the opinion of witnesses who had not seen the fruit that was shipped, and based their conclusions only upon inspection certificates that it could not have been ripe fruit because it would not have been marketable at points further away than Elko, Nev. We have not tabulated the number, but the exhibits introduced to which we have referred show that hundreds of packages of ripe fruit were shipped to points of destination more than twice the distance between Loomis, Cal., and Elko, Nev.

We may add, further, that the testimony of the witness Day, who had been engaged in the fruit business for forty years preceding the trial of this action, shows clearly that the "Levi" peaches referred to in the opinion of the trial court which we have quoted were canning peaches, and that up to 1927 the California Peach Growers had marketed all of such peaches with the canneries, and that in 1927 the canneries refused to receive the same, and supports the conclusion of the trial court that such peaches were canning peaches; and the testimony of the witness is also further to the effect that the disposition of those peaches was discussed with the manager of the exchange, and that, while only a limited quantity of the "Levi" peaches were in fact disposed of, other than through the exchange, no objection was made thereto by the exchange, which further supports the conclusion of the trial court that such peaches were not considered by either the association or the exchange as coming within the terms of the agreement.

While the appellant in its argument schedules the different kinds of fruits shipped by

the association, claimed by it to be ripe fruit, to distant points, giving the number of hours that must elapse between the point of loading and the point of destination, and concludes therefrom that the opinion of the appellant's witnesses must be correct, the exhibits which we have referred to, and which were introduced by the defendant showing the marketing of ripe fruits, conclusively shows that the argument of the appellant, based upon the hours that must necessarily elapse between the time of loading and the time the fruit would reach its destination, is untenable. For instance, the number of hours are given that must elapse between the shipment of fruit from Loomis and reaching its destination at San Antonio, Tex., as 89 hours, and yet the exhibit shows that ripe fruit was actually shipped from Loomis to San Antonio, Tex. The necessarily elapsed time between Loomis and Denver is given as 62 hours. Nevertheless, the exhibits show ripe shipment from Loomis to Denver. The time that would elapse in making shipment from Loomis to Billings, Mont., is stated as 68 hours. Still, we find the schedule introduced by the defendant showing shipment of ripe fruit from Loomis to Billings, Mont. Other instances might be cited, but we content ourselves with the foregoing.

From all of this it is shown that, while there was considerable opinion testimony to the contrary, the truth was presented to the court that ripe fruit could be and was shipped from Loomis to points not only far more distant than the mileage between Loomis and Elko, Nevada, which required only about 30 hours, but to points requiring five, six, and seven days to elapse between the date of shipment and the date of destination.

The conclusion from these facts is inescapable that, even though we had arrived at a different conclusion regarding the application of article XIX of the by-laws of the exchange as it existed after March, 1920, the contention of the association that its shipments outside of the exchange were of fruits properly classed as "ripe fruits" was and is supported by sufficient testimony to uphold the findings of the trial court. The findings and judgment of the trial court as to the amount of money belonging to the association and withheld by the exchange must be determined as found by the trial court and set forth in its judgment.

The appellant relies for support principally on the case of Rusconi v. California Fruit Exchange, 100 Cal. App. 750, 281 P. 84. The respondent answers this contention by citing the case of Buford v. Florin Fruit Growers' Association, 210 Cal. 84, 291 P. 170. Both of these cases have been carefully considered, but, by reason of what we have said showing the difference in the contracts acted upon by the association and the defendant, involved in the case at bar, and the somewhat skeleton record presented in the Rusconi Case, we do not deem it necessary to analyze either the Rusconi or the Buford Cases further than to state that the dissimilarity between the facts presented for our consideration here and those presented to the court in the Rusconi Case are readily distinguishable, even though we were not placing reliance upon the different findings made in the different actions by the trial court. The Buford Case need not be considered further than simply supporting what we have said, that the withholdings made by the exchange were of moneys belonging to the association and to the growers marketing fruit through the exchange.

The only question that remains for further consideration is the decision of the trial court as to the payments which had not matured at the date of the entry of the judgment herein.

The original complaint in this action was filed on the 20th day of June, 1929. Defendant's Exhibits 31-A and 31-B show that the board of directors of the exchange in 1923 declared a 4 per cent. refund on moneys withheld as hereinbefore stated; last installment falling due November 20, 1928. In 1924 a like 4 per cent. refund was declared; final installment falling due November 18, 1929. In 1925 a like 4 per cent. refund was declared, date of final refund not appearing on Exhibit 31-A. In 1926 a 3 per cent. refund was declared, payable in three installments, date of final payment not appearing on Defendant's Exhibit 31-A. In 1927 a 3⅛ per cent. refund was declared, date of final payment not appearing; and in 1928 a 3¾ per cent. refund was declared, payable in installments, date of payment of final installment not appearing on the exhibit. An examination of the record, however, shows the maturity of three installments aggregating $30,381.14, as follows: January 11, 1932; January 10, 1933; January 8, 1934.

The appellants contend that the judgment determining that the exchange is indebted to the association in said sum on account of refund installments that had not matured at the date of the filing of the complaint or the entry of judgment herein is erroneous; the point being made that the action, in so far as the three installments referred to are concerned, is premature.

[7, 8] On the part of the association, it is contended that the action is equitable in its nature; that the court had authority to determine the amount of money that was due, even though payment thereof might not be enforceable until a later date. It is also contended that that portion of the complaint which prays for declaratory relief under section 1060, Code of Civil Procedure, is applicable. Our investigation of cases dealing with declaratory judgments leads to the conclusion that such a proceeding can only be

invoked to declare rights and not to determine or try issues. So far as equity principles are involved, as contended for by the association, we need not enter into any discussion. The state of the record, and a recent case decided by the Supreme Court of this state, we think determinative. Neither any of the demurrers nor answers filed by the exchange tender the question of prematurity of any portion of the action. The instant case was not tried upon the theory that any portion of the action had not matured. It was tried solely and only upon the theory that the association was not entitled to a refund of any portion of the money withheld by the exchange on the asserted ground that the association had not complied with its contract relative to the shipment of fruit through the exchange. No question of prematurity of the action was presented to the trial court. It is presented here for the first time on appeal. No motion was made to vacate any part of the judgment, and the motion for a new trial, even if a ground therefor, does not suggest prematurity. In this action, if the association is entitled to refunds of the moneys withheld by reason of what we have said herein, then the entire theory of the defense upon which the action was tried fails. That the judgment of the trial court contains one sentence that should be changed does not affect anything that we have said relative to the theory upon which the case was tried. The appellant has cited a number of cases from other states. These, however, are not controlling here by reason of the decision of the Supreme Court of this state in the case of Seches v. Bard, 8 P.(2d) 835, 836, decided February 17, 1932. That case involved a suit upon promissory notes, where it appeared during the trial that five notes totalling $20,000 had not matured and were unpaid. In that case the court said: "Defendants did not plead that in reference to this $20,000 the action was premature, nor did they directly or indirectly present that point by motion or otherwise to the trial court. From a reading of the entire record it is obvious that the parties to the action tried the case on the theory that the sole question involved was the proportion that the contestants were entitled to share in the proceeds of the entire settlement. Defendants at no time objected that the $20,000 unpaid was in any different status than the $58,000 that had been paid, and in fact treated the entire $78,000 as being the fund in controversy. It was not until the case was appealed that defendants objected that as to the unpaid notes the action was premature. Respondent states in her brief that, since the trial all of the notes have been paid. This contention is not denied by appellants. On such a state of the record it would not only place an unnecessary burden on the parties to reverse the case in reference to the $20,000 unpaid at the time of trial, but such action would also be violative of certain well-settled legal principles. The rule has long been settled that the defense that an action is premature is in the nature of a dilatory plea not favored in the law, and that such defense must be seasonably urged in the trial court or it is waived. In the early case of Hentsch v. Porter, 10 Cal. 555, at page 561, the rule is stated as follows: 'Where the objection, if true, would only defeat the present right to recover, the defendant, though not compelled to demur or answer, should be obliged to make the objection, by motion or otherwise, before the Court of original jurisdiction, during the term at which the judgment was obtained. But where the defect in the complaint is of such a serious character as to show that the plaintiff could never, at any time, obtain any judgment upon the cause of action alleged, then the defendant should be allowed to make the objection for the first time in the Appellate Court.' This court, in the recent case of Verbeck v. Clymer, 202 Cal. 557, at page 562, 261 P. 1017, 1018, stated the rule in the following language: 'It is well settled that the plea that an action has been prematurely brought is in the nature of a dilatory plea which must be specially pleaded in order to be available as a defense. Realty & Rebuilding Co. v. Rea, 184 Cal. 565, 573, 194 P. 1024; Bemmerly v. Woodward, 124 Cal. 568, 57 P. 561.'"

[9] We have searched the record in vain to ascertain if any distinction was made between the several installment payments, and found none. Nor has our attention been called to any part of the record which would indicate that the case was tried upon any other theory than that, if the association was entitled to any portion of the withheld money, it was entitled to all. The whole controversy revolved around the issue as to whether the association had forfeited its rights to any part of the money withheld. So far as the record speaks, the conclusion is inescapable that the case was tried upon the theory that, if the association was entitled to any of the refunds, it was entitled to all. It is too late now to take a different position. The judgment of the court, however, goes further than to decide the right of the association to the payments not matured at the time of the action, and includes an order that should be changed. Predicating this part of our opinion upon the case of City of Rochester v. Rochester Ry. Co., 109 App. Div. 638, 96 N. Y. S. 152, 158, that portion of the judgment which reads: "That defendant shall pay said sums to plaintiff as they become due, as aforesaid; that execution shall issue for each amount as each amount shall become due," is amended to read as follows: "That execution shall not issue for such future instalments until after the date when such instalments shall become severally due." The case to which we have referred was followed in

Dancel v. Goodyear Shoe Machinery Co. (C. C.) 137 F. 157. This case was affirmed by the Circuit Court of Appeals in 144 F. 679.

The arguments of the respective parties have taken a somewhat wider range than we have included in this opinion, but what we have said we think determinative of the issues involved.

The motion to dismiss the appeal is denied. The judgment of the trial court as amended is affirmed. Respondent is awarded costs.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

128 Cal.App. 90

HUNTER et al. v. ROMAN CATHOLIC BISHOP OF LOS ANGELES & SAN DIEGO CORPORATION SOLE et al.

Civ. 995.

District Court of Appeal, Fourth District, California.

Dec. 7, 1932.

1. Covenants ⇐69(2).

To be effectual, general plan of building restrictions must be recited in deed.

2. Covenants ⇐77.

Street line, not center of street, was boundary line of "lot" conveyed by deed containing restrictions for benefit of "adjoining" lots that only residence be erected thereon 30 feet from front property line; hence lot across the street was not adjoining within restrictions.

The term "lots," in its common and ordinary meaning, includes that portion of the platted territory measured and set apart for individual and private use and occupancy, while the term "streets" means that portion set apart and designated for the use of the public.

[Ed. Note.—For other definitions of "Adjoining," "Lot" and "Street," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by James H. Hunter and others against the Roman Catholic Bishop of Los Angeles and San Diego Corporation Sole and others. From a judgment dismissing the action, plaintiffs appeal.

Affirmed.

James S. McKnight and John L. Rush, both of Los Angeles, for appellants.

J. Wiseman Macdonald, of Los Angeles, for respondents.

MORTON, Justice pro tem.

Plaintiffs brought this action against defendants for an injunction preventing the alleged violation of building restrictions. After sustaining defendants' demurrer to plaintiff's complaint without leave to amend and denying plaintiffs' motion for a temporary injunction, the trial court entered a judgment dismissing the action with costs, from which plaintiffs appeal.

It appears that plaintiffs' lot, known as lot 4 of tract 4464 and located on the southwest corner of Eighth and Cochran streets in the city of Los Angeles, is improved with a one-story stucco residence. The other lot, known as lot 3 of the same tract, is located on the northwest corner of Eighth and Cochran streets and on this lot defendants are building a two-story class A, reinforced concrete school building. Plaintiffs' lot is bounded on the north by Eighth street and defendants' lot is bounded on the south by Eighth street.

By this action plaintiffs sought to restrain and enjoin defendants from constructing any building other than a residence on lot 3 in accordance with the restrictions of the deed, which are as follows: "It is provided and covenanted with a covenant running with the land herein conveyed that this conveyance is made and accepted upon each of the following conditions, which shall apply to and be binding upon the grantee, his heirs, devisees, executors, administrators, and assigns, namely: * * * That said premises shall be used for residence purposes only; that no apartment house, double house, flat, lodging house, hotel, store, nor any building or structure whatever other than a first-class private residence with the accustomary outbuildings, including a private stable, shall be erected, placed or permitted on said premises or any part thereof; that such residence shall cost and be fairly worth not less than Sixty-Five Hundred Dollars ($6,500.00), and shall not (nor shall any porch or projection therefrom, excepts steps) be located less than 30 feet from the front property line of said premises, * * * And as to the owner, and the heirs, devisees, executors, administrators, and assigns of any other lot or lots in said Tract No. 4464 *adjoining the above described premises*, the above mentioned conditions shall operate as a covenant running with the land, for the benefit of *all owners of such adjoining lots in said tract*, their heirs, devisees, executors, administrators, and assigns and the breach of any such covenants or the continuance of any such breach may be enjoined, abated or remedied by appropriate proceedings by any or either of such owners, their heirs, devisees, executors, administrators and assigns." Plaintiffs contend that lot 3 was acquired and is held sub-

ject to the restrictions aforementioned; that lots 3 and 4 are adjoining; that the erection of the Catholic school building is a violation of the deed restrictions, and that this gives them a valid cause of action.

[1] An examination of the deed as to lot 3 discloses that no reference is made to a general plan, and that the restrictions are for the benefit of the grantor and owners of lots adjoining lot 3. In view of this situation plaintiffs have no cause of action unless lot 4 adjoins defendants' lot 3. To be effectual a general plan or uniform scheme must be recited in the deed. Werner v. Graham, 181 Cal. 174, 183 P. 945; McBride v. Freeman, 191 Cal. 152, 215 P. 678.

Basing their contention on the theory that where land is conveyed by a description which bounds it by a street, the real boundary line is the center of the street and not the side line, plaintiffs maintain that lots 3 and 4 are adjoining lots. Anderson v. Citizens' Savings & Trust Co., 185 Cal. 386, 197 P. 113; Porter v. City of Los Angeles, 182 Cal. 515, 189 P. 105.

Respondents have set forth a number of authoritative definitions of the word "adjoining." In the case of Earl v. Dutour, 181 Cal. 58, at page 60, 183 P. 438, 6 A. L. R. 1163, it appears that the court passed on the point confronting us. Plaintiff and defendant owned respectively the easterly and westerly half of a lot bounded on the west by a street sixty feet in width. The sole question was whether the center line of the lot should be determined by including or excluding the thirty-foot strip covered by one-half the street. The trial court included the thirty-foot strip covered by the street in determining the center line, and in reversing the decision the Supreme Court held: "With this conclusion we are unable to agree. However clearly it may appear that the owner of a lot holds title to the center of an adjoining street, subject to the public easement, and that the boundary of the lot is technically, therefore, the center of the street, in view of the fact that the owner of such lot or land has no right to the possession or occupancy of any portion of such public street, we are of the opinion that the word 'lot,' as generally and customarily used, does not include such portion of the street. Wegge v. Madler, 129 Wis. 412, 116 Am. St. Rep. 953, 109 N. W. 223. As stated by the Supreme Court of Indiana: 'Lot and street are two separate and distinct terms, and have separate and distinct meanings. The term "lots," in its common and ordinary meaning, includes that portion of the platted territory measured and set apart for individual and private use and occupancy. While the term "streets" means that portion set apart and designated for the use of the public, and such is the sense in which such terms will be presumed to have been used, unless it be made to appear that a contrary meaning was intended.' Montgomery v. Hines, 134 Ind. 221, 225, 33 N. E. 1100, 1101. In the absence, therefore, of any circumstance indicating that a more unusual and technical meaning of the word 'lot' was contemplated and intended by the grantor, it will be presumed that the grant of a fractional part or of a given number of feet of a certain lot or parcel of land conveys the given fractional part or number of feet of that portion of the lot or parcel of land which is set apart for private use and occupancy."

On this same point in a later decision (Joens v. Baumbach, 193 Cal. 567, at page 571, 226 P. 400, 401), the Supreme Court again said: "However clearly it may appear that an owner of a parcel of land holds title to the center of an adjoining roadway subject to a public easement, and that the boundary of the parcel is technically, therefore, the center of the street, in view of the fact that the owner of such land has no right to the possession or occupancy of any portion of such roadway, we are of opinion that, when a grantor describes his land, as was done in this case, as fronting on the county road, and running 'thence northerly nine hundred (900) feet,' it will be presumed that the grant conveys the given number of feet of land which is set apart for private use and occupancy. Earl v. Dutour, 181 Cal. 58, 60, 6 A. L. R. 1163, 183 P. 438."

In Fralinger v. Cooke, 108 Md. 682, 71 A. 529, the court in effect held that only lots on the same side of the street could be reasonably termed as adjoining properties.

[2] In the instant case respondents point out that it should be noted that the restrictions provide for a thirty-foot setback from the front property line. If the center line of the fifty-foot street is held to be the boundary line, then only a five-foot setback would be required from the street line. Plaintiffs, however, in their complaint set forth, as a breach of the restrictions, that defendants are constructing their building within less than thirty feet from the front property line of said premises on Cochran avenue (now Cahuenga Valley road). Two distinct forms of equitable relief are thus sought requiring contrary technical interpretations of the location of the southerly boundary line of lot 3. Careful consideration of the terms of the deed contract therefore make it clear that the boundary line of lot three is the street line as delineated on the tract maps and the northerly half of the street is not included. Therefore, we hold the lots are not adjoining.

In view of the aforementioned holding it is not necessary to pass upon the insufficiency of the allegations of the complaint to justify the granting of a preliminary injunction.

Judgment of the trial court is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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SALMON v. MALONEY.

Civ. 8139.

District Court of Appeal, First District, Division 1, California.

Dec. 14, 1932.

1. Automobiles ⇐244(10).

Defendant's testimony that he kept his hand out while traveling from 35 "to" 50 feet before making left turn at intersection sustained finding that signal complied with statute (St. 1923, p. 561, § 136, as amended by St. 1925, p. 413).

The word "to" is ordinarily a term of inclusion, and hence jury might reasonably have concluded that signal given complied with California Vehicle Act, § 130, St. 1923, p. 561, § 136, as amended by St. 1925, p. 413, requiring that hand signal be given continuously during the last 50 feet traveled by vehicle before making turn.

[Ed. Note.—For other definitions of "To," see Words and Phrases.]

2. Appeal and error ⇐930(1).

Appellate court must construe evidence most favorably to prevailing party.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Mary Salmon against Joseph A. Maloney. Judgment for defendant, and plaintiff appeals.

Affirmed.

Norman S. Menifee, of Redwood City, for appellant.

Paul B. Gibson and Joseph J. McShane, both of San Francisco, for respondent.

PER CURIAM.

The above action was brought to recover for damage due to injuries received in an automobile collision.

Defendant was traveling north on a public highway. He was in the act of turning to his left at an intersection when a collision occurred with a car proceeding south in which plaintiff was riding as a guest.

The complaint alleged that the injuries were caused by the defendant's negligence. This was denied, and contributory negligence on the part of plaintiff and the driver of the car in which she was riding was alleged as a defense. A jury returned a verdict for the defendant, and from the judgment entered thereon plaintiff has appealed. The grounds for the appeal are that the defendant was guilty of negligence as a matter of law and that plaintiff was not chargeable with contributory negligence.

[1, 2] As to the first ground, it is claimed that defendant failed to give the signal required by law and that he made the turn in negligent disregard of approaching traffic.

The statute required the defendant to signal his intention to make the turn and that the signal be given continuously during the last fifty feet traveled by his vehicle before turning. California Vehicle Act, § 130, as amended by St. 1925, p. 413. Defendant testified: "I put my hand out, directly out, my left hand straight out, and made a normal turn." Further, that before making the turn he kept his hand in this position while traveling from 35 to 50 feet.

The testimony must be construed most favorably to the prevailing party. 2 Cal. Jur., Appeal and Error, §§ 515, 543, pp. 880, 926. The word "to" is ordinarily a term of inclusion (Heiberger v. Worthington, 23 App. D. C. 565; 1 Lewis, Statutory Construction, 330), and when the defendant testified that his hand was kept in position while traveling from 35 to 50 feet, the jury might reasonably have concluded that the signal given complied with the statutory requirement.

As urged by plaintiff, there was no evidence that she was guilty of negligence. Nevertheless, there is sufficient testimony to support a finding that her injuries were wholly due to the negligence of the driver of the car in which she was riding.

We have examined the evidence and are satisfied that the verdict of the jury was fairly supported, and that nothing has been shown which would justify a reversal of the judgment.

The judgment is affirmed.



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